THE JUSTICES OF the Supreme Court are not elected, but rather are appointed by the president and confirmed by the Senate. The same is true for all other federal court judges. It is a fact that many federal judges and Supreme Court justices sit on the bench for 30 years or more. As discussed in the What if..., some critics of the court suggest that lifetime appointments for judges guarantee that some will be out of touch with current political and social debates.

As Alexis de Tocqueville, a French commentator on American society in the 1800s, noted, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] Our judiciary forms part of our political process. The instant that judges interpret the law, they become actors in the political arena—policymakers working within a political institution. The most important political force within our judiciary is the United States Supreme Court.

How do courts make policy? Why do the federal courts play such an important role in American government? The answers to these questions lie, in part, in our colonial heritage. Most of American law is based on the English system, particularly the English *common-law tradition.* In that tradition, the decisions made by judges constitute an important source of law. In the United States, the Supreme Court has extraordinary power to shape the nation's policies through the practice of **judicial review**, first explicated by Justice Marshall in the *Marbury v. Madison* case in 1803. We open this chapter with an examination of this tradition and of the various sources of American law. We then look at the federal court system—its organization, how its judges are selected, how these judges affect policy, and how they are restrained by our system of checks and balances.

did you know?

The Supreme Court was not provided with a building of its own until 1935, in the 146th year of its existence.

Judicial Review
The power of the Supreme Court or any court to hold a law or other legal action as unconstitutional.

Learning Outcome 1:
Explain how judges in the American system decide cases, and define *stare decisis.*

Sources of American Law

In 1066, the Normans conquered England, and William the Conqueror and his successors began the process of unifying the country under their rule. One of the ways they did this was to establish king's courts. Before the conquest, disputes had been settled according to local custom. The king's courts sought to establish a common or uniform set of rules for the whole country. As the number of courts and cases increased, portions of the most important decisions of each year were compiled in *Year Books.* Judges settling disputes similar to ones that had been decided before used the *Year Books* as the basis for their decisions. If a case was unique, judges had to create new laws, but they based their decisions on the general principles suggested by earlier cases. The body of judge-made law that developed under this system is still used today and is known as the **common law**.

Common Law
Judge-made law that originated in England from decisions shaped according to prevailing custom. Decisions were applied to similar situations and gradually became common to the nation.

The practice of deciding new cases with reference to former decisions—that is, according to **precedent**—became a cornerstone of the English and American judicial systems and is embodied in the doctrine of *stare decisis* (pronounced *ster*-ay dih-*si*-ses), a Latin phrase that means "to stand on decided cases." The doctrine of ***stare decisis*** obligates judges to follow the precedents set previously by their own courts or by higher courts that have authority over them.

Precedent
A court rule bearing on subsequent legal decisions in similar cases. Judges rely on precedents in deciding cases.

Stare Decisis
To stand on decided cases; the judicial policy of following precedents established by past decisions.

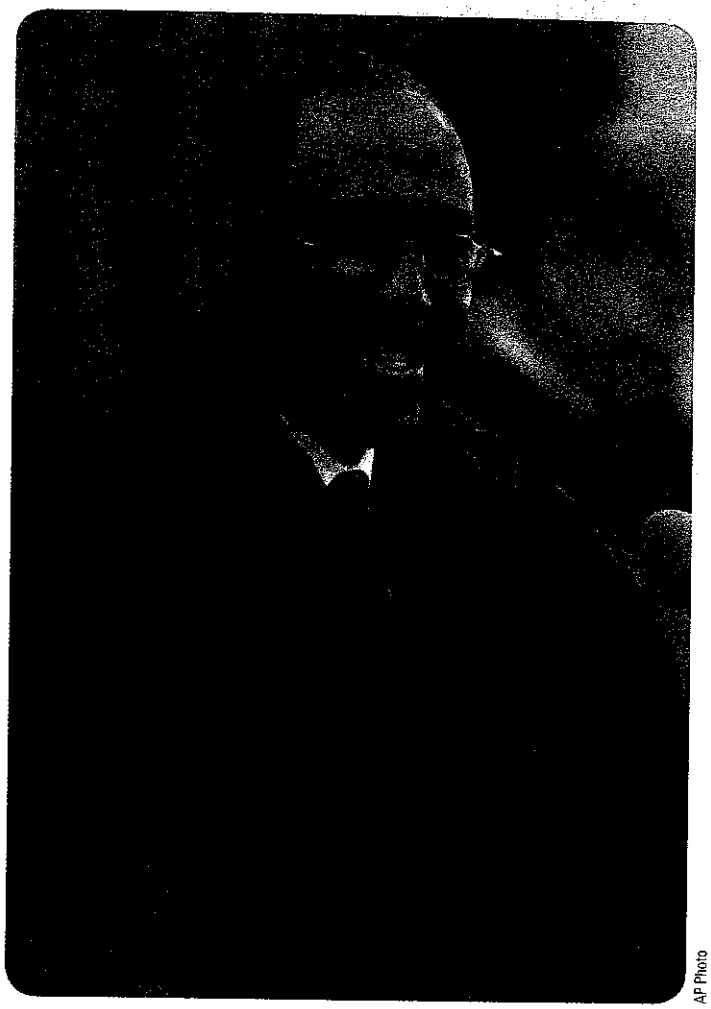
For example, a lower state court in California would be obligated to follow a precedent set by the California Supreme Court. That lower court, however, would

1. Alexis de Tocqueville, *Democracy in America* (New York: Harper & Row, 1966), p. 248.

not be obligated to follow a precedent set by the supreme court of another state, because each state court system is independent. Of course, when the United States Supreme Court decides an issue, all of the nation's other courts are obligated to abide by the Court's decision, because the Supreme Court is the highest court in the land.

The doctrine of *stare decisis* provides a basis for judicial decision making in all countries that have common-law systems. Today, the United States, Britain, and several dozen other countries have common-law systems. Generally, those countries that were once British colonies, such as Australia, Canada, and India, have retained their English common-law heritage. An alternative legal system based on Muslim *sharia* is discussed in this chapter's Beyond Our Borders feature.

The body of American law includes the federal and state constitutions, statutes passed by legislative bodies, administrative law, and case law—the legal principles expressed in court decisions. The power of case law rests in the principle of judicial review.



AP Photo

Judge Tom Colbert is the first African American to be appointed to the Supreme Court of Oklahoma. Prior to that appointment, he served on the Oklahoma Court of Civil Appeals.

Constitutions

The constitutions of the federal government and the states set forth the general organization, powers, and limits of government. The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, may be declared unconstitutional and thereafter cannot be enforced. Similarly, the state constitutions are supreme within their respective borders (unless they conflict with the U.S. Constitution or federal laws and treaties made in accordance with it). The Constitution thus defines the political playing field on which state and federal powers are reconciled. The idea that the Constitution should be supreme in certain matters stemmed from widespread dissatisfaction with the weak federal government that had existed previously under the Articles of Confederation adopted in 1781.

Statutes and Administrative Regulations

Although the English common law provides the basis for both our civil and criminal legal systems, statutes (laws enacted by legislatures) increasingly have become important in defining the rights and obligations of individuals. Federal statutes may relate to any subject that is a concern of the federal government and may apply to areas ranging from hazardous waste to federal taxation. State statutes include criminal codes, commercial laws, and laws covering a variety of other matters. Cities, counties, and other local political bodies also pass statutes, which are called ordinances. These ordinances may deal with such issues as zoning proposals and public safety. Rules and regulations issued by administrative agencies are another source of law. Today, much of the work of the courts consists of interpreting these laws and regulations and applying them to circumstances in cases before the courts.

Beyond Our Borders

THE LEGAL SYSTEM BASED ON *SHARIA*

Hundreds of millions of Muslims throughout the world are governed by a system of law called *sharia*. In this system, religious laws and precepts are combined with practical laws relating to common actions, such as entering into contracts and borrowing funds.

THE AUTHORITY OF *SHARIA*

It is said that *sharia*, or Islamic law, is drawn from two major sources and one lesser source. The first major source is the Qur'an (Koran) and the specific guidelines laid down in it. The second major source, called *sunnah*, is based on the way the Prophet Muhammad lived his life. The lesser source is called *ijma*; it represents the consensus of opinion in the community of Muslims. *Sharia* law is comprehensive in nature. All possible actions of Muslims are divided into five categories: obligatory, meritorious, permissible, reprehensible, and forbidden.

THE SCOPE OF *SHARIA* LAW

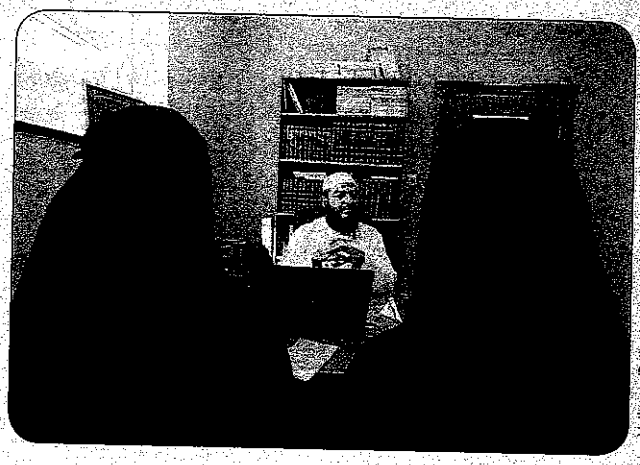
Sharia law covers many aspects of daily life, including the following:

- Dietary rules
- Relations between married men and women
- The role of women
- Holidays
- Dress codes, particularly for women
- Speech with respect to the Prophet Muhammad
- Crimes, including adultery, murder, and theft
- Business dealings, including the borrowing and lending of funds

WHERE *SHARIA* LAW IS APPLIED

The degree to which *sharia* is used varies throughout Muslim societies today. Several of the countries with the largest Muslim populations (e.g., Bangladesh, India, and Indonesia) do not have Islamic law. Other Muslim countries have dual systems of *sharia* courts and secular courts. In 2008, many British citizens were surprised by the remarks of the Archbishop of Canterbury, the religious leader of all Episcopalians, that there was a need for accommodation of *sharia* law in Great Britain.* He was referring to a system of *sharia* courts that has been functioning in Muslim neighborhoods for the last 20 years. The comments followed news that a *sharia* court had released some Somali youths who had stabbed another young man after ordering the assailants to compensate the victim and apologize. This incident led to national debate over whether the *sharia* court was performing functions that should be reserved for criminal and civil courts. In other parts of England, *sharia* courts deal mainly with Islamic laws regarding divorce and the rights of women, much in the same way the Catholic Church decides the status of its own members.**

Canada, which has a *sharia* arbitration court in Ontario, is the first North American country to establish a *sharia* court. Some countries, including Iran and Saudi Arabia, maintain religious courts for all aspects of jurisprudence, including civil and criminal law. Recently, Nigeria has reintroduced *sharia* courts.



Ian Meldrum/Daily Mail/Associated Newspapers Ltd./Solo Syndication

A *Sharia* court judge in Great Britain confers with two Muslim women about their court case.

FOR CRITICAL ANALYSIS

1. ***Do you think that a nation can have two different systems of law at the same time?***
2. ***How should decisions about religious law be regarded by civil legal systems?***

*"Sharia Law Courts Are Already Dealing with Crime on the Streets of London, It Has Emerged," *Evening Standard*, London, February 8, 2008.
**"The View from Inside a Sharia Court," BBC News, February 11, 2008.

Case Law

Because we have a common-law tradition, in which the doctrine of *stare decisis* (described earlier) plays an important role, the decisions rendered by the courts also form an important body of law, collectively referred to as **case law**. Case law includes judicial interpretations of common-law principles and doctrines, as well as interpretations of the types of law just mentioned—constitutional provisions, statutes, and administrative agency regulations. As you learned in previous chapters, it is up to the courts—and particularly the Supreme Court—to decide what a constitutional provision or a statutory phrase means. In doing so, the courts, in effect, establish law.

Case Law
Judicial interpretations of common-law principles and doctrines, as well as interpretations of constitutional law, statutory law, and administrative law.

Judicial Review

The process for deciding whether a law is contrary to the mandates of the Constitution is known as judicial review. This power is nowhere mentioned in the U.S. Constitution. Rather, this judicial power was first established in the famous case of *Marbury v. Madison* (as discussed in the Politics with a Purpose on the next page). In that case, Chief Justice Marshall insisted that the Supreme Court had the power to decide that a law passed by Congress violated the Constitution:

> *It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to a particular case must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.*[2]

Learning Outcome 2:
Define *judicial review* and explain the constitutional and judicial origins of this power.

The Supreme Court has ruled parts or all of acts of Congress to be unconstitutional fewer than 200 times in its history. State laws, however, have been declared unconstitutional by the court much more often—more than 1,000 times. The court has been more active in declaring federal or state laws unconstitutional since the beginning of the 20th century.

The Supreme Court, through its power of judicial review, can effectively define the separation of powers between the branches. In 1983, for example, the Court outlawed the practice of the legislative veto by which one or both chambers of Congress could overturn decisions made by the president or by executive agencies. This single decision overturned dozens of separate statutes and reinforced the Court's position as the arbiter of institutional power.

The Federal Court System

The United States has a dual court system. There are state courts and federal courts. Each of the 50 states, as well as the District of Columbia, has its own independent system of courts. This means that there are 52 court systems in total. The federal court derives its power from the U.S. Constitution, Article III, Section 1, and is organized according to congressional legislation. State courts draw their authority from state constitutions and laws. Court cases that originate in state court systems reach the Supreme Court only after they have been appealed to the highest possible state court. Figure 14–1 shows the basic components of the state and federal court systems.

Learning Outcome 3:
Produce a graphic illustration of the federal court system, and explain how a case moves from the trial court to the highest court of appeals, the Supreme Court.

Basic Judicial Requirements

In any court system, state or federal, before a case can be brought before a court, certain requirements must be met. Two important requirements are jurisdiction and standing to sue.

2. 5 U.S. (1 Cranch) 137 (1803).

Politics with a Purpose

POLITICAL STRUGGLES FOUGHT IN THE COURT

Complaints about activist judges, a hotly contested election with partisan opponents hurling nasty insults, and debates about big government. One might argue that this is a description of politics in the 21st century. However, it also describes the presidential election of 1800, the aftermath of which led to *Marbury v. Madison*, one of the most important Supreme Court cases, whose influence is felt today.

Marbury v. Madison established the doctrine of judicial review, or the ability of the Court to rule an act of government to be unconstitutional. It was precipitated by the presidential election of 1800, in which the incumbent president, John Adams, was defeated by his vice president, Thomas Jefferson. Not only did this event mark the first election where issues divided the emerging political parties, but the election was also intensely and personally fought. President Adams was a member of the Federalist Party, which had emerged victorious in the fights over ratification of the Constitution. Jefferson was an Anti-Federalist and the leader of the ascendant Jeffersonian Republicans. These two groups disagreed on the power of the federal government. In addition, the two men bitterly disagreed with each other's politics.

While Thomas Jefferson would eventually win the election, he would not take office until March 1801.[a] In the interim between the election and inauguration, the Federalist-controlled Congress passed a series of laws creating additional judicial positions that would be staffed with Federalist appointments. One of these positions was District of Columbia Justice of the Peace, a relatively low-level judicial appointment whose term would expire in five years. William Marbury was confirmed as one of these appointments. The day before inauguration, the appointment papers were signed and sealed, but not delivered. John Marshall was to deliver the appointment, but he had his own appointment to become chief justice of the Supreme Court. Upon taking office, President Jefferson ordered his secretary of state, James Madison, not to deliver the commissions. Marbury and two others brought suit to the Supreme Court, asking that the Court force Jefferson to deliver the commissions.

Some accounts argue that Marbury took this action, not because he wanted the appointment, but because he wanted to provoke a fight with Jefferson. Marbury was a committed Federalist who believed that the Jeffersonian argument to reduce federal government control and give power back to state governments was deeply flawed. These Federalists were very unhappy with the outcome of the election and were seeking mechanisms to remain influential.[b]

By then, the chief justice of the Supreme Court was John Marshall, a Federalist appointed by the former President Adams. Marshall had a real dilemma to resolve in this case. He knew that if he ordered Jefferson to honor the commission, the president would likely ignore the order, resulting in an unacceptably dangerous constitutional crisis for the young country, and the Supreme Court would be weakened. Marshall, writing for the Court, issued a decision that found Marbury's rights had been denied but that the law passed by Congress that would have granted the Court the power of redress was unconstitutional. In other words, Marshall said that the Supreme Court was not where Marbury should have sought a solution, arguing for the first time that the Court had the power to "say what the law is."[c]

John Marshall's role and the legal arguments he used in deciding the case have many interpretations.[d] Without dispute, however, this case marked the formal articulation of judicial review, a power that in the 20th century would touch Americans' most basic liberties and rights. Even more significantly, the case illustrates that the intense battles waged by groups to make a difference in contemporary politics (e.g., *Roe v. Wade* and *Bush v. Gore*) are as old as the Republic.

[a] This election was also noteworthy for illustrating the flaw in the electoral college that resulted in a tie between Jefferson and his running mate, Aaron Burr. Breaking the tie in the House of Representatives took six days and 36 ballots. www.historynow.org/09_2004/historian4b.html, accessed May 16, 2008.

[b] www.claremont.org/publications/crb/id.1183/article_detail.asp#, accessed May 17, 2008.

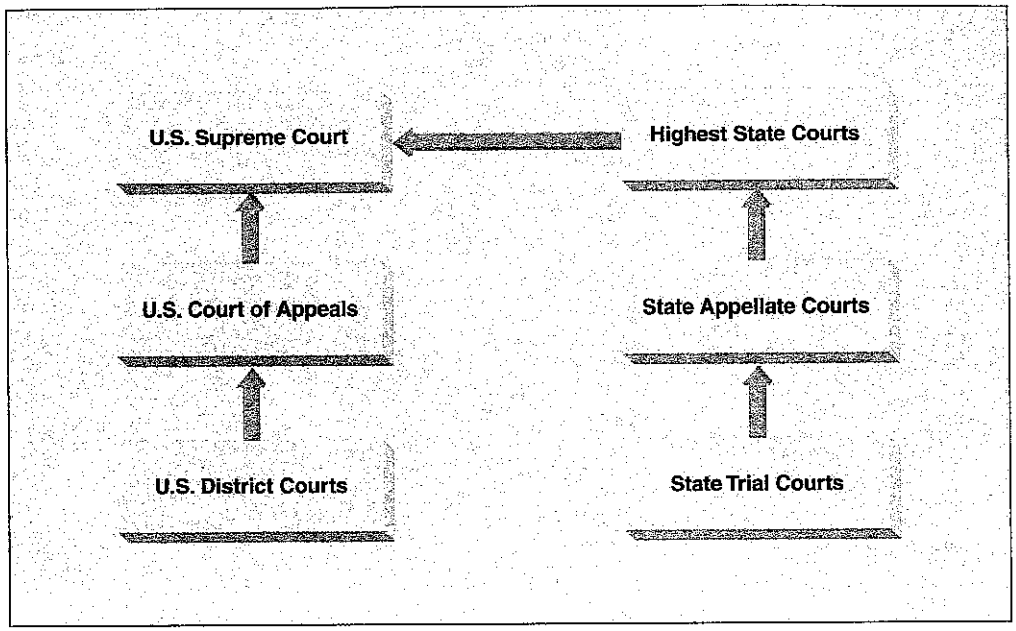
[c] *Marbury v. Madison*, 5 U.S. 137 (1803).

[d] See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986); and William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Lawrence, KS: University Press of Kansas, 2000).

Jurisdiction
The authority of a court to decide certain cases. Not all courts have the authority to decide all cases. Two jurisdictional issues are where a case arises as well as its subject matter.

Jurisdiction. A state court can exercise **jurisdiction** (the authority of the court to hear and decide a case) over the residents of a particular geographic area, such as a county or district. A state's highest court, or supreme court, has jurisdictional authority over all residents within the state. Because the Constitution established a federal government with limited powers, federal jurisdiction is also limited.

Figure 14-1 ▶ **Dual Structure of the American Court System**



Article III, Section 1, of the U.S. Constitution limits the jurisdiction of the federal courts to cases that involve either a federal question or diversity of citizenship. A **federal question** arises when a case is based, at least in part, on the U.S. Constitution, a treaty, or a federal law. A person who claims that her or his rights under the Constitution, such as the right to free speech, have been violated could bring a case in a federal court. **Diversity of citizenship** exists when the parties to a lawsuit are from different states, or (more rarely) when the suit involves a U.S. citizen and a government or citizen of a foreign country. The amount in controversy must be at least $75,000 before a federal court can take jurisdiction in a diversity case, however.

Federal Question
A question that has to do with the U.S. Constitution, acts of Congress, or treaties. A federal question provides a basis for federal jurisdiction.

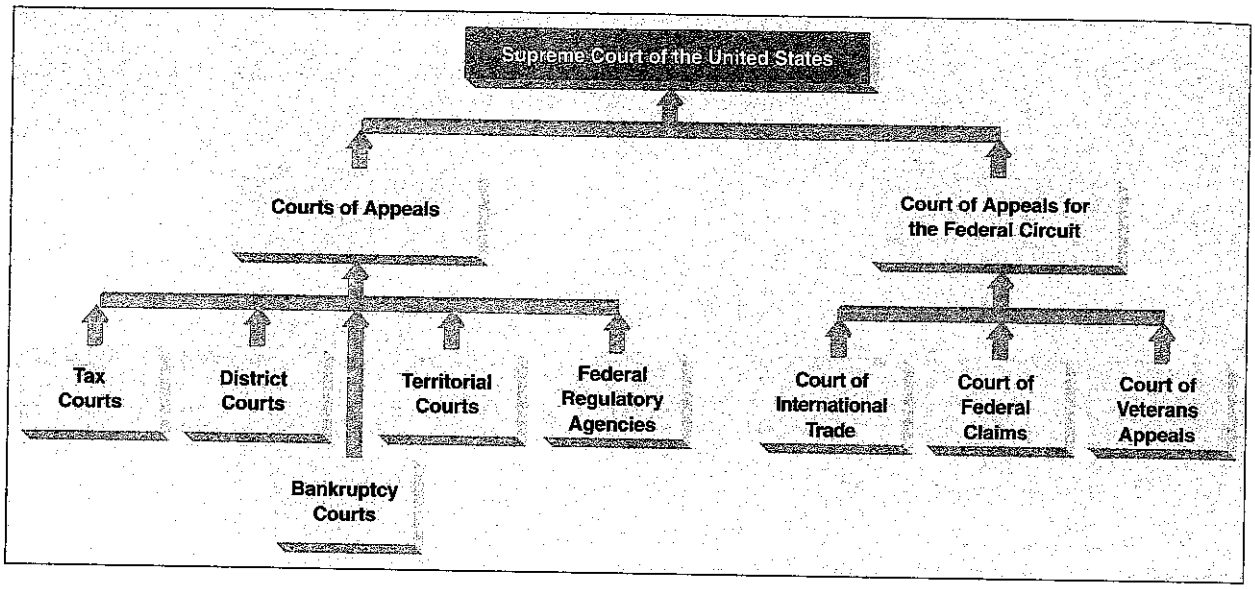
Diversity of Citizenship
The condition that exists when the parties to a lawsuit are citizens of different states, or when the parties are citizens of a U.S. state and citizens or the government of a foreign country. Diversity of citizenship can provide a basis for federal jurisdiction.

Standing to Sue. Another basic judicial requirement is standing to sue, or a sufficient "stake" in a matter to justify bringing suit. The party bringing a lawsuit must have suffered a harm, or have been threatened by a harm, as a result of the action that led to the dispute in question. Standing to sue also requires that the controversy at issue be a justiciable controversy. A *justiciable controversy* is a controversy that is real and substantial, as opposed to hypothetical or academic. In other words, a court will not give advisory opinions on hypothetical questions.

Types of Federal Courts

As you can see in Figure 14–2, the federal court system is basically a three-tiered model consisting of (1) U.S. district courts and various specialized courts of limited jurisdiction (not all of the latter are shown in the figure); (2) intermediate U.S. courts of appeals; and (3) the United States Supreme Court. Other specialized courts in the federal system are discussed in a later section. In addition, the U.S. military has its own system of courts, which are established under the Uniform Code of Military Justice. Cases from these other federal courts may also reach the Supreme Court.

Figure 14–2 ▶ **The Federal Court System**



Trial Court
The court in which most cases begin.

General Jurisdiction
Exists when a court's authority to hear cases is not significantly restricted. A court of general jurisdiction normally can hear a broad range of cases.

Limited Jurisdiction
Exists when a court's authority to hear cases is restricted to certain types of claims, such as tax claims or bankruptcy petitions.

Appellate Court
A court having jurisdiction to review cases and issues that were originally tried in lower courts.

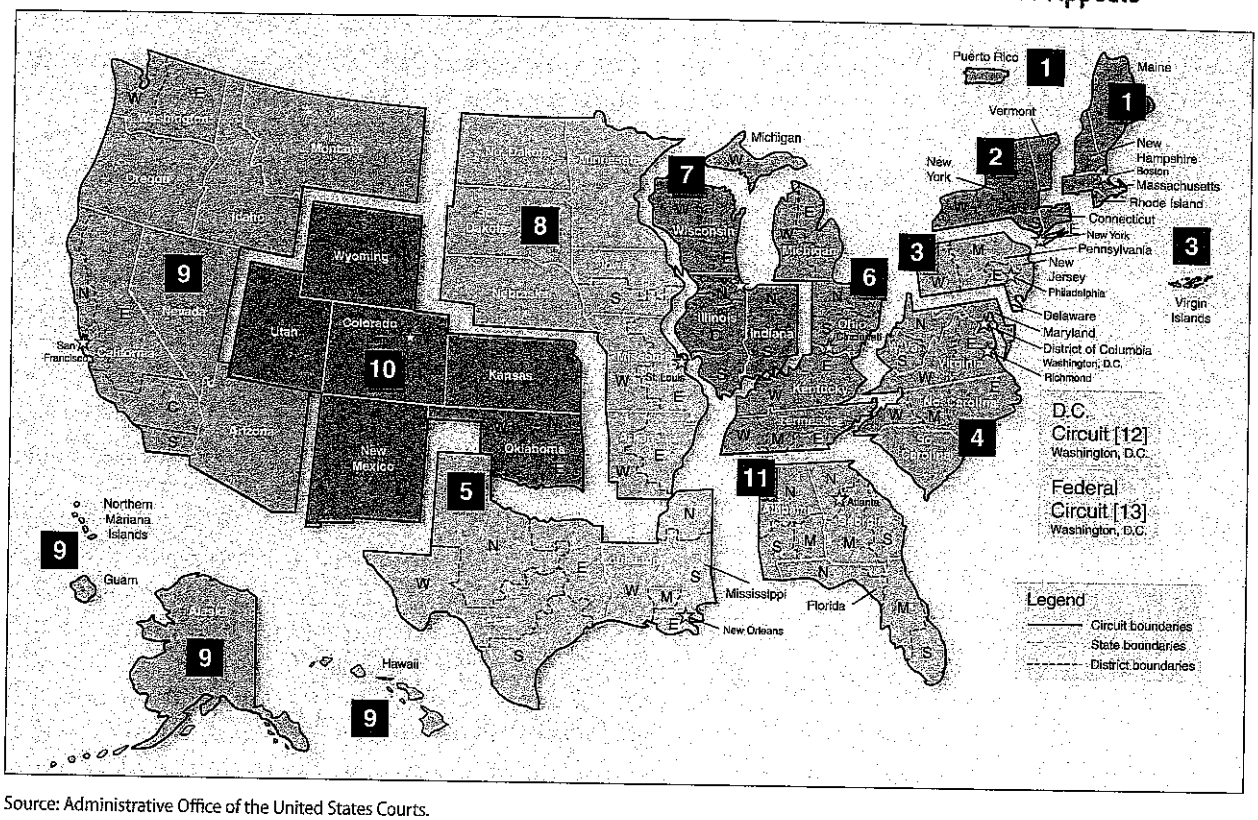
U.S. District Courts. The U.S. district courts are trial courts. A **trial court** is what the name implies—a court in which trials are held and testimony is taken. The U.S. district courts are courts of **general jurisdiction**, meaning that they can hear cases involving a broad array of issues. Federal cases involving most matters typically are heard in district courts. The other courts on the lower tier of the model shown in Figure 14–2 are courts of **limited jurisdiction**, meaning that they can try cases involving only certain types of claims, such as tax claims or bankruptcy petitions.

Every state has at least one federal district court. The number of judicial districts can vary over time as a result of population changes and corresponding caseloads. Currently, there are 94 federal judicial districts. A party who is dissatisfied with the decision of a district court can appeal the case to the appropriate U.S. court of appeals, or federal **appellate court**. Figure 14–3 shows the jurisdictional boundaries of the district courts (which are state boundaries, unless otherwise indicated by dotted lines within a state) and of the U.S. courts of appeals.

U.S. Courts of Appeals. The 13 U.S. courts of appeals are also referred to as U.S. circuit courts of appeals. Twelve of these courts, including the U.S. Court of Appeals for the District of Columbia, hear appeals from the federal district courts located within their respective judicial circuits (geographic areas over which they exercise jurisdiction). The Court of Appeals for the Thirteenth Circuit, called the Federal Circuit, has national appellate jurisdiction over certain types of cases, such as cases involving patent law and those in which the U.S. government is a defendant.

Note that when an appellate court reviews a case that was decided in a district court, the appellate court does not conduct another trial. Rather, a panel of three or more judges reviews the record of the case on appeal, which includes a transcript of the trial proceedings, and determines whether the trial court committed an error. Usually, appellate courts do not look at questions of *fact* (such as whether a party did, in fact, commit a certain action, such as burning a flag) but

Figure 14-3 ▶ **Geographic Boundaries of Federal District Courts and Circuit Courts of Appeals**



Source: Administrative Office of the United States Courts.

at questions of *law* (such as whether the act of burning a flag is a form of speech protected by the First Amendment to the Constitution). An appellate court will challenge a trial court's finding of fact only when the finding is clearly contrary to the evidence presented at trial or when no evidence supports the finding.

A party can petition the United States Supreme Court to review an appellate court's decision. The likelihood that the Supreme Court will grant the petition is slim, however, because the Court reviews very few of the cases decided by the appellate courts. This means that decisions made by appellate judges are usually final.

The United States Supreme Court. The highest level of the three-tiered model of the federal court system is the United States Supreme Court. When the Supreme Court came into existence in 1789, it had five justices. Congress passes laws that determine the number of justices and other aspects of the court. In the following years, more justices were added. Since 1869, nine justices have been on the Court at any given time.

According to the language of Article III of the U.S. Constitution, there is only one national Supreme Court. All other courts in the federal system are considered "inferior." Congress is empowered to create other inferior courts as it deems necessary. The inferior courts that Congress has created include the district courts, the federal courts of appeals, and the federal courts of limited jurisdiction.

Although the Supreme Court can exercise original jurisdiction (that is, act as a trial court) in certain cases, such as those affecting foreign diplomats and those in which a state is a party, most of its work is as an appellate court. The Court

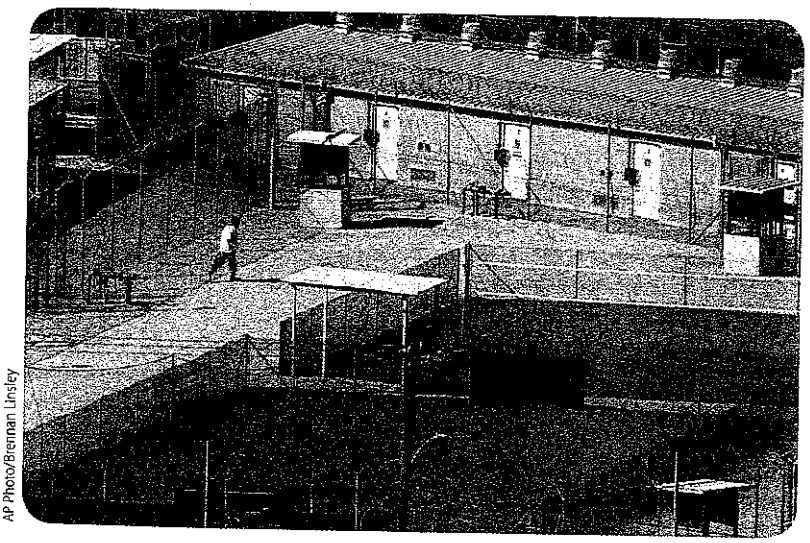
hears appeals not only from the federal appellate courts but also from the highest state courts. Note, though, that the United States Supreme Court can review a state supreme court decision only if a federal question is involved. Because of its importance in the federal court system, we will look more closely at the Supreme Court in a later section.

Specialized Federal Courts and the War on Terrorism

As noted, the federal court system includes a variety of trial courts of limited jurisdiction, dealing with matters such as tax claims, patent law, Native American claims, bankruptcy, or international trade. The government's attempts to combat terrorism have drawn attention to certain specialized courts that meet in secret.

The FISA Court. The federal government created the first secret court in 1978. In that year, Congress passed the Foreign Intelligence Surveillance Act (FISA), which established a court to hear requests for warrants for the surveillance of suspected spies. Officials can request warrants without having to reveal to the suspect or the public the information used to justify the warrant. The FISA court has approved almost all of the thousands of requests for warrants that the U.S. attorney general's office and other officials have submitted. The seven judges on the FISA court (who are also federal district judges from across the nation) meet in secret, with no published opinions or orders. The public has no access to the court's proceedings or records. Hence, when the court authorizes surveillance, most suspects do not even know that they are under scrutiny. Additionally, during the Clinton administration, the court was given the authority to approve physical as well as electronic searches, which means that officials may search a suspect's property without obtaining a warrant in open court and without notifying the subject.

In the aftermath of the terrorist attacks on September 11, 2001, the Bush administration expanded the powers of the FISA court. Previously, the FISA allowed secret domestic surveillance only if the target was spying as an agent of another nation. Post–September 11 amendments allow warrants if a "significant purpose" of the surveillance is to gather foreign intelligence and allow surveillance of groups who are not agents of a foreign government.



AP Photo/Brennan Linsley

The prison at Guantánamo Bay, Cuba, where the detainees from the Afghanistan and Iraq wars were held until their military trials or their release to another country. Why did the United States create the prison at Guantánamo Bay?

Alien "Removal Courts." The FISA court is not the only court in which suspects' rights have been reduced. In response to the Oklahoma City bombing in 1995, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996. The act included a provision creating an alien "removal court" to hear evidence against suspected "alien terrorists." The judges rule on whether there is probable cause for deportation. If so, a public deportation proceeding is held in a U.S. district court. The prosecution does not need to follow procedures that normally apply in criminal

cases. In addition, the defendant cannot see the evidence that the prosecution used to secure the hearing.

In some cases, the United States Supreme Court ruled against the George W. Bush administration's efforts to use secret legal proceedings in dealing with suspected terrorists. In 2004, the Supreme Court ruled that enemy combatants who are U.S. citizens and who have been taken prisoner by the United States cannot be denied due process rights. Justice Sandra Day O'Connor wrote that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis of that detention before a neutral decision maker.... A state of war is not a blank check for the president when it comes to the rights of the nation's citizens."[3] The Court also found that noncitizen detainees held at Guantánamo Bay in Cuba were entitled to challenge the grounds for their confinement.[4]

In response to the court rulings, the Bush administration asked Congress to enact a law establishing military tribunals to hear the prisoners' cases at Guantánamo. In 2006, the Court held that these tribunals did not meet due-process requirements for a fair hearing. The central issue in the case was whether the entire situation at the prison camp violated the prisoners' right of *habeas corpus*—the right of a detained person to challenge the legality of his or her detention before a judge or other neutral party. Congress then passed the Military Commissions Act of 2006, which eliminated federal court jurisdiction over *habeas corpus* challenges by enemy combatants. This law was also tested in court, but the Supreme Court refused to hear the case, so the law, as upheld by an appellate court, stands.[5]

Finally, in 2008, the Supreme Court, by a 5-4 majority, held that enemy combatants have the right to challenge their detention in front of a federal court if they have not been charged with a crime. This ruling essentially grants the detainees at Guantánamo Bay the right of *habeas corpus,* a right that the majority said Congress cannot restrict.[6] After President Obama took office in 2009, he announced that the prison at Guantánamo would be closed within a year; however, Congress has been unwilling to fund a prison in the United States to hold suspected terrorists and the administration has let the prison continue to exist. In addition, it has been difficult to find countries to accept some of the remaining prisoners who might be released. As of 2012 about 170 prisoners remained in the Cuban facility awaiting either trial or release.

Parties to Lawsuits

In most lawsuits, the parties are the plaintiff (the person or organization that initiates the lawsuit) and the defendant (the person or organization against whom the lawsuit is brought). Numerous plaintiffs and defendants may be in a single lawsuit. In the last several decades, many lawsuits have been brought by interest groups (see Chapter 7). Interest groups play an important role in our judicial system, because they **litigate**—bring to trial—or assist in litigating most cases of racial or gender-based discrimination, virtually all civil liberties cases, and more than one-third of the cases involving business matters. Interest groups also file *amicus curiae* (pronounced ah-*mee*-kous *kur*-ee-eye) briefs, or "friend of the court" briefs, in more than 50 percent of these kinds of cases.

Litigate
To engage in a legal proceeding or seek relief in a court of law; to carry on a lawsuit.

3. *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).
4. Hamdi was eventually released following a settlement with the government under which he agreed to renounce his U.S. citizenship and return to Saudi Arabia.
5. *Boumediene v. Bush,* 476 F.3d 981 (D.C. Cir. 2007).
6. *Boumediene v. Bush,* 553 U.S. 723 (2008).

Class-Action Suit
A lawsuit filed by an individual seeking damages for "all persons similarly situated."

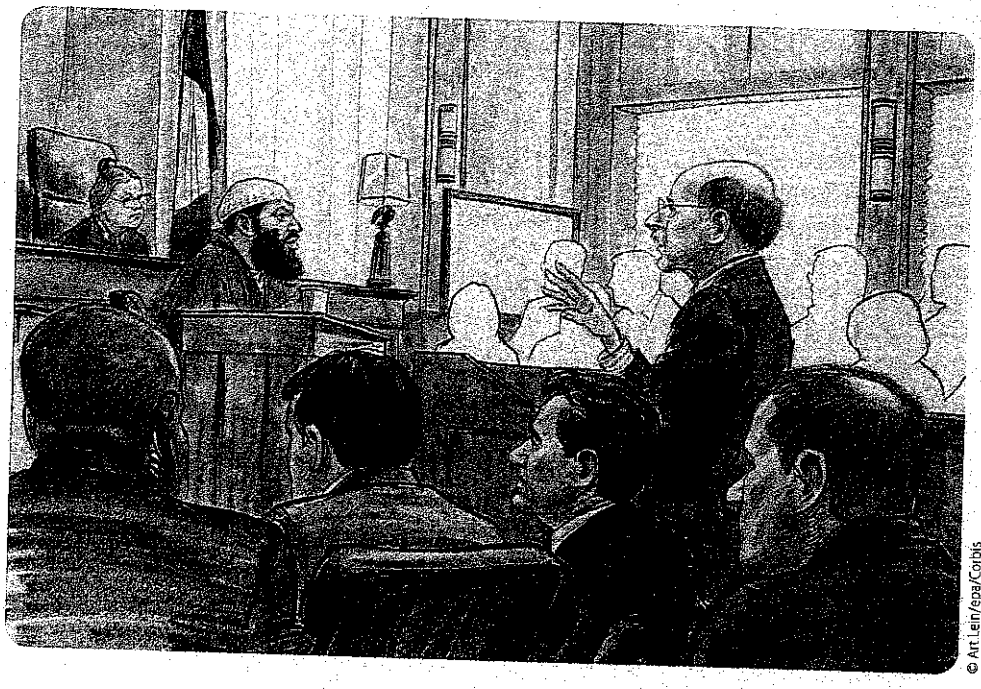
Sometimes interest groups or other plaintiffs will bring a **class-action suit**, in which whatever the court decides will affect all members of a class similarly situated (such as users of a particular product manufactured by the defendant in the lawsuit). The strategy of class-action lawsuits was pioneered by such groups as the National Association for the Advancement of Colored People (NAACP), the Legal Defense Fund, and the Sierra Club, whose leaders believed that the courts would offer a more sympathetic forum for their views than would Congress.

Procedural Rules

Both the federal and the state courts have established procedural rules that shape the litigation process. These rules are designed to protect the rights and interests of the parties, to ensure that the litigation proceeds in a fair and orderly manner, and to identify the issues that must be decided by the court, thus saving court time and costs. Court decisions may also apply to trial procedures. For example, the Supreme Court has held that the parties' attorneys cannot discriminate against prospective jurors on the basis of race or gender. Some lower courts have also held that people cannot be excluded from juries because of their sexual orientation or religion.

The parties must comply with procedural rules and with any orders given by the judge during the course of the litigation. When a party does not follow a court's order, the court can cite him or her for contempt. A party who commits *civil* contempt (failing to comply with a court's order for the benefit of another party to the proceeding) can be taken into custody, fined, or both, until the party complies with the court's order. A party who commits *criminal* contempt (obstructing the administration of justice or bringing the court into disrespect) also can be taken into custody and fined but cannot avoid punishment by complying with a previous order.

Throughout this book, you have read about how technology is affecting all areas of government. The judiciary is no exception. Today's courts continue to place opinions and other information online. Increasingly, lawyers are expected to file court documents electronically. There is little doubt that in the future we will see more court proceedings being conducted through use of the Internet.



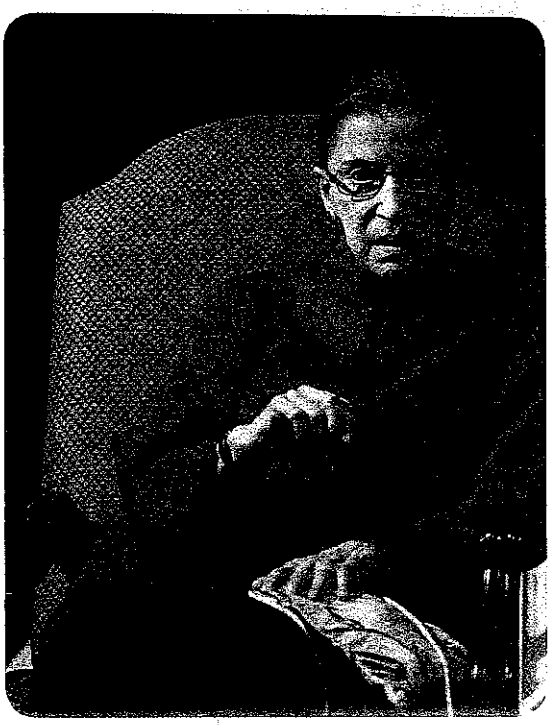
© Art Lein/epa/Corbis

A courtroom artist's rendering of the sentencing trial for Zacarias Moussaoui at the federal courthouse. The confessed September 11 conspirator testified he knew about the terrorist plot when he was arrested a month before the attacks and lied to FBI agents because he wanted the mission to go forward.

The Supreme Court at Work

The Supreme Court begins its regular annual term on the first Monday in October and usually adjourns in late June or early July of the next year. Special sessions may be held after the regular term ends, but only a few cases are decided in this way. More commonly, cases are carried over until the next regular session.

Of the total number of cases that are decided each year, those reviewed by the Supreme Court represent less than one-half of 1 percent. Included in these, however, are decisions that profoundly affect our lives. In recent years, the United States Supreme Court has decided issues involving the Obama health reform legislation, capital punishment, affirmative action programs, religious freedom, assisted suicide, abortion, property rights, sexual harassment, pornography, states' rights, limits on federal jurisdiction, and many other matters with significant consequences for the nation. Because the Supreme Court exercises a great deal of discretion over the types of cases it hears, it can influence the nation's policies by issuing decisions in some types of cases and refusing to hear appeals in others, thereby allowing lower court decisions to stand.



AP Photo/Kevin Wolf

Justice Ruth Bader Ginsburg being interviewed in 2008. She noted the presence of two Jewish justices on the court and that their religion plays no role in their decisions.

Which Cases Reach the Supreme Court?

Many people are surprised to learn that in a typical case, there is no absolute right of appeal to the United States Supreme Court. The Court's appellate jurisdiction is almost entirely discretionary; the Court can choose which cases it will decide. The justices never explain their reasons for hearing certain cases and not others, so it is difficult to predict which case or type of case the Court might select. Former chief justice William Rehnquist, in his description of the selection process in *The Supreme Court: How It Was, How It Is,*[7] said that the decision of whether to accept a case "strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment."

Factors That Bear on the Decision. Factors that bear on the decision include whether a legal question has been decided differently by various lower courts and needs resolution by the highest court, whether a lower court's decision conflicts with an existing Supreme Court ruling, and whether the issue could have significance beyond the parties to the dispute.

Another factor is whether the solicitor general is pressuring the Court to take a case. The solicitor general, a high-ranking presidential appointee within the Justice Department, represents the national government before the Supreme Court and promotes presidential policies in the federal courts. He or she decides what cases the government should ask the Supreme Court to review and what position the government should take in cases before the Court.

Granting Petitions for Review. If the Court decides to grant a petition for review, it will issue a **writ of *certiorari*** (pronounced sur-shee-uh-*rah*-ree). The writ orders a lower court to send the Supreme Court a record of the case for

Writ of *Certiorari*
An order issued by a higher court to a lower court to send up the record of a case for review.

7. William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: Morrow, 1987).

review. More than 90 percent of the petitions for review are denied. A denial is not a decision on the merits of a case, nor does it indicate agreement with the lower court's opinion. (The judgment of the lower court remains in force, however.) Therefore, denial of the writ has no value as a precedent. The Court will not issue a writ unless at least four justices approve of it. This is called the **rule of four**.[8]

Rule of Four
A United States Supreme Court procedure by which four justices must vote to grant a petition for review if a case is to come before the full court.

Deciding Cases

Once the Supreme Court grants *certiorari* in a particular case, the justices do extensive research on the legal issues and facts involved in the case. (Of course, some preliminary research is necessary before deciding to grant the petition for review.) Each justice is entitled to four law clerks, who undertake much of the research and preliminary drafting necessary for the justice to form an opinion.[9]

The Court normally does not hear any evidence, as is true with all appeals courts. The Court's consideration of a case is based on the abstracts, the record, and the briefs. The attorneys are permitted to present **oral arguments**. All statements and the justices' questions are recorded during these sessions. Unlike the practice in most courts, lawyers addressing the Supreme Court can be (and often are) questioned by the justices at any time during oral argument.

Oral Arguments
The verbal arguments presented in person by attorneys to an appellate court. Each attorney presents reasons to the court why the court should rule in her or his client's favor.

The justices meet to discuss and vote on cases in conferences held throughout the term. In these conferences, in addition to deciding cases currently before the Court, the justices determine which new petitions for *certiorari* to grant. These conferences take place in the oak-paneled chamber and are strictly private—no stenographers, tape recorders, or video cameras are allowed. Two pages used to be in attendance to wait on the justices while they were in conference, but fear of information leaks caused the Court to stop this practice.[10]

Decisions and Opinions

When the Court has reached a decision, its opinion is written. The **opinion** contains the Court's ruling on the issue or issues presented, the reasons for its decision, the rules of law that apply, and other information. In many cases, the decision of the lower court is **affirmed**, resulting in the enforcement of that court's judgment or decree. If the Supreme Court believes that a reversible error was committed during the trial or that the jury was instructed improperly, however, the decision will be **reversed**. Sometimes the case will be **remanded** (sent back to the court that originally heard the case) for a new trial or other proceeding. For example, a lower court might have held that a party was not entitled to bring a lawsuit under a particular law. If the Supreme Court holds to the contrary, it will remand (send back) the case to the trial court with instructions that the trial proceed.

Opinion
The statement by a judge or a court of the decision reached in a case. The opinion sets forth the applicable law and details the reasoning on which the ruling was based.

Affirm
To declare that a court ruling is valid and must stand.

Reverse
To annul or make void a court ruling on account of some error or irregularity.

Remand
To send a case back to the court that originally heard it.

The Court's written opinion sometimes is unsigned; this is called an opinion *per curiam* ("by the court"). Typically, the Court's opinion is signed by all the justices who agree with it. When in the majority, the chief justice assigns the opinion

8. The "rule of four" is modified when seven or fewer justices participate, which occurs from time to time. When that happens, as few as three justices can grant *certiorari*.
9. For a former Supreme Court law clerk's account of the role these clerks play in the high court's decision-making process, see Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* (New York: Times Books, 1998).
10. It turned out that one supposed information leak came from lawyers making educated guesses.

and often writes it personally. When the chief justice is in the minority, the senior justice on the majority side decides who writes the opinion.

When all justices unanimously agree on an opinion, the opinion is written for the entire Court (all the justices) and can be deemed a **unanimous opinion**. When there is not a unanimous opinion, a **majority opinion** is written, outlining the views of the majority of the justices involved in the case. Often, one or more justices who feel strongly about making or emphasizing a particular point that is not made or emphasized in the unanimous or majority written opinion will write a **concurring opinion**. That means the justice writing the concurring opinion agrees (concurs) with the conclusion given in the majority written opinion, but for different reasons. Finally, in other than unanimous opinions, one or more **dissenting opinions** are usually written by those justices who do not agree with the majority. The dissenting opinion is important because it often forms the basis of the arguments used years later if the Court reverses the previous decision and establishes a new precedent.

Unanimous Opinion
A court opinion or determination on which all judges agree.

Majority Opinion
A court opinion reflecting the views of the majority of the judges.

Concurring Opinion
A separate opinion prepared by a judge who supports the decision of the majority of the court but who wants to make or clarify a particular point or to voice disapproval of the grounds on which the decision was made.

Dissenting Opinion
A separate opinion in which a judge dissents from (disagrees with) the conclusion reached by the majority on the court and expounds his or her own views about the case.

Shortly after the opinion is written, the Supreme Court announces its decision from the bench. At that time, the opinion is made available to the public at the office of the clerk of the Court. The clerk also releases the opinion for online publication. Ultimately, the opinion is published in the *United States Reports*, which is the official printed record of the Court's decisions.

Some have complained that the Court reviews too few cases each term, thus giving the lower courts less guidance on important issues. The number of signed opinions issued by the Court has dwindled notably since the 1980s. For example, in its 1982–1983 term, the Court issued signed opinions in 141 cases. By 2010, this number dropped to between 80 and 100 per term.

Some scholars suggest that one of the reasons why the Court hears fewer cases today than in the past is the growing conservatism of the judges sitting on lower courts. More than half of these judges have now been appointed by Republican presidents. As a result, the government loses fewer cases in the lower courts, which lessens the need for the government to appeal the rulings through the solicitor general's office. Some support for this conclusion is given by the fact that the number of petitions filed by that office declined by more than 50 percent after George W. Bush became president.

The Selection of Federal Judges

Learning Outcome 4:
Explain how judges are nominated and confirmed for the Supreme Court.

All federal judges are appointed. The Constitution, in Article II, Section 2, states that the president appoints the justices of the Supreme Court with the advice and consent of the Senate. Congress has provided the same procedure for staffing other federal courts. This means that the Senate and the president jointly decide who shall fill every vacant judicial position, no matter what the level.

Federal judgeships in the United States number more than 870. Once appointed to such a judgeship, a person holds that job for life. Judges serve until they resign, retire voluntarily, or die. Federal judges who engage in blatantly illegal conduct may be removed through impeachment, although such action is rare.

Judicial Appointments

Judicial candidates for federal judgeships are suggested to the president by the Department of Justice, senators, other judges, the candidates, and lawyers'

Ryan Kelly/Getty Images

Associate Justice Sonia Sotomayor arrives in the House of Representatives for the President's State of the Union Address in 2010.

Senatorial Courtesy
In federal district court judgeship nominations, a tradition allowing a senator to veto a judicial appointment in his or her state.

associations and other interest groups. In selecting a candidate to nominate for a judgeship, the president considers not only the person's competence but also other factors, including the person's political philosophy (as will be discussed shortly), ethnicity, and gender.

The nomination process—no matter how the nominees are obtained—always works the same way. The president makes the actual nomination, transmitting the name to the Senate. The Senate then either confirms or rejects the nomination. To reach a conclusion, the Senate Judiciary Committee (operating through subcommittees) invites testimony, both written and oral, at its various hearings. A practice used in the Senate, called **senatorial courtesy**, is a constraint on the president's freedom to appoint federal district judges. Senatorial courtesy allows a senator of the president's political party to veto a judicial appointment in her or his state by way of a "blue slip." Traditionally, the senators from the nominee's state are sent a blue form on which to make comments. They may return the "blue slip" with comments or not return it at all. Not returning the blue slip is a veto of the nomination.[11] During much of American history, senators from the "opposition" party (the party to which the president did not belong) also have enjoyed the right of senatorial courtesy, although their veto power has varied over time.

Federal District Court Judgeship Nominations. Although the president officially nominates federal judges, in the past the nomination of federal district court judges actually originated with a senator or senators of the president's party from the state in which there was a vacancy. In effect, judicial appointments were a form of political patronage. President Jimmy Carter (served 1977–1981) ended this tradition by establishing independent commissions to oversee the initial nomination process. President Ronald Reagan (served 1981–1989) abolished Carter's nominating commissions and established complete presidential control of nominations.

Federal Courts of Appeals Appointments. Appointments to the federal courts of appeals are far less numerous than federal district court appointments, but they are more important. This is because federal appellate judges handle more important matters, at least from the point of view of the president, and therefore presidents take a keener interest in the nomination process for such judgeships. Also, the U.S. courts of appeals have become stepping-stones to the Supreme Court.

Supreme Court Appointments. As we have described, the president nominates Supreme Court justices.[12] As you can see in Table 14–1, which summarizes the background of all Supreme Court justices to 2012 the most common

11. Mitchell A. Sollenberger, "The Blue Slip Process in the Senate Committee on the Judiciary: Background, Issues, and Options," Congressional Research Service, November 21, 2003.
12. For a discussion of the factors that may come into play during the process of nominating Supreme Court justices, see David A. Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999).

occupational background of the justices at the time of their appointment has been private legal practice or state or federal judgeship. Those nine justices who were in federal executive posts at the time of their appointment held the high offices of secretary of state, comptroller of the treasury, secretary of the navy, postmaster general, secretary of the interior, chairman of the Securities and Exchange Commission, and secretary of labor. In the "Other" category under "Occupational Position before Appointment" in Table 14–1 are two justices who were professors of law (including William H. Taft, a former president) and one justice who was a North Carolina state employee with responsibility for organizing and revising the state's statutes.

The Special Role of the Chief Justice. Although ideology is always important in judicial appointments, as described next, when a chief justice is selected for the Supreme Court, other considerations must also be taken into account. The chief justice is not only the head of a group of nine justices who interpret the law. He or she is also in essence the chief executive officer (CEO) of a large bureaucracy that includes all of the following: 1,200 judges with lifetime tenure, more than 850 magistrates and bankruptcy judges, and more than 30,000 staff members.

The chief justice is also the chair of the Judicial Conference of the United States, a policymaking body that sets priorities for the federal judiciary. That means that the chief justice also indirectly oversees the $5.5 billion budget of this group.

Finally, the chief justice appoints the director of the Administrative Office of the United States Courts. The chief justice and this director select judges who sit on judicial committees that examine international judicial relations, technology, and a variety of other topics.

Partisanship and Judicial Appointments

Ideology plays an important role in the president's choices for judicial appointments. In most circumstances, the president appoints judges or justices who belong to the president's own political party. Presidents see their federal judiciary appointments as the one sure way to institutionalize their political views long after they have left office. By 1993, for example, presidents Ronald Reagan and George H. W. Bush together had appointed nearly three-quarters of all federal court judges. This preponderance

Table 14–1 ▶ Background of U.S. Supreme Court Justices to 2012; Number of Justices = 112 Total)

OCCUPATIONAL POSITION BEFORE APPOINTMENT	
Private legal practice	25
State judgeship	21
Federal judgeship	31
U.S. attorney general	7
Deputy or assistant U.S. attorney general	2
U.S. solicitor general	3
U.S. senator	6
U.S. representative	2
State governor	3
Federal executive post	9
Other	3
RELIGIOUS BACKGROUND	
Protestant	83
Roman Catholic	14
Jewish	7
Unitarian	7
No religious affiliation	1
AGE ON APPOINTMENT	
Under 40	5
41–50	34
51–60	59
61–70	14
POLITICAL PARTY AFFILIATION	
Federalist (to 1835)	13
Jeffersonian Republican (to 1828)	7
Whig (to 1861)	1
Democrat	46
Republican	44
Independent	1
EDUCATIONAL BACKGROUND	
College graduate	96
Not a college graduate	16
GENDER	
Male	108
Female	4
RACE	
White	109
African American	2
Hispanic American	1

Source: Congressional Quarterly, *Congressional Quarterly's Guide to the U.S. Supreme Court* (Washington, DC: Congressional Quarterly Press, 1996); and authors' updates.

SIPA USA/SIPA/Newscom

On August 7, 2010, Elena Kagan is sworn in as the 112th U.S. Supreme Court justice and the Court's fourth woman ever.

of Republican-appointed federal judges strengthened the legal moorings of the conservative social agenda on a variety of issues, ranging from abortion to civil rights. Nevertheless, President Bill Clinton had the opportunity to appoint about 200 federal judges, thereby shifting the ideological makeup of the federal judiciary.

During the first two years of his second term, President George W. Bush was able to nominate two relatively conservative justices to the Supreme Court—John Roberts, who became chief justice, and Samuel Alito. Both are Catholics and have relatively, but not consistently, conservative views. In fact, during his first term as chief justice, Roberts voted most of the time with the Court's most conservative justices, Antonin Scalia and Clarence Thomas. Nonetheless, Roberts and Alito did not cause the Supreme Court to "tilt to the right" as much as some people anticipated. The reason is that the two Bush appointees replaced justices who were moderate to conservative. Interestingly, some previous conservative justices have shown a tendency to migrate to a more liberal view of the law. Sandra Day O'Connor, the first female justice and a conservative, gradually shifted to the left on several issues, including abortion. In 1981, during her confirmation hearing before the Senate Judiciary Committee, she said, "I am opposed to it [abortion], as a matter of birth control or otherwise." By 1992, she was part of a 5-4 majority that agreed that the Constitution protects a woman's right to an abortion.

Similarly, Justice John Paul Stevens, who was appointed by Gerald Ford, was expected to be a moderate or conservative in his views but, over time, became a member of the liberal bloc on the Court. Stevens, who retired in 2010, was renowned for his ability to find a compromise between the justices and to build a voting majority. President Obama nominated Solicitor General Elena Kagan, former dean of the law school at Harvard University, to fill Stevens's seat. His first nominee to the Court, Associate Justice Sonia Sotomayor, who replaced Justice David Souter, became the first Hispanic American to serve on the Court. Both of President Obama's appointments were to seats formerly held by more liberal justices, so the balance of ideology on the Supreme Court remained the same as it had been during the George W. Bush administration.

The Senate's Role

Ideology also plays a large role in the Senate's confirmation hearings, and presidential nominees to the Supreme Court have not always been confirmed. In fact, almost 20 percent of presidential nominations to the Supreme Court have been either rejected or not acted on by the Senate. Many acrimonious battles over Supreme Court appointments have occurred when the Senate and the president have not seen eye to eye about political matters.

The U.S. Senate had a long record of refusing to confirm the president's judicial nominations extending from the beginning of Andrew Jackson's presidency in 1829 to the end of Ulysses Grant's presidency in 1877. From 1894 until 1968, however, only three nominees were not confirmed. Then, from 1968 through

1987, four presidential nominees to the highest court were rejected. One of the most controversial Supreme Court nominations was that of Clarence Thomas, who underwent an extremely volatile confirmation hearing in 1991, replete with charges against him of sexual harassment. He was ultimately confirmed by the Senate, however, and has been a stalwart voice for conservatism ever since.

President Bill Clinton had little trouble gaining approval for both of his nominees to the Supreme Court: Ruth Bader Ginsburg and Stephen Breyer. President George W. Bush's nominees faced hostile grilling in their confirmation hearings, and various interest groups mounted intense media advertising blitzes against them. Bush had to forgo one of his nominees, Harriet Miers, when he realized that she could not be confirmed by the Senate. President Obama's two nominations, Sonia Sotomayor and Elena Kagan, while seen as too liberal by some senators, were eminently qualified for the Court and were approved by the Senate with little incident.

Both Clinton and Bush had trouble securing Senate approval for their judicial nominations to the lower courts. In fact, during the late 1990s and early 2000s, the duel between the Senate and the president aroused considerable concern about the consequences of the increasingly partisan and ideological tension over federal judicial appointments. On several occasions, presidents have appointed federal judges using a temporary "recess appointment." This procedure is always used for the same reason—to avoid the continuation of an acrimonious and perhaps futile Senate confirmation process.

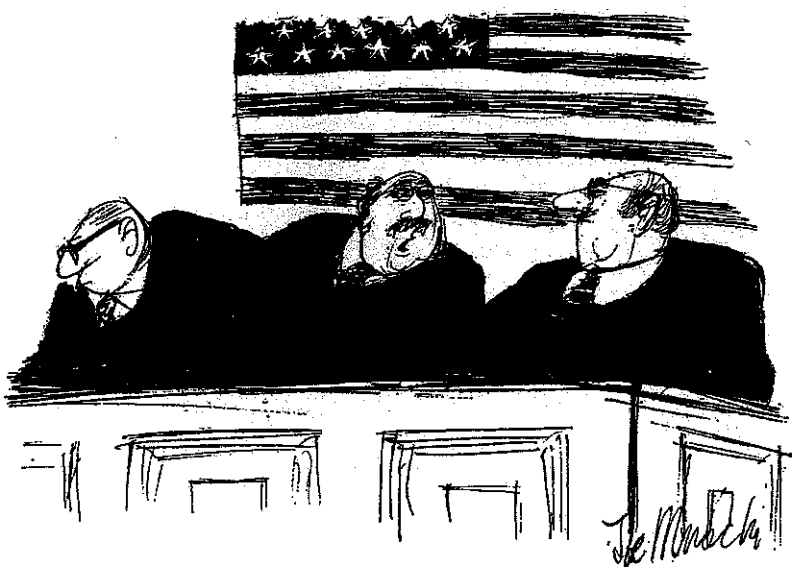
Although the confirmation hearings on Supreme Court nominees get all of the media attention, the hearings on nominees for the lower federal courts are equally bitter, leading some to ask whether the politicization of the confirmation process has gone too far. According to Fifth Circuit Court Judge Edith Jones, judicial nominations have turned into battlegrounds because so many federal judges now view the courts as agents of social change. Jones argues that when judge-made law (as opposed to legislature-made law) enters into sensitive topics, it provokes a political reaction. Thus, the ideology and political views of the potential justices should be a matter of public concern and political debate.[13]

Politics has played a role in selecting judges since the administration of George Washington. The classic case cited earlier, *Marbury v. Madison*, was rooted in partisan politics. Nonetheless, most nominees are confirmed without dispute. As of 2006, the vacancy rate on the federal bench was at its lowest point in 14 years. Those nominees who run into trouble are usually the most conservative Republican nominees or the most liberal Democratic ones. It is legitimate to evaluate a candidate's judicial ideology when that ideology is strongly held and likely to influence the judge's rulings.

Policymaking and the Courts

The partisan battles over judicial appointments reflect an important reality in today's American government: the importance of the judiciary in national politics. Because appointments to the federal bench are for life, the ideology of judicial appointees can affect national policy for years to come. Although the primary function of judges in our system of government is to interpret and apply the laws, inevitably judges make policy when carrying out this task. One of the major policymaking tools of the federal courts is their power of judicial review.

13. Cited by John Leo, "A Judge with No Agenda," *Jewish World Review*, July 5, 2005.



Do you ever have one of those days when everything seems un-Constitutional?"

Judicial Review

If a federal court declares that a federal or state law or policy is unconstitutional, the court's decision affects the application of the law or policy only within that court's jurisdiction. For this reason, the higher the level of the court, the greater the impact of the decision on society. Because of the Supreme Court's national jurisdiction, its decisions have the greatest impact. For example, when the Supreme Court held that an Arkansas state constitutional amendment limiting the terms of congresspersons was unconstitutional, laws establishing term limits in 23 other states were also invalidated.[14]

Some claim that the power of judicial review gives unelected judges and justices on federal court benches too much influence over national policy. Others argue that the powers exercised by the federal courts, particularly the power of judicial review, are necessary to protect our constitutional rights and liberties. Built into our federal form of government is a system of checks and balances. If the federal courts did not have the power of judicial review, no governmental body could check Congress's lawmaking authority.

Judicial Activism and Judicial Restraint

■ Learning Outcome 5: **Compare the concepts of judicial activism and judicial restraint, and link these concepts to the decisions of the Supreme Court in the last few decades.**

Judicial Activism
A doctrine holding that the Supreme Court should take an active role by using its powers to check the activities of governmental bodies when those bodies exceed their authority.

Judicial Restraint
A doctrine holding that the Supreme Court should defer to the decisions made by the elected representatives of the people in the legislative and executive branches.

Judicial scholars like to characterize different judges and justices as being either "activist" or "restraintist." The doctrine of **judicial activism** rests on the conviction that the federal judiciary should take an active role by using its powers to check the activities of Congress, state legislatures, and administrative agencies when those governmental bodies exceed their authority. One of the Supreme Court's most activist eras was the period from 1953 to 1969, when the Court was headed by Chief Justice Earl Warren. The Warren Court propelled the civil rights movement forward by holding, among other things, that laws permitting racial segregation violated the equal protection clause.

In contrast, the doctrine of **judicial restraint** rests on the assumption that the courts should defer to the decisions made by the legislative and executive branches, because members of Congress and the president are elected by the people, whereas members of the federal judiciary are not. Because administrative agency personnel normally have more expertise than the courts do in the areas regulated by the agencies, the courts likewise should defer to agency rules and decisions. In other words, under the doctrine of judicial restraint, the courts should not thwart the implementation of legislative acts and agency rules unless they are clearly unconstitutional.

Judicial activism sometimes is linked with liberalism, and judicial restraint with conservatism. In fact, though, a conservative judge can be activist, just as a liberal judge can be restraintist. In the 1950s and 1960s, the Supreme Court was activist and liberal. Some observers believe that the Rehnquist Court, with its conservative majority, became increasingly activist during the early 2000s. Some go even

14. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

further and claim that the federal courts, including the Supreme Court, wield too much power in our democracy.

Strict versus Broad Construction

Other terms that are often used to describe a justice's philosophy are *strict construction* and *broad construction.* Justices who believe in **strict construction** look to the "letter of the law" when they attempt to interpret the Constitution or a particular statute. Those who favor **broad construction** try to determine the context and purpose of the law.

Strict Construction
A judicial philosophy that looks to the "letter of the law" when interpreting the Constitution or a particular statute.

Broad Construction
A judicial philosophy that looks to the context and purpose of a law when making an interpretation.

As with the doctrines of judicial restraint and judicial activism, strict construction is often associated with conservative political views, whereas broad construction is often linked with liberalism. These traditional political associations sometimes appear to be reversed, however. Consider the Eleventh Amendment to the Constitution, which rules out lawsuits in federal courts "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Nothing is said about citizens suing their *own* states, and strict construction would therefore find such suits to be constitutional. Conservative justices, however, have construed this amendment broadly to deny citizens the constitutional right to sue their own states in most circumstances. John T. Noonan, Jr., a federal appellate court judge who was appointed by a Republican president, has described these rulings as "adventurous."[15]

Broad construction is often associated with the concept of a "living constitution." Supreme Court Justice Antonin Scalia has said that "the Constitution is not a living organism, it is a legal document. It says something and doesn't say other things." Scalia believes that jurists should stick to the plain text of the Constitution "as it was originally written and intended."[16]

Ideology and the Rehnquist Court

William H. Rehnquist became the 16th chief justice of the Supreme Court in 1986, after 14 years as an associate justice. He was known as a strong anchor of the Court's conservative wing until his death in 2005. With Rehnquist's appointment as chief justice, it seemed to observers that the Court would necessarily become more conservative.

Indeed, that is what happened. The Court began to take a rightward shift shortly after Rehnquist became chief justice, and the Court's rightward movement continued as other conservative appointments to the bench were made during the Reagan and George H. W. Bush administrations. During the late 1990s and early 2000s, three of the justices (William Rehnquist, Antonin Scalia, and Clarence Thomas) were notably conservative in their views. Four of the justices (John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer) held moderate-to-liberal views. The middle of the Court was occupied by two moderate-to-conservative justices, Sandra Day O'Connor and Anthony Kennedy. O'Connor and Kennedy usually provided the swing votes on the Court in controversial cases.

Although the Court seemed to become more conservative under Rehnquist's leadership, its decisions were not always predictable. Many cases were decided by very close votes, and results seemed to vary depending on the issue. For example, the Court ruled in 1995 that Congress had overreached its powers under the commerce clause when it attempted to regulate the possession of guns in

15. John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (Berkeley, CA: University of California Press, 2002).
16. Speech given at the Woodrow Wilson Center, Washington, D.C., March 14, 2005.

schoolyards. According to the Court, the possession of guns in school zones had nothing to do with the commerce clause.[17] Yet in 2005, the Court upheld Congress's power under the commerce clause to ban marijuana use even when a state's law permitted such use.[18] In other areas such as civil rights, the Court generally issued conservative opinions.

The Roberts Court

In 2006, a new chief justice was appointed to the court. John Roberts had a distinguished career as an attorney in Washington, D.C. He had served as a clerk to the Supreme Court while in law school and was well liked by the justices. The confirmation process had been quite smooth, and many hoped that he would be a moderate leader of the Court.

During John Roberts's first term (2005–2006) as chief justice, the Court ruled on several important issues, but no clear pattern was discernible in the decisions. In the years following his appointment, Roberts was more likely to vote with the conservative justices—Scalia, Thomas, and Alito—than with the moderate-to-liberal bloc. Thus, several important decisions were handed down with close votes. In an important case for environmentalist groups, the Court held that the Environmental Protection Agency (EPA) did have the power under the Clean Air Act to regulate greenhouse gases. The vote was 5-4, with the chief justice on the minority side.[19] Similarly, when the Court upheld the 2003 federal law banning partial-birth abortions, Roberts was on the conservative side in a 5-4 vote.[20]

Attorneys General Pam Bondi of Florida and Luther Strange of Alabama, both Republicans, depart the Supreme Court building after the third day of oral arguments on the constitutionality of the Affordable Health Care Act.

RON SACHS/DPA/Landov

Later in 2007, the Supreme Court issued a very important opinion on school integration. By another 5-4 vote, the Court ruled that school district policies that included race as a determining factor in admission to certain schools were unconstitutional on the ground that they violated the equal protection clause of the Constitution.[21] After Justices Sonia Sotomayor and Elena Kagan joined the court early in the Obama adminstration, court-watchers believed that the Roberts Court would make conservative decisions but that the majority often would be razor-thin. Indeed, in 2012, the Court announced two decisions that supported this appraisal: The Court overturned four provisions of Arizona's controversial law regarding illegal immigrants but upheld the central provision allowing police officers to check the immigration status of those individuals who had been arrested or stopped on other charges. A few days later, the Supreme Court upheld the individual mandate to buy health insurance under the Affordable Health Care Act (Obama's health care legislation) by a 5-4 margin, with the chief

17. *United States v. Lopez*, 514 U.S. 549 (1995)
18. *Gonzales v. Raich*, 545 U.S. 1 (2005).
19. *Massachusetts v. EPA*, 127 St. Ct. 1438 (2007).
20. *Gonzales v. Carhart*, 127 St. Ct. 1610 (2007).
21. *Parents Involved in Community Schools v. Seattle School District*, N. 1, 127 St. Ct. 2162 (2007).

justice supporting the law as legal under the commerce clause of the Constitution.

What Checks Our Courts?

Our judicial system is one of the most independent in the world, but the courts do not have absolute independence, for they are part of the political process. Political checks limit the extent to which courts can exercise judicial review and engage in an activist policy. These checks are exercised by the executive branch, the legislature, the public, and, finally, the judiciary.

Time & Life Pictures/Getty Images

Federal troops were sent by President Eisenhower to guard Little Rock High School and to ensure the safety of the African American students who were going to attend that school.

Executive Checks

President Andrew Jackson was once supposed to have said, after Chief Justice John Marshall made an unpopular decision, "John Marshall has made his decision; now let him enforce it."[22] This purported remark goes to the heart of **judicial implementation**—the enforcement of judicial decisions in such a way that those decisions are translated into policy. The Supreme Court simply does not have any enforcement powers, and whether a decision will be implemented depends on the cooperation of the other two branches of government. Rarely, though, will a president refuse to enforce a Supreme Court decision, as President Jackson did. To take such an action could mean a significant loss of public support because of the Supreme Court's stature in the eyes of the nation.

Judicial Implementation
The way in which court decisions are translated into action.

More commonly, presidents exercise influence over the judiciary by appointing new judges and justices as federal judicial seats become vacant. Additionally, as mentioned earlier, the U.S. solicitor general plays a significant role in the federal court system, and the person holding this office is a presidential appointee.

Executives at the state level may also refuse to implement court decisions with which they disagree. A notable example of such a refusal occurred in Arkansas after the Supreme Court ordered schools to desegregate "with all deliberate speed" in 1955.[23] Arkansas Governor Orval Faubus refused to cooperate with the decision and used the state's National Guard to block the integration of Central High School in Little Rock. Ultimately, President Dwight Eisenhower had to federalize the Arkansas National Guard and send federal troops to Little Rock to quell the violence that had erupted.

Legislative Checks

Courts may make rulings, but often the legislatures at local, state, and federal levels are required to appropriate funds to carry out the courts' rulings. A court, for example, may decide that prison conditions must be improved, but the

22. The decision referred to was *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831).
23. *Brown v. Board of Education,* 349 U.S. 294 (1955)—the second *Brown* decision.

legislature authorizes the funds necessary to carry out the ruling. When such funds are not appropriated, the court that made the ruling, in effect, has been checked.

Constitutional Amendments. Courts' rulings can be overturned by constitutional amendments at both the federal and state levels. Many of the amendments to the U.S. Constitution (such as the Fourteenth, Fifteenth, and Twenty-sixth Amendments) check the state courts' ability to allow discrimination, for example. Proposed constitutional amendments that were created in an effort to reverse courts' decisions on school prayer and abortion have failed.

Rewriting Laws. Finally, Congress or a state legislature can rewrite (amend) old laws or enact new ones to overturn a court's rulings if the legislature concludes that the court is interpreting laws or legislative intentions erroneously. For example, Congress passed the Civil Rights Act of 1991 in part to overturn a series of conservative rulings in employment-discrimination cases. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), which broadened religious liberties, after Congress concluded that a 1990 Supreme Court ruling restricted religious freedom to an unacceptable extent.[24]

According to political scientist Walter Murphy, "A permanent feature of our constitutional landscape is the ongoing tug and pull between elected government and the courts."[25] Certainly, over the last few decades, the Supreme Court has been in conflict with the other two branches of government. Congress at various times has passed laws that, among other things, made it illegal to burn the American flag and attempted to curb pornography on the Internet. In each instance, the Supreme Court ruled that those laws were unconstitutional. The Court also invalidated the RFRA.

Whenever Congress does not like what the judiciary does, it threatens to censure the judiciary for its activism. One member of the Senate Judiciary Committee, John Cornyn (R.-Tex.), claimed that judges are making "political decisions yet are unaccountable to the public." He went on to say that violence against judges in the courtroom can be explained by the public's distress at such activism.

The states can also negate or alter the effects of Supreme Court rulings, when such decisions allow it. A good case in point is *Kelo v. City of New London.*[26] In that case, the Supreme Court allowed a city to take private property for redevelopment by private businesses. Since that case was decided, a majority of states have passed legislation limiting or prohibiting such takings.

Public Opinion

Public opinion plays a significant role in shaping government policy, and certainly the judiciary is not exempt from this rule. For one thing, persons affected by a Supreme Court decision that is noticeably at odds with their views may simply ignore it. Officially sponsored prayers were banned in public schools in 1962, yet it was widely known that the ban was (and still is) ignored in many southern districts. What can the courts do in this situation? Unless someone complains about the prayers and initiates a lawsuit, the courts can do nothing. The public can also pressure state and local government officials to refuse to enforce a certain decision. As already mentioned, judicial implementation requires the cooperation of

24. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).
25. As quoted in Neal Devins, "The Last Word Debate: How Social and Political Forces Shape Constitutional Values," *American Bar Association Journal,* October 1997, p. 48.
26. 545 U.S. 469 (2005).

government officials at all levels, and public opinion in various regions of the country will influence whether such cooperation is forthcoming.

Additionally, the courts necessarily are influenced by public opinion to some extent. After all, judges are not isolated in our society; their attitudes are influenced by social trends, just as the attitudes and beliefs of all persons are. Courts generally tend to avoid issuing decisions that they know will be noticeably at odds with public opinion.[27] In part, this is because the judiciary, as a branch of the government, prefers to avoid creating divisiveness among the public. Also, a court—particularly the Supreme Court—may lose stature if it decides a case in a way that markedly diverges from public opinion. For example, in 2002, the Supreme Court ruled that the execution of mentally retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishment. In its ruling, the Court indicated that the standards of what constitutes cruel and unusual punishment are influenced by public opinion and that there is "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[28]

Judicial Traditions and Doctrines

Supreme Court justices (and other federal judges) typically exercise self-restraint in fashioning their decisions. In part, this restraint stems from their knowledge that the other two branches of government and the public can exercise checks on the judiciary, as previously discussed. To a large extent, however, this restraint is mandated by various judicially established traditions and doctrines. When reviewing a case, the Supreme Court typically narrows its focus to just one issue or one aspect of an issue involved in the case. The Court rarely makes broad, sweeping decisions on issues. Furthermore, the doctrine of *stare decisis* acts as a restraint because it obligates the courts, including the Supreme Court, to follow established precedents when deciding cases. Only rarely will courts overrule a precedent.

Hypothetical and Political Questions. Other judicial doctrines and practices also act as restraints. As already mentioned, the courts will hear only what are called justiciable disputes, which arise out of actual cases. In other words, a court will not hear a case that involves a merely hypothetical issue. Additionally, if a political question is involved, the Supreme Court often will exercise judicial restraint and refuse to rule on the matter. A **political question** is one that the Supreme Court declares should be decided by the elected branches of government—the executive branch, the legislative branch, or those two branches acting together. For example, the Supreme Court has refused to rule on the controversy regarding the rights of gays and lesbians in the military, preferring instead to defer to the executive branch's decisions on the matter. Generally, fewer questions are deemed political questions by the Supreme Court today than in the past.

Political Question
An issue that a court believes should be decided by the executive or legislative branch.

The Impact of the Lower Courts. Higher courts can reverse the decisions of lower courts. Lower courts can act as a check on higher courts, too. Lower courts can ignore—and have ignored—Supreme Court decisions. Usually, this is done indirectly. A lower court might conclude, for example, that the precedent set by the Supreme Court does not apply to the exact circumstances in the case before the court; or the lower court may decide that the Supreme Court's decision was ambiguous with respect to the issue before the lower court. The fact that the Supreme Court rarely makes broad and clear-cut statements on any issue makes it easier for the lower courts to interpret the Supreme Court's decisions in a different way.

27. One striking counterexample is the *Kelo v. City of New London* decision mentioned earlier.
28. *Atkins v. Virginia*, 536 U.S. 304 (2002).

Key Terms

affirm 458
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Chapter Summary

1. American law is rooted in the common-law tradition, which is part of our heritage from England. Fundamental sources of American law include the U.S. Constitution and state constitutions, statutes enacted by legislative bodies, regulations issued by administrative agencies, and case law. The common-law doctrine of *stare decisis* (which means "to stand on decided cases") obligates judges to follow precedents established previously by their own courts or by higher courts that have authority over them. Precedents established by the United States Supreme Court, the highest court in the land, are binding on all lower courts. The justices of the Supreme Court as well as those in all federal courts are appointed for life terms, making them invulnerable to political pressure or the need for reelection. Thus, appointed judges are, in fact, able to make decisions that have a lasting impact on American society.

2. Article III, Section 1, of the U.S. Constitution limits the jurisdiction of the federal courts to cases involving (1) a federal question, which is a question based, at least in part, on the U.S. Constitution, a treaty, or a federal law; or (2) diversity of citizenship, which arises when parties to a lawsuit are from different states or when the lawsuit involves a foreign citizen or government. The federal court system is a three-tiered model consisting of (1) U.S. district (trial) courts and various lower courts of limited jurisdiction, (2) U.S. courts of appeals, and (3) the United States Supreme Court. Cases may be appealed from the district courts to the appellate courts. In most cases, the decisions of the federal appellate courts are final because the Supreme Court hears relatively few cases.

3. The Supreme Court's decision to review a case is influenced by many factors, including the significance of the issues involved and whether the solicitor general is pressing the Court to take the case. After a case is accepted, the justices undertake research (with the help of their law clerks) on the issues involved in the case, hear oral arguments from the parties, meet in conference to discuss and vote on the issue, and announce the opinion, which is then released for publication.

4. Federal judges are nominated by the president and confirmed by the Senate. Once appointed, they hold office for life, barring gross misconduct. The nomination and confirmation process, particularly for Supreme Court justices, is often extremely politicized. Democrats and Republicans alike realize that justices may occupy seats on the Court for decades and naturally want to have persons appointed who share their basic views. Nearly 20 percent of all Supreme Court appointments have been either rejected or not acted on by the Senate.

5. In interpreting and applying the law, judges inevitably become policymakers. The most important policymaking tool of the federal courts is the power of judicial review. This power was not mentioned specifically in the Constitution, but John Marshall claimed the power for the Court in his 1803 decision in *Marbury v. Madison*.

6. Judges who take an active role in checking the activities of the other branches of government sometimes are characterized as "activist" judges, and judges who defer to the other branches' decisions sometimes are regarded as "restraintist" judges. The Warren Court of the 1950s and 1960s was activist in a liberal direction, whereas the Rehnquist Court became increasingly activist in a conservative direction. Several politicians and scholars argue that judicial activism has gotten out of hand. One of the criticisms of the Court is that it should not "make law" but should defer to the legislative branch in deciding policy issues. However, in the