The Federal Judiciary

In 1787, when writing *The Federalist Papers*, Alexander Hamilton urged support for the U.S. Constitution. He firmly believed that the judiciary would prove to be "the least dangerous" branch of government. Today, the role of the courts, particularly the Supreme Court, differs significantly from what the Framers envisioned. The "least dangerous branch" is now perceived by many people as having too much power. The Framers devoted little time to writing **Article III**, which created the **judicial branch** of government. The Framers believed that a federal judiciary posed little threat of tyranny and some debated whether any federal courts below the Supreme Court were necessary, arguing instead that all cases should be decided in *state courts* and only appeals going before the Supreme Court.

The Framers did not envision the Supreme Court as a potential policymaker, and arguably would not have given the justices life tenure with "good behavior" if they had known how the Court would develop. At the time, the Framers believed that justices needed to be independent of politics, politicians, and the public. They did, however, create effective checks on the court's power. The Congress can propose constitutional amendments that, if ratified, can reverse judicial decisions, and it can impeach and remove federal judges. Furthermore, the president appoints all federal judges with the "advice and consent" of the Senate.

Article III, Section 2 specifies the judicial power of the Supreme Court and discusses its **jurisdiction**, the authority vested in it to hear and decide the issues in a particular case. Courts have two types of jurisdiction: original and appellate. **Original jurisdiction** refers to a court's ability to hear a case first in order to determine the facts of the case. The Supreme Court has original jurisdiction in cases involving the state governments or public officials. **Appellate jurisdiction** refers to a court's ability to review and/or revise cases already decided by a trial court. The Supreme Court has appellate jurisdiction in all other cases.

There are two basic kinds of cases – **criminal law** and **civil law** cases. In a criminal law case, the government charges an individual with violating specific laws. A civil law case involves a dispute between two parties (one of whom may be the government itself) over a variety of matters such as contracts, property ownership, child custody, etc. Civil law consists of both **statutes** (laws passed by legislatures) and **common law** (the accumulation of judicial decisions about legal issues). The vast majority of all criminal and civil cases involve state law and are tried in state courts. An individual involved in a lawsuit is called a litigant (either the plaintiff, the individual harmed, or the defendant, the individual accused). Plaintiffs must have what is called **"standing" to sue**; that is, they must have serious interest in a case, which is typically determined by whether they have sustained a *direct injury* from another party. The courts have broadened the concept of standing to sue to include **class action suits**, which permit a small number of people to sue on behalf of all other people in similar circumstances.

The **Judiciary Act of 1789** established the **three-tiered** structure of the **federal court system**. At the bottom are the **federal district courts** (first tier) – at least one in each state. If an individual is unhappy with the court's verdict, they can appeal their case to the **federal circuit courts** (second tier). The **Supreme Court** (third tier) was initially comprised of six members – the chief justice plus five associate justices. The Supreme Court's size can be changed by Congress, and the court's size was fixed at nine in 1869. In 1891, the federal circuit courts (**courts of appeals**) took on an exclusively appellate function.

The judicial system in the United States is described as a dual system comprised of the *federal court system* and the *state court systems*. Both systems are three-tiered; the first tier is the **trial courts**, where litigation begins. The second tier is the **appellate courts**, which review rulings made by the trial courts; and the third tier is the **court of last resort**. Within the federal system, trial courts are called *district courts*, the circuit/appellate courts are termed *courts of appeals*, and the Supreme Court is the *court of last resort*. The federal district courts, courts of appeals, and the Supreme Court are called **constitutional (or Article III) courts**. There are 94 regular federal district courts (350,000 cases per year), 13 federal courts of appeals (60,000 cases per year), and the Supreme Court hears 75-80 cases per term. Other courts can be created by Congress for special purposes, and these are called **legislative courts.** Examples include the Court of Military Appeals and the Court of International Trade.

Each of the 94 regular federal districts has a U.S. attorney who is nominated by the president and confirmed by the Senate. The courts of appeals review the decisions made by district courts, unless the case goes directly to the Supreme Court (rare). There are 12 regular courts of appeals (circuits) and an additional Federal court (13 total). Each regular court of appeals serves at least two states (Texas, Louisiana, and Mississippi are circuit 5), while the D.C. Court of Appeals handles most appeals that involve decisions made regarding independent regulatory commissions. Judges for the appeals courts serve on rotating three-judge panels (total number of judges varies by circuit), but all of the judges in a court of appeals may choose to sit together **(en banc)** to decide a case of special importance by majority vote.

Once a court of appeals makes a decision, a litigant no longer has a right to an appeal. They may submit a **petition** to the U.S. Supreme Court to hear the case, but the Court only chooses a small number of cases to consider. Courts of appeals hear no new testimony; instead, lawyers submit a written argument called a **brief** and then appear to present and argue the case orally. The decisions of any court of appeals are binding on only the courts within its geographic area. The U.S. Supreme Court can review cases from any court of appeals and state supreme courts, and acts in many ways as the final interpreter of the U.S. Constitution. Decisions made by the U.S. Supreme Court are binding throughout the nation and establish national **precedents**, or rules settling subsequent cases of a similar nature. Relying on precedents to formulate decisions in new cases is called ***stare decisis*** ("let the decision stand") and allows for continuity and predictability in the judicial system. However, judges can still ignore, decline to follow,

or even overrule precedents in order to reach a different conclusion in a case involving similar circumstances.

The Supreme Court protects its privacy and sense of decorum, and the rites and rituals contribute to its mystique. Oral arguments are not televised, and utmost secrecy surrounds deliberations concerning the outcome of cases. Over 7,000 cases were filed at the Supreme Court in 2012, but only 79 were heard and 77 resulted in decisions. If the cases require interpretation of the Bill of Rights or other constitutional law issues, then the Court assumes a policy making position. Justices can also exercise a role in policy making by opting not to hear a case. The Supreme Court controls its own **caseload** through the ***certiorari*** process, in which the Supreme Court orders lower courts to send its records for further review. **Petitions** must meet two criteria:

-the case must come from a U.S. court of appeals, a court of military appeals, district court, or a state court of last resort.

-the case must involve a federal question: involves either a federal constitutional law issue or a federal statute, action, or treaty.

Only about the 30% of petitions make it to the "**discuss list**" where the nine justices discuss the petitions and vote on whether to hear the cases in court. *Certiorari* is granted according to the **Rule of Four** – when at least four justices vote to hear a case. Each Supreme Court justice has four clerks who help review petitions, do research, and write opinions.

The Supreme Court is more likely to hear the case if the petition comes from the U.S. government. The **solicitor general** is responsible for handling all appeals on behalf of the U.S. government and is appointed by the president. Another reason the Supreme Court may decide to hear a case is if significant conflict exists between the lower courts on an issue. Interest groups play a significant role in guiding a case through the court system by devising the legal strategy and paying the costs of litigation. A common, and less expensive, way for an interest group to express a position on a case is to file an ***amicus curiae*** **brief** that states a viewpoint on the issue or predicts the potential consequences of a particular ruling.

The Supreme Court's **annual term** begins the first Monday in October and typically ends mid-June. The justices hear **oral arguments** from the beginning of the term until early April. Attorney's typically have 30 minutes to present their cases. A small portion of the public is able to attend the oral arguments. The justices then meet in **closed conference** to discuss the oral arguments. After the justices reach a decision in conference, they must formulate a written opinion. An **opinion** is a statement of legal reasoning behind a judicial decision. Often, the content of an opinion is as important as the decision itself. Justices that agree with the outcome of the decision, but not with the legal rationale for the decision, may file **concurring opinions** to express their different view. Justices who disagree with the majority opinion can write a **dissenting opinion**. The dissenting opinions are an important indicator of the legal thought that exists within the Court and is an opportunity to note personal, legal, and philosophical disagreements with other justices.

Principles of ***stare decisis*** dictate that the justices follow the law of previous cases, but other factors both legal and extra-legal influence Supreme Court decision making. One of the primary issues concerning judicial decision making focuses on **judicial philosophy**, particularly the **activism/restraint debate**. Advocates of **judicial restraint** argue that courts should allow the decisions of other branches to stand, even if they offend a judge's own principles. The argument made is that the Court, as an unelected body, should defer policy making to other branches as much as possible. Proponents of judicial restraint point to *Roe v. Wade* (1973), the case that liberalized abortion laws, as a classic example of **judicial activism.** The activism/restraint debate is not over the decisions made in cases such as *Roe*, but over which branch should be making the decision. "Restraintist" critics of *Roe* argue that the Court should have deferred policy making to the states or the elected branches of the federal government. Congress and many state governments have since passed laws to restrict access to abortion and the issue remains one of the most controversial topics in American politics.

Advocates of judicial restraint generally argue that judges should be **strict constructionists**; that is, they should interpret the Constitution as the Framers wrote and originally intended it. Strict constructionists argue that in determining the constitutionality of a statute or policy, the Court should rely on the explicit meanings of the clauses in the document. Advocates of **judicial activism** contend that judges should use their power broadly to further justice and realize other political principles, even if it means "infringing" on the policy making authority of Congress. Although judicial activism is historically associated with politically liberal judges and judicial restraint with politically conservative judges, a new brand of conservative judicial activism has become prevalent since the 1980s. The rise of conservative judicial activism coincided with the rise of the Religious Right and the "devolution" movement within federalism.

Most conservative justices and judges do not accept the term strict constructionist, however, and scholars argue that the term is too general and tends to gloss over significant differences between conservative approaches to legal interpretation. **Originalism** offers two different legal approaches that are used by conservatives. Originalism insists that the meaning of the U.S. Constitution does not change or evolve over time, and that the meaning of the text is fixed and should be the guide used to interpret the Constitution today. Originalism tries to uncover the original intent and original meaning of the U.S. Constitution when applying it to contemporary law. One form of originalism, associated with Supreme Court Justice Clarence Thomas, is "**original intent theory**" which holds that interpretation of the U.S. Constitution should be consistent with what was meant by those who drafted it. Another form of originalism, associated with Supreme Court Justice Antonin Scalia, is "**original meaning theory**" which holds that judges should base their interpretations of the U.S. Constitution on what persons living at the time of its adoption would have declared the *ordinary* meaning of the text to be. This approach is also called **Textualism**, and holds that a statute's *ordinary* meaning should govern its interpretation rather than the legislative intent behind the statute. In other words, what do the words say when read in a straight-forward way without making inferences or taking into account the problem that the statute was meant to solve?

Advocates of originalism view it as a means of constraining the exercise of **judicial discretion**, which they see as the foundation of the liberal Court decisions of the 1930s and 1960s, especially on matters of civil liberties and civil rights. The primary alternative to originalism does not have a clear label, but those holding it view the U.S. Constitution in flexible terms, as a document whose meaning is dynamic and thus changes over time. Such **non-originalists** as Supreme Court Justice Stephen Breyer, also called **pragmatists**, argue that the Constitution is subject to different interpretations in different ages. Judges from different times and places will differ about what they think the Constitution means. Pragmatists, instead of searching for original meanings, focus on precedent, the consequences of judicial decisions, and the promotion of what they consider to be the public good. Pragmatists, therefore, would favor a judicial decision that is "wrong" based on originalism, but that furthers a worthy public goal. Critics of originalism often argue that its deference to the intentions of the Framers and original meaning is simply a cover for making conservative decisions and that judicial discretion is used even when basing decisions on original intent. They further attack the premises of originalism by pointing out that reconstructing the Framer's intentions is difficult, if not impossible; that the Constitution itself embraces general principles open to different interpretations and that there is little historical evidence that the Framers believed that their intentions should guide later interpretations of the Constitution.

The philosophical and legal battle between originalists and non-originalists is heated. Originalists argue that their approach preserves the authority of the Court, respects the Constitution as a binding contract, and prevents judges from imposing their subjective views onto society. Non-originalists respond that no constitution can anticipate what challenges and changes the future will bring, that a pragmatic approach avoids crises resulting from an inflexible interpretation, and that the Constitution works better if it is allowed to evolve to match more enlightened understandings. Despite these differences in outlook and approach, a number of scholars argue that the judges own policy preference is often more influential than precedent, meaning, or perceived intentions. In other words, justices usually arrive at a decision consistent with the policy outcome they prefer. In this sense, both liberals and conservatives are seen as increasingly engaged in judicial activism and the use of judicial discretion.

Court decisions carry legal, even moral, authority, but courts must rely on other units of government to enforce their decisions. **Judicial implementation** refers to how and whether court decisions are translated into actual policy. Judicial decision is the end of one process – the litigation process – and the beginning of another process – the process of judicial implementation. This process involves an **interpreting population** composed of those who must correctly understand and reflect the intent of the original decision in their subsequent actions. This population includes lower-court judges. The **implementing population** is any organization, business, or group that must implement the decision. For example, School Boards were responsible for implementing civil rights decisions about integration. If the implementers disagree with a decision, then "**slippage**" may occur. The **consumer population** is the population that the decision impacts. Congress and the president can also help or hinder judicial implementation. Different presidents have different commitments to a particular judicial policy.

The influence that the court has had on public policy and the interpretation of the constitutionality of legislative and executive actions has changed over time. **John Marshall**, chief justice from 1801 to 1835 did much to affirm and establish the power of **judicial review**, which some scholars argued was implied in the U.S. Constitution. Judicial review is the power of the courts to hold acts of Congress and, by implication, the executive in violation of the Constitution. Alexander Hamilton had assumed in *The Federalist Papers* that the federal courts had the power to review legislation. In ***Marbury v. Madison*** (1803), the Supreme Court firmly established the power it believed it already had based on the Constitution and the **Judiciary Act of 1789**. The Court empowered the national government to *promote* economic activity during the early and mid 19th century, and then empowered it to *regulate* economic activity in the late 19th and early 20th centuries. Initially, the Court declared New Deal policies unconstitutional, but ultimately the Court allowed government to respond to the unprecedented economic challenges with unprecedented influence and regulation (for better or worse). At the time, public opinion was on the side of FDR and his New Deal proposals. While it is difficult to determine if public opinion influences the Court, scholars argue that the Court's rulings on controversial issues definitely influence public opinion in the direction of the Court's opinion.

The **Warren Court** (1953-1969), led by Chief Justice Earl Warren, is considered one of the most active in shaping public policy. The Court dealt with segregation, defendant's rights, reapportionment of congressional representation, and prayer in public schools. President Nixon was able to appoint Warren's successor and chose a "strict constructionist" to be the new chief justice. The **Berger Court** was more conservative than the Warren Court, but it upheld many of the precedents established by the previous Court and even made the controversial *Roe v. Wade* decision and upheld affirmative action programs. One of the most important cases of the Berger Court was *United States v. Nixon* (1974) that unanimously ordered the president to turn White House tapes over to the courts. Public support for the Court was highest at this time because many Americans had lost faith in the presidency and felt that they could at least rely on the Supreme Court to do the right thing.

Conservative judges appointed in the 1980s and 1990s moved the Court in an even more conservative direction. The Supreme Court has been somewhat evenly divided between liberals and conservatives (with a conservative majority and chief justice) for the last three decades. The **Rehnquist Court** even decided the outcome of the 2000 election. The general trend, however, has been to limit rather than reverse the decisions made by earlier liberal justices. In 2005, John Roberts became Chief Justice and the **Roberts Court** is currently building a reputation as a conservative body dedicated to expanding the institutional power of the Supreme Court. The Court has already made significant decisions regarding health care, campaign finance, and same-sex marriage. Public support for the Court hit an all-time low in 2012 as the Court has played a more influential role in policy making, partly due to inaction by Congress. Again, judicial activism is no longer associated only with liberal justices, and the Rehnquist Court (1986-2005) and Roberts Court (2005 -) have been the *most active* in the nation's history in terms of using judicial review to void legislation passed by Congress. The Court has used

the doctrine of **political questions** to avoid deciding some issues that involve conflicts between the president and Congress such as the War Powers Act.

The Court is aware that separation of powers must be maintained, and that its policy making role, as an unelected branch, cannot go too far without undermining its own authority and credibility. One reason that a certain amount of judicial activism is tolerated is the fact that checks do exist: the president and the Senate determine who sits on the Supreme Court, and Congress can amend the Constitution to override a judicial decision. If the case involves **statutory construction**, in which the court interprets an act of Congress, then the legislature often passes legislation that clarifies existing laws and, in effect, overturns the courts. In the end, the description of the judiciary as the "ultimate arbiter of the Constitution" is hyperbolic; all the branches of government help define and shape the Constitution.

The public directly elects most state and local judges. All federal judges and justices are nominated by the president and confirmed by the Senate for lifetime tenures. State-level federal judicial nominations are subject to an unwritten tradition of **senatorial courtesy**, which enables a *senator from the president's party* from the state with a judicial vacancy to block a nomination. In 2009, Senate Republicans added a new element of senatorial courtesy when they vowed to prevent the confirmation of judicial nominees when Republican senators were not consulted. The implication being that members of the opposition party would also have a de facto veto power, something without precedent in the history of judicial selection. In practice, the Senate nominates judges for state-level district courts and the president approves them. At the federal level, in the appeals courts, the president has more influence in the selection process. Nominations to the Supreme Court may be a president's most important legacy. Richard Nixon was able to nominate four justices, while Ronald Reagan was able to nominate three. The Senate actively exercises its confirmation powers, and through its Judiciary Committee, may probe a nominee's judicial philosophy in great detail before confirmation. Since the ideological and political divides of the 1960s, the confirmation process has become more partisan and more difficult. As long as Americans are polarized on social issues and as long as the Court makes critical decisions about these issues, the potential for conflict over the president's nominations will remain.

Typically, justices have held high administrative or judicial positions before moving to the Supreme Court. Most have had some experience as a judge, often at the appellate level, and many have worked for the Department of Justice. The current Chief Justice is John Roberts (W. Bush, 05). The Associate Justices are Antonin Scalia (Reagan, 86), Anthony Kennedy (Reagan, 88), Clarence Thomas (H.W. Bush 91), Ruth Bader Ginsburg (Clinton, 93), Stephen Breyer (Clinton, 94), Samuel Alito (W. Bush, 06), Sonia Sotomayor (Obama, 09), and Elena Kagan (Obama, 10). The Court is comprised of 5 conservatives nominated by Republican presidents and 4 liberals nominated by Democratic presidents. Clarence Thomas, an African-American, replaced the previous and first African-American Supreme Court Justice. Sonio Sotomayor is the first Hispanic Supreme Court Justice. Three of the justices are Jewish, and six are Catholic.