**The Judicial Branch**

The Supreme Court is the only court expressly provided for in the Constitution. Congress is given the power to establish lower federal courts as it sees fit—”to constitute Tribunals inferior to the Supreme Court” (*Art. 1, § 8*)

**Structure**

* Supreme Court **justices** are nominated by the president and confirmed by the Senate.
  + No qualifications are laid out in the Constitution
  + Nomination generally is based on candidate’s competence, ethics, ideology, political support, and political activism
* **Term of office:** Justices hold position for life, barring resignation or impeachment
* **Number of justices:**
  + Originally 6 when the Court was established in 1789
  + At one point after the Civil War, there were 10 justices
  + Since 1869, the Court has been comprised of 9 justices
* **Court-packing scheme:**
  + In 1937, Franklin Delano Roosevelt tried to increase the number of judges on the court (1 new judge for every judge over age 70), hoping to make the court more liberal and supportive of his progressive New Deal policy.
  + This “court packing scheme” would have allowed FDR to appoint 6 new justices.
  + The Senate rejected the policy change, and the uproar cost FDR some credibility.
* **Chief justice of the Supreme Court:**
  + Presides over meetings
  + Assigns writing of opinions
  + Can significantly shape the Court’s direction
  + The **Marshall Court** (1801–1835), under Chief Justice John Marshall, greatly enhanced federal power at the expense of states’ rights.
  + The **Warren Court** (1953–1969), under Chief Justice Earl Warren, was liberal and progressive and expanded civil and political rights.

**Federal Jurisdiction**

* Court has jurisdiction over any case involving:
  + The U.S. Constitution, federal laws, treaties, and admiralty and maritime affairs
  + Ambassadors, other public ministers, or consuls
  + Cases in which the U.S. or a state itself is a party
  + Interstate affairs
* **Original jurisdiction** in all cases involving a state or an ambassador or other public minister or consul
* **Appellate jurisdiction** in federal cases (sometimes state cases) in which the original decision is appealed

**3 Paths to the Supreme Court**

1. **Writs of certiorari:**
   * The Court grants a writ when it agrees to hear a case.
   * 4 of 9 justices must agree to hear a case.
   * If the Court refuses to hear a case, then the lower court ruling stands. This does not necessarily mean that the Court agrees with the lower court’s ruling, however.
   * The Court might refuse to hear if the case lacks national importance, if the issues at stake are too narrow (i.e., not a federal question), or if the Court is too divided on the matter.
2. **Right of appeal:**
   * The Court must hear appeals of decisions made by three-judge district courts.
   * It can simply affirm or reverse the decision with a short statement.
3. ***In forma pauperis* petition:**
   * According to federal law, any indigent who takes a “pauper’s oath” postponing payment of required fees can submit a case to a federal court.
   * Most of these petitions are written by inmates in federal and state prisons.
   * Many petitions go unanswered; in rare instances, the Court holds hearings and reopens the case.

**THE COURTS AS POLICYMAKERS**

The first decision the Supreme Court must make is *which cases to decide*: unlike other federal courts, the Supreme Court *controls its own agenda*. Approximately 7,500 cases are submitted annually to the U.S. Supreme Court (but only two percent are accepted for review).

The nine justices meet in *conference* at least once each week. The first task in conference is for the justices to consider the chief justice's *discuss list* and decide which cases they want to hear. Most of the justices rely heavily on their *law clerks* to screen cases. If four justices agree to grant review of a case (the "rule of four"), it can be scheduled for oral argument or decided on the basis of the written record already on file with the Court. The most common way for the Court to put a case on its docket is by issuing a ***writ of* *certiorari*** to a lower federal or state court-a formal document that orders the lower court to send up a record of the case for review.

An important influence on the Supreme Court is the **solicitor general**. As a presidential appointee and the third-ranking official in the Department of Justice, the solicitor general is in charge of the appellate court litigation of the federal government. By avoiding frivolous appeals and displaying a high degree of competence, they typically earn the confidence of the Court, which in turn grants review of a large percentage of the cases they submit.

The Supreme Court decides *very few cases*. In a typical year, the Court issues fewer than 100 *formal written opinions* that could serve as precedent. In a few dozen additional cases, the Court reaches a *per curiam decision*-a decision without explanation (usually unsigned); such decisions involve only the immediate case and have no value as precedent because the Court does not offer reasoning that would guide lower courts in future decisions.

The second task of the weekly conferences is to *discuss cases* that have been accepted and argued before the Court. Beginning the first Monday in October and lasting until June, the Court hears **oral arguments** in two-week cycles. Unlike a trial court, justices are familiar with the case before they ever enter the courtroom. The Court will have received written **briefs** from each party. They may also have received briefs from parties who are interested in the outcome of the case but are not formal litigants (known as ***amicus curiae***-or "friend of the court"-briefs).

The chief justice presides in conference. The chief justice calls first on the senior associate justice for discussion and then the other justices in order of seniority. If the votes are not clear from the individual discussions, the chief justice may ask each justice to vote. Once a *tentative vote* has been reached (votes are not final until the opinion is released), an *opinion* may be written.

The written **opinion** is the legal reasoning behind the decision. The *content of an opinion may be as important as the decision itself*. Tradition requires that the chief justice-if he voted with the majority-assign the **majority opinion** to himself or another justice in the majority; otherwise, the opinion is assigned by the senior associate justice in the majority.

***Concurring opinions*** are those written to support a majority decision but also to stress a different constitutional or legal basis for the judgment. ***Dissenting opinions***are those written by justices opposed to all or part of the majority's decision. Justices are free to write their own opinions, to join in other opinions, or to associate themselves with part of one opinion and part of another.

The vast majority of cases are settled on the principle of ***stare decisis*** ("let the decision stand"), meaning that an earlier decision should hold for the case being considered. Lower courts are expected to follow the **precedents** of higher courts in their decision making. The Supreme Court may overrule its own precedents, as it did in ***Brown v. Board of Education*** (1954) when it overruled ***Plessy v. Ferguson*** (1896) and found that segregation in the public schools violated the Constitution.

Policy preferences do matter in judicial decision making, especially on the nation's highest court. When precedent is not clear, the law is less firmly established. In such cases, there is more leeway and judges become more purely political players with room for their values to influence their judgment.

The most contentious issue involving the courts is the role of *judicial discretion*; the Constitution itself does not specify any rules for interpretation. Some have argued for a jurisprudence of **original intent** (sometimes referred to as **strict constructionism**). This view, which is popular with conservatives, holds that judges and justices should determine the intent of the framers of the Constitution and decide cases in line with that intent. Advocates of strict constructionism view it as a means of constraining the exercise of judicial discretion, which they see as the *foundation of the liberal decisions* of the past four decades. Others assert that the Constitution is subject to multiple meanings; they maintain that what appears to be deference to the intentions of the framers is simply *a cover for making conservative decisions*.

**Judicial implementation** refers to how and whether court decisions are translated into actual policy, thereby affecting the behavior of others. The implementation of any Court decision involves many actors besides the justices, and the justices have no way of ensuring that their decisions and policies will be implemented.

**THE COURTS AND THE POLICY AGENDA**

The courts both *reflect* and *help to determine* the national *policy agenda*. Until the Civil War, the dominant questions before the Court regarded the strength and legitimacy of the federal government and slavery. From the Civil War until 1937, questions of the relationship between the federal government and the economy predominated; the courts traditionally favored corporations, especially when government tried to regulate them. From 1938 to the present, the paramount issues before the Court have concerned personal liberty and social and political equality. In this era, the Court has enlarged the scope of personal freedom and civil rights, and has removed many of the constitutional restraints on the regulation of the economy. Most recently, environmental groups have used the courts to achieve their policy goals.

John Marshall, chief justice from 1801 to 1835, established the Supreme Court's power of **judicial review** in the 1803 case of ***Marbury* *v.* *Madison*** (the so-called *"midnight judges"* case). In a shrewd solution to a political controversy, Marshall asserted for the courts *the power to determine what is and is not constitutional* and thereby established the power of judicial review. By in effect reducing its own power-the authority to hear cases such as Marbury's under its original jurisdiction-the Court was able to assert the right of judicial review in a fashion that the other branches could not easily rebuke.

Few eras of the Supreme Court have been as active in shaping public policy as that of the Warren Court. The Court's decisions on desegregation, criminal defendants' rights, and voting reapportionment reshaped public policy and also led to calls from right-wing groups for Chief Justice Earl Warren's impeachment. His critics argued that the unelected justices were making policy decisions that were the responsibility of elected officials.

The Burger Court-which followed the Warren Court-was more conservative than the liberal Warren Court, but did not overturn the due process protections of the Warren era. The Court narrowed defendants' rights, but did not overturn the fundamental contours of the *Miranda* decision. It was also the Burger Court that wrote the abortion decision in***Roe* *v.* *Wade***(1973), required school busing in certain cases to eliminate historic segregation, and upheld affirmative action programs in the *Weber* case. When the Supreme Court was called upon to rule on whether President Nixon's White House (Watergate) tapes had to be turned over to the courts, it unanimously ordered him to do so (***United States* *v.* *Nixon***, 1974), and thus hastened his resignation.

The Rehnquist Court has not created a "revolution" in constitutional law. Instead, it has been slowly chipping away at liberal decisions such as those regarding defendants' rights, abortion, and affirmative action. The Court no longer sees itself as the special protector of individual liberties and civil rights for minorities; it has typically deferred to the will of the majority and the rules of the government.

**UNDERSTANDING THE COURTS**

Powerful courts are unusual; very few nations have them. The power of American judges raises questions about the compatibility of unelected courts with a democracy and about the appropriate role for the judiciary in policymaking.

In some ways, the courts are not a very democratic institution. Federal judges are not elected and are almost impossible to remove. Their social backgrounds probably make the courts the most elite-dominated policymaking institution. However, the courts are not entirely independent of popular preferences. Even when the Court seems out of step with other policymakers, it eventually swings around to join the policy consensus (as it did in the New Deal era).

There are strong disagreements concerning the appropriateness of allowing the courts to have a policymaking role. Many scholars and judges favor a policy of **judicial restraint** (sometimes called *judicial self-restraint*), in which judges play minimal policymaking roles, leaving policy decisions to the legislatures. Advocates of judicial restraint believe that decisions such as those on abortion and school prayer go well beyond the "referee" role they feel is appropriate for courts in a democracy. On the other side are proponents of **judicial activism**, in which judges make bolder policy decisions, even breaking new constitutional ground with a particular decision. Advocates of judicial activism emphasize that the courts may alleviate pressing needs, especially of those who are weak politically or economically.

*Judicial activism or restraint* should *not be confused* with *liberalism or conservatism*. In the early years of the New Deal, judicial activists were conservatives. During the tenure of Earl Warren, activists made liberal decisions. The tenure of the conservative Chief Justice Warren Burger and several conservative nominees of Republican presidents marked the most active use of judicial review in the nation's history. The problem remains of reconciling the American democratic heritage with an active policymaking role for the judiciary. The federal courts have developed a doctrine of **political questions** as a means to avoid deciding some cases, principally those that involve conflicts between the president and Congress.

One factor that increases the acceptability of activist courts is *the ability to overturn their decisions*. The president and the Senate determine who sits on the federal bench (a process that has sometimes been used to reshape the philosophy of the Court). Congress can begin the process of amending the Constitution to overcome a constitutional decision of the Supreme Court, and Congress could even alter the appellate jurisdiction of the Supreme Court to prevent it from hearing certain types of cases. If the issue is one of **statutory construction** (in which a court interprets an act of Congress), the legislature routinely passes legislation that *clarifies existing laws*-and, in effect, overturns the courts.