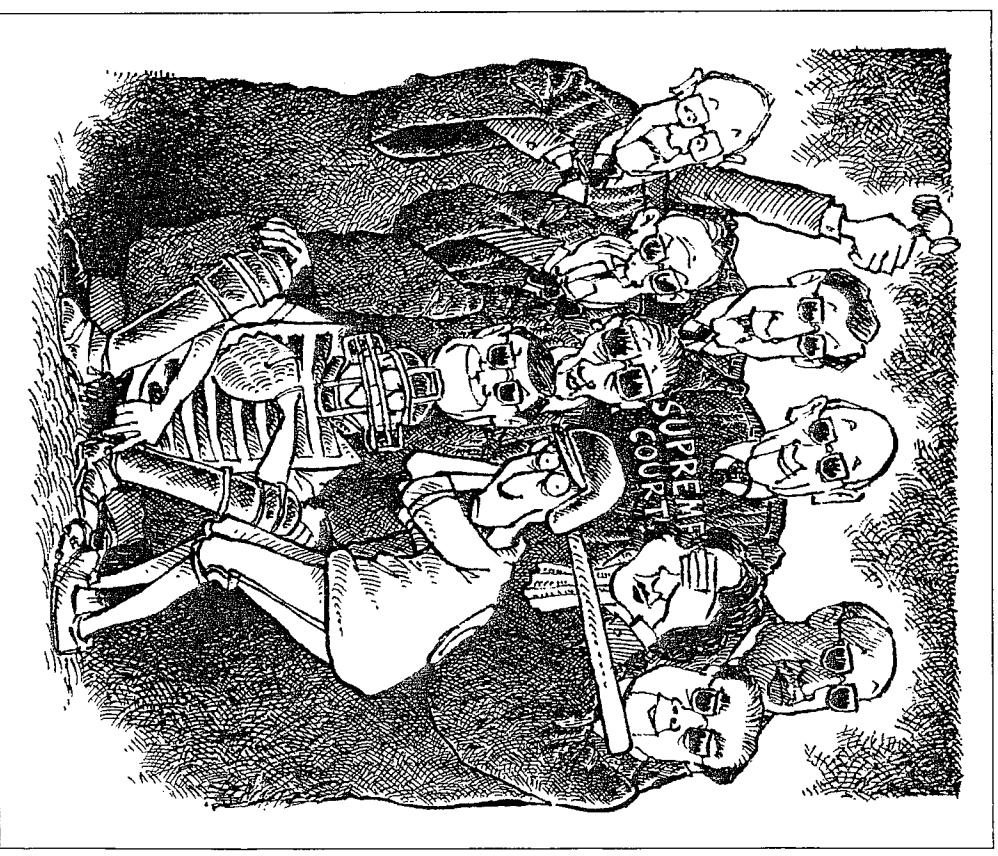


The Judicial Branch: The Supreme Court and the Federal Court System



The Constitution gets right to the point in Article III: “The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” Whenever a new justice is appointed—as happened in 2009 with the Court’s first Hispanic woman, Sonia Sotomayor, taking the bench—we are reminded of the Supreme Court’s central importance to constitutional government. The public attention given to this change in leadership reflects the pressing political issues revolving around civil liberties, federalism and presidential power that the judicial player is called on to resolve.

Following the lead of the Constitution, Congress set up two major levels of federal courts below the Supreme Court—federal district courts and courts of appeals. It also established several special federal courts as the need for them has arisen. The federal court system is responsible for judging cases involving the U.S. Constitution and federal laws.

Paralleling the federal court system are the state courts. Each state has its own judicial system to try cases that come under state law (though it may also deal with cases under the U.S. Constitution and laws). Issues involving the Constitution may be appealed to the U.S. Supreme Court. In this chapter we will focus on the federal court system and particularly the Supreme Court; state courts are set up in much the same way.

Federal Court System

U.S. District Courts

At the base of the federal system are the courts of *original jurisdiction*—the *U.S. district courts*. Except in a few special instances, all cases involving federal law are tried first in district courts. There are 89 district courts in the United States and another 5 in the U.S. territories, with at least 1 federal district court in each state. The larger, more populous states have more district courts. New York, for example, has 4 district courts. Each district has between 1 and 28 judges, for a total of 678 district judges in the country. These judges preside over most federal cases, including civil rights cases, controversies involving more than \$10,000, antitrust suits, and counterfeiting cases. The large volume of cases they handle (over 250,000 annually) has led to long delays in administering justice. At one time, it took four years to complete a civil case in the Southern District of New York.

Courts of Appeals

Above the district courts are the *courts of appeals* (sometimes called by their old name, *circuit courts of appeals*). These courts have only *appellate jurisdiction*, that is, they hear *appeals* from the district courts and from important regulatory commissions, like the Federal Trade Commission. If you took a civil rights case to your district court and lost, you could appeal the decision and have the case brought before a court of appeals. The United States is divided into 13 courts of appeals. There are 12 geographic *circuits* (11 plus 1 in Washington, D.C.), and 1 U.S. Court of Appeals for the Federal Circuit dealing with appeals from special federal courts like the U.S. Claims Court. Each of the 13 appeals courts has between 6 and 28 judges, depending on the volume of work. Usually 3 judges hear each case. One hundred and seventy-nine circuit court judges handle almost 55,000 cases a year. These are the final courts of appeal for most cases, but less than a hundred cases each year are appealed further to the Supreme Court. (See Figure 5.1.)

Special Federal Courts

Special federal courts have been created by Congress to handle certain cases. The *U.S. Claims Court* deals with people’s claims against government seizure of property. The *U.S. Court of Military Appeals*

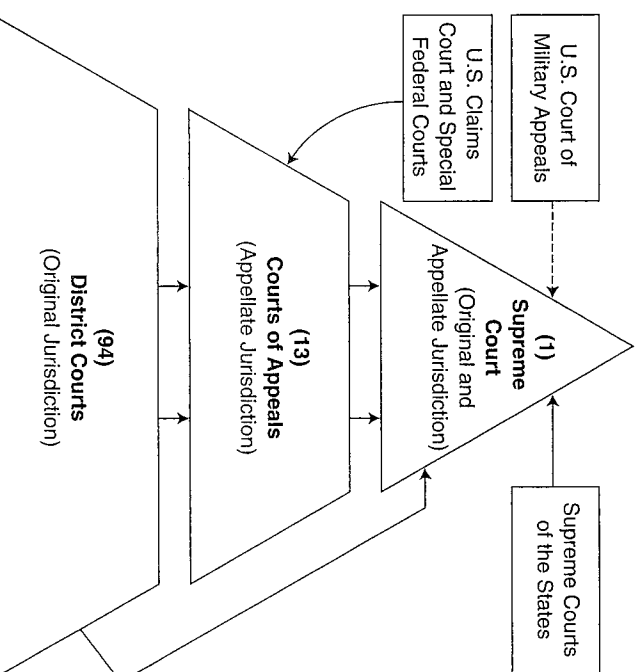


FIGURE 5.1
Federal Court Structure and the Flow of Cases to the Supreme Court.

(often called the *GI Supreme Court*), composed of three civilians, is the final judge of court-martial convictions. The U.S. Supreme Court can review only certain types of military cases.

The Judges



All federal judges, including Supreme Court justices, are nominated to the bench by the president and must be confirmed by the Senate. Under the Constitution, federal judges hold office for life “during good behavior” and are removed only by impeachment. This has rarely happened. However, in October 1989, the Senate impeached a Florida judge (who is now a Florida congressman), Alcee Hastings, in a controversial bribery case. To further protect them from political pressures, judges’ salaries cannot be reduced while they’re in office.

Despite these protections, the appointment of judges is a very political matter. Judges almost always are selected on a party basis, usually as a reward for their political services. One commentator called the judiciary “the place to put political workhorses out to pasture.” In this partisan spirit, 87 percent of Bill Clinton’s appointments to federal judgeships were Democrats, while 89 percent of George Bush Sr.’s were Republicans. This partisan spirit carries over to the Senate where the majority party may prove reluctant to confirm federal judges appointed by a president of the opposing party. In the past this has led to a “vacancy crisis” in the federal courts as the Senate delayed acting on presidents’ nominees to the bench.

Adding to a president’s problems is that many of these nominees need the consent of their home-state senators. This custom, *senatorial courtesy*, is followed by the Senate in confirming federal judges below the Supreme Court. By this practice, senators will not vote for nominees unacceptable to the senator from the state concerned. This gives the Senate the whip hand in appointing federal judges and makes sure local opinion is heard in the selection process. How the two senators of each state divide up their choices for nominees is left up to them. In the 1960s and 1970s, when the federal courts took the lead in enforcing racial integration, senatorial courtesy made the appointment of liberal federal judges in the South difficult for a president.

The president’s power to influence the makeup of one of the three major branches of the government is extremely important, though it

may be restricted in practice. By the end of his second term Clinton had appointed 373 federal judges, including 65 of the 179 appellate judges. Similarly, George W. Bush finished his eight years in office having appointed a total of 324 judges, 261 to district courts, 61 on courts of appeals, and 2 Supreme Court justices. Some scholars have argued that Democrats like Clinton stressed diversity over ideology, often picking minority and female judges that didn’t necessarily reflect the president’s own political philosophy. On the other hand, Republican presidents are more ideological, with conservative credentials given priority over diversity in filling judicial vacancies. In appointing Justice Sotomayor, who was not the most liberal choice among the candidates on his short list, Barack Obama seems to be continuing this Democratic pattern.

A majority of Supreme Court justices have been appointed by Republican presidents. In 2005 President Bush had the unusual opportunity to appoint two justices to the Court, John G. Roberts as chief justice and Samuel A. Alito Jr. as an associate justice. Both replaced Republican-appointed justices. Alito took the seat of Sandra Day O’Connor who, in 1981, became the first woman on the Supreme Court. Roberts replaced Chief Justice William Rehnquist who had been elevated to that post from his seat on the Court when Warren Burger resigned in 1986. At that same time President Ronald Reagan nominated an equally conservative Antonin Scalia to be the first justice of Italian descent. Reagan’s 1988 selection of Anthony Kennedy, after the Senate had rejected Robert Bork, was aimed at pointing the Court in a conservative direction. President Bush’s 1990 appointment of a moderate New Hampshire judge, David Souter, was later considered a mistake by conservatives.

Three justices have been chosen by Democratic presidents. Bill Clinton selected Ruth Bader Ginsburg in 1993 and Stephen G. Breyer in 1994, while Barack Obama appointed Sonia Sotomayor in 2009 to replace David Souter, who resigned. All these Democratic-appointed justices have been considered moderates when they were appointed and have generally voted as part of the Court’s liberal wing. Justice Ginsburg, for example, has focused on gender issues. She and Justice Breyer vigorously dissented from the Court’s decision to stop the vote recount in the 2000 Florida presidential election.

Senate confirmation of justices, once a fairly gentlemanly affair, turned nasty in the late 1980s. President Reagan’s 1987 nomination of Robert Bork set off fierce opposition from liberal groups offended by his views on civil rights, abortion, and privacy. After a flurry of personal attacks (now called “borking” by conservatives), Bork was rejected by the Democratic Senate. This unusually public politicizing of the confirmation process continued with President Bush’s nomination of conservative Clarence Thomas in 1991. Unlike Bork, Thomas had fewer

Presidents and the Court

Less than 6 months after taking office the new president had a chance to nominate Judge Sonia Sotomayor to the Supreme Court. The popular enthusiasm for the first Latin woman justice may have obscured her record as a moderate who was probably not as liberal as Barack Obama. Justices do have a way of disappointing the president appointing them.

Theodore Roosevelt said of famed justice Oliver Wendell Holmes: “He has the backbone of a banana.” President Eisenhower was so angered at Chief Justice Earl Warren’s rulings that he called Warren’s appointment “the biggest damn-fool mistake I ever made.” The controversy set off by the Warren Court’s activism led President Nixon to appoint Warren Burger as chief justice to replace Earl Warren when he retired in 1969. Nixon hoped that the four justices he had appointed, including Burger, would inspire greater restraint in the Court. However, the Burger Court, in *U.S. v. Nixon* (1974), ruled that President Nixon had to surrender to the special Watergate prosecutor the White House tapes of his conversations about illegal activities. The president, who resigned shortly afterward, was certainly not pleased by this example of the Court’s independence.

qualifications, which ironically gave opponents less of a “paper trail” to criticize. Despite the dramatic televised testimony of Anita Hill (accusing him of sexual harassment), Thomas was confirmed, though by the smallest margin of approval (52–48) in more than 100 years.

The confirmation hearings in 2005 and 2006 of Chief Justice Roberts and Justice Alito looked mild by comparison. Although partisan in their questioning of the nominees, Democratic senators seemed relieved that the appointees were not as conservative as other potential candidates. Although most Republican senators opposed Justice Sotomayor in 2009 her hearings were also restrained, perhaps because a Democratic majority made her confirmation a given. Recent appointees have also been better briefed on how to deal with televised Senate hearings than they were in the past. On hot-button issues, like abortion, the nominees duck and weave repeated questions without firmly expressing a position. This tends to produce Senate confirmations of less substance and more ritual. (See “Presidents and the Court.”)

Jurisdiction

Jurisdiction refers to the matters over which a court may exercise its authority. The jurisdiction of the federal courts falls into two broad categories: In the first group, it depends on the *subject of the case*; in the

second, on the *parties to the case*, no matter what the subject. The federal courts have jurisdiction over all subjects related to the Constitution and over treaties of the United States. (Admiralty and maritime cases involving international law are also included.) Jurisdiction determined by parties includes cases involving ambassadors and other foreign representatives, controversies in which the United States is a party, and controversies between two or more states or between a state or citizen of the United States and a foreign citizen or state. The federal court system’s last and largest source of cases is suits between citizens of different states.

This definition does not mean that the federal courts have the *only* jurisdiction over such cases. Federal courts have *exclusive jurisdiction* in some cases, such as cases involving crimes against the laws of the United States. However, in other cases, they have *concurrent jurisdiction*, shared with state courts. For example, some suits between citizens of different states may be heard by both federal and state courts.

U.S. Supreme Court

Composed of a chief justice and eight associate justices, the *Supreme Court of the United States* sits on the summit of the federal court system. (See Table 5.1.) Although Congress is allowed to set the number of justices on the Supreme Court, the number has remained at nine justices since 1869. The Supreme Court has some *original jurisdiction* (cases that can be presented first to the court), but most of the cases it hears are appeals of lower court decisions, which involve its *appellate jurisdiction*. If your civil rights case lost in both the district court and the court of appeals, you could be heard by the Supreme Court.

TABLE 5.1 THE SUPREME COURT, 2010

JUSTICE APPOINTED	DATE OF BIRTH	APPOINTED BY	DATE
John J. Roberts Jr. (chief justice)	1955	Bush II	2005
John Paul Stevens	1920	Ford	1975
Antonin Scalia	1936	Reagan	1986
Anthony Kennedy	1936	Reagan	1988
Clarence Thomas	1946	Bush	1991
Ruth Bader Ginsburg	1933	Clinton	1993
Stephen G. Breyer	1938	Clinton	1994
Samuel A. Alito Jr.	1950	Bush II	2006
Sonia Sotomayor	1954	Obama	2009

Actually very few cases reach the Supreme Court. Of more than 10 million cases tried every year in American courts (federal and state), some 7,400 petitions for review are taken to the Supreme Court. In the 2007–2008 term the Court issued signed opinions in only 67 cases, a reduction from the case load of previous years. The other petitions are affirmed or reversed by written *memorandum orders*. The majority of the cases that come to the Court do so in the form of petitions (written requests) for a *writ of certiorari* (*certiorari* means to be informed of something). A writ of certiorari is an order to the lower court to send the entire record of the case to the higher court for review. If you lost your civil rights case in a lower court, you could petition for this writ. It is granted when four justices of the Supreme Court feel that the issues raised are important enough to merit a review. Many of these involve constitutional issues. The Court denies almost 90 percent of these applications. This procedure rests control over the appeal process in the hands of the Supreme Court, keeping a maximum number of decisions in the lower courts.

The Final Authority?

The prominence of the Supreme Court in American history rests on its “final” authority over what the Constitution means. Yet a ruling of the Court has not always been the final word. The Court itself has reversed its decisions. (See “Separate but Equal?”) If the Court interprets a law in a way Congress does not like, Congress can simply rewrite the law. In 1990 Congress passed the Civil Rights Restoration Act, which extended civil rights protection to all programs of colleges accepting federal aid. The act overturned a court ruling that limited this protection. Amendments to the Constitution also have reversed decisions by the Court. An 1895 Court decision striking down the federal income tax was overturned by the Sixteenth Amendment in 1913, which allowed income taxes.

The strength of the Court’s “final” authority is also tempered by the other branches of government and by public opinion. Despite the Court’s popularity, the public’s acceptance of a decision is not always guaranteed. In civil rights cases like racial profiling, where police indiscriminately stop black motorists, and in civil liberties cases like Christinas displays in public buildings, local communities have ignored the Court’s interpretation of the Constitution. Congress and the president have taken their turn in interpreting vague parts of the Constitution to meet the demands of the time and the needs of those in power. The president’s right to involve the country in the Vietnam and Iraq wars, without a formal declaration of war, would seem to fly in the face of the

war-making powers given to Congress by the Constitution. Yet without a challenge by Congress, the president’s interpretation of the Constitution stood.

Despite this shared role in changing the Constitution, the Supreme Court, through its rulings, constantly explains and applies the Constitution, breathing life into 200-year-old words. A brief history of the Court will show how.

Early Years of the Court

In its first years the Supreme Court was neglected. It did not start life as the powerful player we know today. No cases at all were brought to the Court in its first three years. Many leaders, such as Patrick Henry and Alexander Hamilton, refused appointments to the Court; court sessions were held in basement apartments. When Washington, D.C., was first planned, the Court was overlooked, with no building provided to house it.

Under the leadership of John Marshall, 1801–1835, the Court’s influence greatly increased. Two landmark decisions marked this growth in power. The first announced the Court’s *judicial review*, the power not only to declare acts and laws of any state and local government unconstitutional but also to strike down acts of any branch of the federal government. The second major decision established the principle of *national supremacy*, that the U.S. laws and Constitution are the supreme law of the land and that state laws that are in conflict with federal laws cannot stand. (See “Chief Justice John Marshall.”)

Judicial Review and National Supremacy

Marbury v. Madison (1803) clearly established the principle of judicial review. In this case the Supreme Court, for the first time, struck down an act of Congress. The case shows Chief Justice John Marshall as a shrewd politician.

Shortly before leaving office, President John Adams (who had nominated Marshall to the court) appointed a number of minor judicial officials in order to maintain the influence of his party in the coming administration of his opponent, Thomas Jefferson. When Jefferson took office, he discovered that the commission of William Marbury had not actually been delivered. Jefferson ordered Secretary of State James Madison to hold it up. Under a section of the Judiciary Act of 1789, Marbury sued in the Supreme Court to compel delivery of the commission. Marshall was then confronted with deciding a case between his political allies and his enemy, Jefferson, who as president was determined to weaken the power of the conservative Supreme Court.

Chief Justice John Marshall

"Marshall found the Constitution paper and he made it power."

—President James A. Garfield

John Marshall served as the fourth, and arguably greatest, chief justice. He applied his genius to a single mission: building the government of a united nation. Raising the limited prestige and power of the Supreme Court was necessary so that it could serve that mission. Marshall shaped constitutional law so that it too could propel a strong central government into an unlimited future. For Marshall, the Constitution must serve its goal of creating a lasting union. Thus his famous phrase, "We must never forget that it is a *constitution* that we are expounding."

Marshall acted more like a statesman than a judge. In his major decisions on judicial review and national supremacy, he was not strictly interpreting and applying the law. Marshall was establishing principles for an infant nation. Interestingly, his lack of legal education—less than three months of law classes, and poorly attended at that—may have helped him. Rather than deciding cases legalistically, he acted like a legislator breaking with the past. His experience in General Washington's army at Valley Forge may have provided his most important lesson, reminding him of the price of disunity.

When Marshall died in Philadelphia, citizens rang the Liberty Bell in his honor. It cracked and has never been rung again.

What Marshall did was to dismiss *Marbury's* case, ruling that the section of the Judiciary Act under which he had sued was unconstitutional (the act allowed the Supreme Court original jurisdiction in a case not mentioned by the Constitution). By doing so he clearly asserted that the Supreme Court, on the basis of *its* interpretation of the Constitution, could limit the actions of Congress. At the same time, the Court supported Jefferson's argument that he did not have to deliver the commission. How could the president object?

Another early decision established that states could not interfere with the functioning of the federal government. In this case, *McCulloch v. Maryland* (1819), the state of Maryland attempted to tax the Baltimore branch of the unpopular Bank of the United States, established by the federal government. Chief Justice Marshall, speaking for a unanimous court, ruled that the federal government, "though limited in its powers, is supreme within its sphere of action." Marshall also found that although the Constitution did not specifically allow Congress to create a bank, Article I, Section 8 gave Congress the power to make all laws "necessary and proper" for carrying out its authority.

Implied powers based on this clause were used later in broadly expanding the duties that Congress could undertake.

In 1857 came the famous *Dred Scott* case (*Dred Scott v. Sandford*). Here, the Court ruled that a slave (*Dred Scott*) was not automatically free just because his owner had taken him to a state not allowing slavery. Congress, the Court said, had no right to interfere with property rights guaranteed by the Constitution. The Court went on to say that the Missouri Compromise (1820), which had attempted to resolve the slavery issue by dividing the new western territories into slave and free parts, was invalid. In terms of constitutional development, this unpopular decision supporting slavery was the first time an act of Congress of great importance was struck down by the courts. As such, the *Dred Scott* case marked a critical expansion of judicial powers. Had the Court gone too far?

The Court after the Civil War

The end of the Civil War signaled the end of the major political conflict dominating the first 75 years of the Republic—*states' rights* versus *federal powers*. With federal unity achieved, rapid national growth began. The resulting economic expansion and the unrestrained growth of giant monopolies created a new demand for government regulation of the economy. The Supreme Court became more active, and judicial power was greatly enlarged. In just 9 years (1864–1873), 10 acts of Congress were struck down, compared with only 2 acts in the previous 74 years.

Not only was the Court more active, it also was more conservative. Many liberals viewed the Court as an instrument for protecting the property rights of the rich and ignoring popular demands for government regulation.

This trend continued into the twentieth century, when the Court found itself up against the growing power of the executive branch. The presidency was widely felt to be the most effective place in the government to regulate the social and economic changes brought about by the post-Civil War industrialization. But the Supreme Court continued to resist the expansion of government's regulatory power, even though much of the legislation it struck down (such as minimum wage and child labor laws) was widely popular. Between 1890 and 1936, the Court declared 46 laws unconstitutional in full or in part.

It was President Franklin D. Roosevelt who caused the Court's policy to change. He fought the Court's opposition to his New Deal measures by threatening to expand the Court with new judges of his own choosing, the so-called *court-packing* bill. Although Roosevelt's plan was unsuccessful and aroused a storm of public and congressional

opposition, it may have accomplished FDR's purposes. In 1937 the Court backed down—the famous “switch in time that saved nine”—and turned away from economic policymaking.

Modern Courts

Beginning in 1937, Supreme Court decisions have shown three major trends. These trends peaked in the decisions of the Warren Court (led by Chief Justice Earl Warren) in the 1950s and 1960s, and have been eroded in the decisions of more recent, more conservative courts.

First, the Court invalidated much less federal legislation than it had in the 50 years before the New Deal. Generally only a few federal laws were held unconstitutional, and in most of these cases the legislation struck down was not very significant. In a second area, the Court avoided protecting private property rights. The Court, until recently, has not been greatly concerned with guarding economic interests from government policymaking.

The Court has shown more positive interest in a third area—increased judicial protection for civil liberties. While reducing property rights in importance, the Court has sought to preserve and protect the rights of individuals against the increased powers of an expanding government. First Amendment freedoms of speech, press, religion, and assembly have been developed and extended by modern Supreme Courts. With Earl Warren as chief justice (1953–1969), the Supreme Court moved to liberalize reapportionment, racial discrimination, and the rights of defendants in criminal cases.

In decisions dealing with reapportionment, beginning with *Baker v. Carr* (1962), the Warren Court established the principle of “one man, one vote” for election districts. The Court ruled that districts must contain roughly equal population, while still allowing partisan advantage in drawing their boundaries. In moving to eliminate racial discrimination, the Court led the nation in cutting away racism in schooling, voting, housing, and the use of public facilities.

Another major interest of the Warren Court, the rights of criminal defendants, saw the Court throw the protection of the Bill of Rights around people accused of crimes by state and federal authorities. The Court insisted on an impoverished defendant's basic right to a lawyer, declared that illegally seized evidence cannot be used in state criminal trials, and held that suspects must be advised of their constitutional right to silence and to have a lawyer before questioning. This last area, summed up as *Miranda* (*Miranda v. Arizona*, 1966), is familiar to all fans of TV detective series. (See “Miranda: Pop Culture and the Court.”)

Miranda: Pop Culture and the Court

“You have the right to remain silent” is how the *Miranda* warning begins. It was also how Chief Justice Rehnquist began his decision upholding *Miranda*. The chief justice was reflecting the fact that TV had made *Miranda* a part of pop culture. Detective shows starting with Sergeant Joe Friday in *Dragnet* had repeated this warning endlessly. It was delivered so frequently that these by-the-book TV cops made it a bit of a joke.

When the Supreme Court had to rule on Congress's effort to overturn *Miranda v. Arizona* (1967), it had to deal with a warning that had become part of the nation's culture. In *Dickerson v. United States* (2000), Chief Justice Rehnquist, speaking for a 7 to 2 majority, ruled that *Miranda* “announced a constitutional rule,” which Congress was not free to replace with a case-by-case test. The Court noted that *Miranda* had become an accepted national norm for making an arrest legitimate. It had become difficult for the justices to overturn both the Constitution and the culture.

The Supreme Court under Warren Burger (1969–1986) was not as liberal as the Warren Court, but not as conservative as his supporters had hoped. On the liberal side, the Burger Court legalized abortions except in the last 10 weeks of pregnancy, declined to stop publication of the Pentagon Papers (official papers on the government's planning for the Vietnam War unofficially leaked to the press), and drastically limited capital punishment.

In more conservative directions, the Burger Court allowed local communities, within limits, to define obscenity and ban those works considered pornographic. (See “The Court Examines Porn.”) Perhaps the most important changes the Burger Court made were in the rights of the accused. Here the Court allowed the police broader powers in searching without a warrant—deciding, for example, that people detained on minor charges (like traffic violations) may be searched for evidence of more serious crimes (like possession of drugs). The Court also permitted illegally obtained information to be used at a trial and allowed the police to continue their questioning after a suspect claimed the right to silence. However, the Burger Court left the *Miranda* decision in place.

The Rehnquist Court (1986–2005)

When Chief Justice William Rehnquist died at the age of 80 in the summer of 2005 he had served on the Supreme Court for 33 years and as its chief since 1986. His appointment as chief justice came from President Ronald Reagan's hopes for a more conservative, more restrained court.

The Court Examines Porn

The following is an account of how the Burger Court researched a decision on pornography:

The justices take their obligation to research opinions so seriously that in one area of law—obscenity—the result has led to a lot of snickering both on and off the bench. Since 1957, the Court has tried repeatedly to define obscenity. The subject has become so familiar at the Supreme Court building that a screening room has been set up in the basement for the justices and their clerks to watch the movies submitted as exhibits in obscenity cases. Justice Douglas never goes to the dirty movies because he thinks all expression—obscene or not—is protected by the First Amendment. And Chief Justice Burger rarely, if ever, goes because he is offended by the stuff. But everyone else shows up from time to time.

Justice Blackmun watches in what clerks describe as “a near-catastrophic state.” Justice Marshall usually laughs his way through it all. The late Justice Harlan used to dutifully attend the Court’s porno flicks even though he was virtually blind; Justice Stewart would sit next to Harlan and narrate for him, explaining what was going on in each scene. Once every few minutes, Harlan would exclaim in his proper way, “By George, extraordinary!”

Source: From Nina Totenberg, “Behind the Marble, Beneath the Robes,” *The New York Times Magazine*, March 16, 1975. Copyright © 1975 by The New York Times Company. Reprinted by permission.

These hopes were only partly fulfilled. While Rehnquist was a skillful leader noted for his wit and informality, he never was able to create a “Rehnquist Court” in the same defining way that there had been a “Warren Court.” He was often in the minority, positioned firmly to the right of the Court’s majority, on issues like affirmative action, abortion, religion, property rights, and campaign finance. The courts he presided over were deeply split. Both the independent-minded jurists (described as “nine scorpions in a bottle”) and the polarized nation they served made it hard for Rehnquist to win converts to his conservative philosophy.

Consequently the Rehnquist Court, lacking a conservative majority, did not dramatically break with past Court rulings. In some areas, like civil liberties, the Court zigged and zagged with little of the clear direction that Rehnquist’s Republican backers had hoped for. In its abortion rulings, for example, the Court placed few limits on the practice while affirming it as a woman’s basic right. In major decisions affecting race and religion, the Court was cautiously conservative. In three 5–4 decisions, the Court narrowed the use of race in hiring for government programs, in attracting suburban students into city schools, and in drawing

boundaries for congressional districts. Its landmark 2003 decision on affirmative action at the University of Michigan upheld the practice in college admissions. (See Chapter 7, Case Study: “University of Michigan and Affirmative Action.”)

The Rehnquist Court’s activism was most apparent in its rulings on federalism. Here the Court seemed willing to overturn laws of Congress and decisions by executive agencies in order to guard the rights of the states. The Court’s modest revolution over federalism limited the power of Congress while protecting the rights of the states. In *United States v. Lopez* (1995) the Court ruled that Congress had exceeded its authority to regulate interstate commerce by passing a law intended to keep guns out of schools. This marked the first time in 60 years that the Court had limited Congress’s power to regulate interstate commerce. By a 5–4 decision in the 2000 term, the Court threw out a congressional law that allowed victims of violence to sue in federal court against their assailants. In this case (*United States v. Morrison*), the Court found the matter so clearly noncommercial that it remained a state issue that Congress lacked the power to punish. Previous courts for most of the nineteenth century and since the New Deal had used the Commerce Clause to expand federal power. The Rehnquist Court reversed this course and restrained the federal government.

Many of these decisions reflected a thin 5–4 majority in which two moderate justices, O’Connor and Kennedy, swung to either a conservative or liberal core of justices to produce a majority. The Court also showed a pragmatic ability, as one law professor put it, “to split the difference and avoid drawing bright lines.” This led varying majorities in the Court to overturn student-led prayers at public high school football games, yet to allow partial-birth abortions because they are the most medically appropriate way of terminating some pregnancies. Arguably the Court’s most memorable ruling was in *Bush v. Gore* in 2000, where the Court split on partisan lines, stopped a vote count, and made George W. Bush president. Their decision may have avoided a national crisis as Rehnquist suggested, but the weakness of the majority’s legal arguments have also stained the Rehnquist legacy. (See “*Bush v. Gore*.”)

The Court under Rehnquist spoke on issues where it was most interested. These were less in the areas of race and individual rights, where modern Courts have historically been assertive. Instead Rehnquist focused on a federal government—including Congress—that his Court viewed as too big, too powerful, and too out of control. Whether this emphasis is extended or modified will depend on his successor as chief justice, John Roberts, and the jurists appointed to serve with him.

Bush v. Gore

The reaction was almost as extraordinary as the decision itself. “Judicial lawlessness,” said a writer in the *Washington Post*; “Comparable to Dred Scott,” thundered both Alan Dershowitz of Harvard Law and Jesse Jackson. A Columbia law professor predicted increased cynicism about the courts. What the Supreme Court had done in their December 12, 2000, decision, *Bush v. Gore*, was to decide the outcome of the presidential election. Five Republican-appointed justices decided that Republican George W. Bush would be the next president of the United States.

By a 5–4 decision the Supreme Court, in a reversal of their usual federalist support of state rulings, overturned the Florida Supreme Court and halted further counting of the state’s disputed presidential votes. This effectively ended 35 days of arguments in the nation’s closest presidential election, which had focused on whether to allow hand recounts of Florida’s vote. Bush, who had narrowly won the state votes, resisted further counts. Al Gore, who had won the nation’s popular vote, thought recounting votes overlooked by machines would give him Florida’s electoral votes and the election. The legal fights in the lower courts had brought the case to the Supreme Court.

The majority ruled that the different standards in Florida counties for counting punch-card ballots created problems of due process and equal protection of the law. In other words, a valid vote in one county wouldn’t necessarily be valid in another one. Some of the dissenting justices agreed that there were problems but thought they could be corrected and the counting resumed. The majority recognized the limits in their opinion when they added that it would only apply in this case. The dissent by Justice John Paul Stevens criticized the Court for serving partisan interests: “Although we may never know with complete certainty the identity of the winner of this year’s presidential election, the identity of the loser is perfectly clear. It is the nation’s confidence in the judge as an impartial guardian of the rule of law.”

The Roberts Court (2005–)

At first the Roberts Court seemed in transition. Its new chief justice, John J. Roberts Jr. was in charge, but not in control. Even when President Bush appointed Samuel Alito in 2006 to replace a more moderate justice, Sandra Day O’Connor, the Court only gradually changed. The Roberts Court was divided but clearly led by a smart, canny strategist as chief justice. As a result it took small incremental steps in the major cases before it.

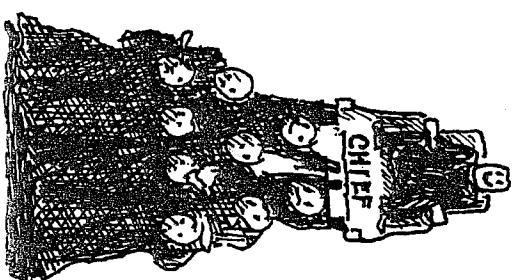
Early in his tenure the Roberts Court limited presidential power in *Hamdan v. Rumsfeld* (2006) by not allowing the president to try Guantanamo detainees without conforming to various judicial protections

and congressional authorization. In this case, the chief justice did not vote because he had earlier, as an appeals court judge, supported the president’s position.

Issues of race brought out the chief justice’s skepticism about government efforts to promote equality. In *Lialac v. Perry* the Court ordered one Latino district redrawn because it violated the Voting Rights Act designed to increase minority representation. Roberts dissented, declaring, “It is a sordid business, this divvying us up by race.” *Community Schools v. Seattle School District* (2007) saw Roberts in a 5–4 majority limiting the use of race to promote diversity in school. In his most-quoted phrase he wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Similarly in *Ricci v. DeStefano* (2009) involving reverse discrimination in New Haven, Connecticut, the Roberts Court sought to restrict affirmative action by supporting the results of exams even when the results were racially unbalanced. In speaking of a group of white firefighters who were denied promotion despite high exam scores, Roberts asked, “Now, why is this not intentional discrimination?”

In areas of voting rights, criminal justice and campaign finance the Court moved resolutely in conservative directions. It showed a new boldness by overturning previous Courts’ precedents and congressional reforms in *Citizens United vs. Federal Election Commission* (2010) which removed almost all restraints on corporations’ spending to influence elections. While labels like ‘conservative’ risk simplifying complex judicial decisions, legal observers mostly agreed with Jeffrey Toobin writing in 2009 that, “In every major case since he became the nation’s seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff.”

The chief justice has spoken of his judicial philosophy as one of “modesty and humility.” But he and the Court’s majority are more conservative than he publically admits. Despite the recent appointment of Sonia Sotomayor and the expectation that Obama will be nominating more justices, most of the coming retirements are likely to be from the aging liberal side of the Court. That means the majority of the future Court will remain on the right while the elected part of the federal government is on the left. The Roberts Court may be George W. Bush’s most lasting legacy. (See “The Chief Umpire: John Roberts.”)



The Chief Umpire: John Roberts

"And I will remember that it's my job to call balls and strikes, and not to pitch or bat."

—John G. Roberts Jr. September 13, 2005

"It's hard to see home plate from right field."

—Senator Richard J. Durbin (D-Illinois), July 13, 2009

From the time he surfaced as a nominee for the Supreme Court, John Roberts embraced modest goals for a judge. He stressed at his Senate confirmation hearings that a judge was to be an umpire, not a player. "Umpires don't make the rules. They apply them." And he emphasized his limited role: "Nobody ever went to a ballgame to see the umpire." His stated lack of a judicial philosophy ("I am not an ideologue") and a respect for precedents set by previous Supreme Courts left the expectation of a restrained, articulate new leader of the Court. But that seems to be only half the story.

Appointed at age 50, Roberts was considerably younger than his colleagues and was expected to serve for decades. Well-known in Court circles, he served as a young law clerk of Chief Justice Rehnquist and as a private lawyer representing corporate clients before the Court. Roberts's early career included service in the Reagan administration, where he wrote strong defenses for conservative positions. His conservative credentials were enough to secure the support of President Bush. After Roberts's public bow to moderation during Senate hearings, he ended up as a strict conservative in most of the major cases before the Court. When Barack Obama was a senator he opposed Robert's nomination, saying at the time, "It is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak."

"The Least Dangerous Branch of Government?"

Despite its great power of judicial review, the Supreme Court is the weakest of the three branches, as Alexander Hamilton predicted in his famous quote. The Court must depend on the other parts of the government to enforce its opinions. Its authority to cancel actions of the rest of the federal government is in fact seldom used and strictly limited. These limits are found both within the Court and within the political system.

Internal Limits on the Court

Most of the limits on the power of the Supreme Court are found in the traditional practices within the Court. For one thing, a long-held interpretation of the Constitution requires that an actual case be presented

to the Court for it to exercise judicial review. The Court cannot take the lead in declaring laws unconstitutional. It cannot give advisory opinions. Justices must wait for a real controversy brought by someone actually injured by the law to make its way through the lower courts. Years may pass after a law is put on the books before the Court can rule on it. (The Supreme Court's *Dred Scott* decision struck down a law—the Missouri Compromise—passed 37 years before.)

Its refusal to resolve political questions is another important restraint on the Court. A *political question* is an issue on which the Constitution or laws give final say to another branch of government, or one the Court feels it lacks the capability to solve. Political questions often crop up in foreign relations. The justices of the Court lack important secret information, they are not experts in diplomacy, and they recognize the president's dominance over foreign affairs. Consequently, a federal court in December 1990 used the doctrine of political questions to avoid deciding whether President Bush Sr. could use force against Iraq without congressional approval. Similarly, a dozen years later the courts were equally reluctant to interfere with his son's decision to attack Iraq.

The Supreme Court has narrowed or expanded its definition of a political question at various times. For many years, the Court used this doctrine of political questions to refuse to consider reapportionment of state legislatures and congressional districts. In 1962 the Court reversed its position forcing state legislatures to draw boundaries to create districts with more nearly equal populations (*Baker v. Carr*). In the 2000 presidential election, the Court could have avoided deciding *Bush v. Gore* by declaring that it was more appropriate for state courts or Congress to resolve—a position consistent with the Court's support for federalism—but it did not. A political question, then, is an issue the Supreme Court wants to avoid.

Just as the Supreme Court avoids political questions, so too it avoids *constitutional issues*. The Court will not decide a case on the basis of a constitutional question unless there is no other way to dispose of the case. The Court will not declare a law unconstitutional unless it clearly violates the Constitution. It will assume that a law is valid unless proved otherwise. Although we have stressed the role of the Court in applying the Constitution, the vast majority of its cases deal with interpretations of less important federal and state laws.

A final internal limit on the Supreme Court is that of *precedent* or *stare decisis* ("to stand by the decision"). Justices generally follow previous court decisions in cases involving the same issue. Recent abortion cases have illustrated the reluctance of the Court to reverse precedents, in this instance, *Roe v. Wade* (1973), which legalized abortion. Yet as the conservative majority on recent opinions has shown, at times

the Court will not follow precedent if they feel the prior cases did not follow the Constitution or the justices' own leanings. The Court likes to appear consistent with precedent even when changing the law.

What these limits on its power mean is that the Supreme Court avoids most of the constitutional questions pressed upon it. "Delay" is the Court's favorite tactic when, for both political and legal reasons, the Court wants to duck an issue that is too controversial, on which the law is uncertain, or where there is no political consensus. The Court may simply not hear the case, or may decide it for reasons other than the major issue involved. An example of this judicial avoidance occurred in June 2004 when the Supreme Court refused to rule on the constitutionality of the phrase "under God" in the Pledge of Allegiance. The Court cited procedural reasons for not deciding on this inflammatory issue in an election year. Knowing the difficulty of enforcing a ruling against strong public opinion, the Court generally avoids such a confrontation.

This self-imposed restraint may make the use of judicial review scattered and long delayed, but the Court has maintained its great authority of judicial review by refusing in most instances to use it.

External Limits on the Court

The Supreme Court's external limits come from the duties the Constitution gives to other parts of the government, especially to Congress. Congress has the right to set when and how often the Court will meet, to establish the number of justices, and to restrict the Court's jurisdiction. This last power has been used to keep the Court out of areas in which Congress wished to avoid judicial involvement. For example, in passing the 2006 Detainee Bill allowing the president to lock up terrorist suspects without various constitutional rights—including indefinite detention without a trial—Congress stripped the courts of jurisdiction over these cases. Nevertheless, such legislation can still be challenged in court.

Congress may also pass legislation so detailed that it limits the Court's scope in interpreting the law. The Senate has the duty of approving or rejecting the president's nominations to the bench, and Congress has the seldom-used power to impeach Supreme Court justices.

These limits on the Court underscore the weakness of that body. With no army or bureaucracy to enforce its decisions, the Supreme Court must depend on the rest of the government to accept and carry out its decisions. (President Andrew Jackson, angrily disagreeing with a Supreme Court decision, once remarked: "John Marshall has rendered his decision; now let him enforce it!") Yet with few exceptions, the Court's decisions have been accepted and enforced. When opposed, this semi-isolated branch of government has overcome resistance. Why?

Strengths of the Court

The Supreme Court relies on three major supports: (1) its enormous prestige, (2) the fragmented nature of the American constitutional structure, and (3) the American legal profession, which acts as the Court's constituency.

The Court's *prestige* is unquestionable. Despite public dissent to many of its decisions in areas like civil liberties and abortion, the Court retains its high public standing. Opinion polls have shown that the position of a judge is one of the nation's most respected. This is due not only to the quality of the people who become judges but also to the public image of an elevated judicial process. Anyone who has watched criminal trials, even televised ones, is familiar with the qualities of theater in the legal process: the judge sitting on a raised platform dressed in robes, the formal speeches addressed to "your honor," the use of Latin phrases, and the oath on the Bible.

These customs creating a somber impression of dignity mask the fact that a judge is simply an administrator resolving public controversies. The Supreme Court, which presides over this judicial system, has added prestige because it is seen as the guardian of the Constitution and often is equated with that document in people's eyes. Nor does the Supreme Court have to actively shape its public relations. After the controversial 2000 Florida election decision, no justice felt the need to explain the opinion in the press, and yet the Court's popularity remained high. (See "The Court's Supreme Popularity.")

Another strength of the Court lies in the *fragmented nature of the American system of government*. With powers separated among the three branches of the federal government, and federalism dividing power between the states and federal government, conflict is inevitable. This division of power creates a need for a referee; the Supreme Court fills that role.

In acting as a referee, the Court is hardly neutral. Its decisions may reflect the justices' partisan loyalties. They are certainly political in determining who gets what, when, and how, and to enforce them the Supreme Court needs political support. The other players might not give this support to decisions they strongly disagree with. Consequently, the Court's rulings generally reflect the practices and values of the country's dominant political forces. As a referee, the Court enforces the constitutional rules of the game as practiced by the political game's most powerful players, of which it is one.

A final source of support for the Court is the *legal profession*. There are more than 1 million active lawyers in the United States. Lawyers occupy all the major judicial positions, and more lawyers than any other

The Court's Supreme Popularity

One of the ironies of American democracy is that the least democratic branch is also the most popular. Other than the president's popularity following 9/11 and Obama's first months in office, people usually show more confidence in the Supreme Court than in the two elected branches of government. One explanation for this lies in the very invisibility of the Court's activities. As a scholar of the Court remarked, the public likes its politics done quietly and without an appearance of partisanship. The Court generally does this. Other reasons lie in the popular view that the Court carries out its duties in a disinterested way, that the justices are people of wisdom, and that the Court both protects and reflects the Constitution. (See Figure 5.2.)

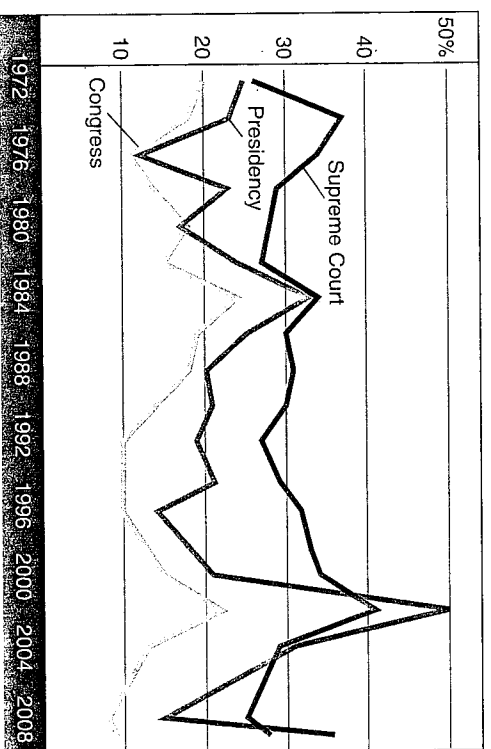


FIGURE 5.2

Public Confidence in the Supreme Court. A higher percentage of the public has consistently said it has a “great deal of confidence” in the Supreme Court, greater than in the presidency or Congress.

Source: The Harris Poll, <http://www.harrisinteractive.com>; Compiled from Harris Poll data by John R. Hibbing and James T. Smith for their article “What the American Public Wants Congress to Be” in *Congress Reconsidered*, seventh edition, Lawrence Dodd and Bruce I. Oppenheimer, eds. (Washington: Congressional Quarterly Press, 2001).

occupational group hold offices in national, state, and city governments. The American Bar Association (ABA), with about half the lawyers in the country as members, reviews nominees to the bench, and its comments on candidates’ fitness influence whether they are appointed. Because of their own commitment to law, as well as some similarity in educational and social backgrounds, lawyers generally back the Court.

In 2007 there were over 45,000 lawyers in Washington, D.C. Perhaps the number of lawyers explains why so many political conflicts, including sex scandals and presidential elections, end up as legal issues. Other countries manage with far fewer lawyers and far fewer issues winding up in court. Some scholars argue that lawyers use their domination of elected offices to pass laws and regulations that create new demands for their skills.

The Court as a Political Player

In applying the Constitution and laws to the cases before it, the Court clearly makes political choices. In arriving at decisions on controversial questions of national policy, the Supreme Court is a player in the political game. The procedures may be legal and the decisions may be phrased in lawyers’ language, but to view the court solely as a legal institution is to ignore its important political role.

“We are under the Constitution, but the Constitution is what the judges say it is,” declared former Chief Justice Charles Evans Hughes. In interpreting the meaning of the Constitution, each Supreme Court must operate within the political climate of its time. Judges not only read the Constitution, they read the newspaper as well. The Court must rely on others, especially the executive branch, to enforce its rulings. The Court cannot ignore the reactions to its decisions in Congress or in the nation because its influence ultimately rests on the acceptance of these decisions by the other players and the public. Generally, the Court’s opinions are not long out of line with the dominant views in the legislative and executive branches. (See “The Court Waits for an Election.”)

Judicial Activism vs. Judicial Restraint

The question of how the political and legal power of the Supreme Court should be applied has centered on whether judicial authority should be active or restrained. How far should the Court go in shaping policy when it may conflict with other branches of the government? The two sides of this debate are reflected in the competing practices of *judicial restraint* and *judicial activism*.

Judicial restraint is the idea that the Court should not impose its views on other branches of the government or on the states unless there is a clear violation of the Constitution. Judicial restraint (often labeled *strict constructionism*) calls for a limited role in which the Court lets the elected branches of the government lead the way in setting controversial policies. The Constitution is constructed or interpreted as close to the intent of the framers as possible and practical. The

The Court Waits for an Election

Civil rights decisions have never been far removed from politics. Here is an example of the Court keeping an eye on the political arena in a landmark case:

"Why doesn't the Supreme Court pass the school desegregation case?" asked one of Chief Justice Vinson's law clerks in 1952. *Brown v. Board of Education of Topeka, Kansas*, had arrived on the Court's docket in 1951, but it was carried over for oral argument the next term and then consolidated with four other cases and reargued in December 1953. The landmark ruling did not come down until May 17, 1954.

"Well," Justice Frankfurter explained, "we're holding it for the election"—1952 was a presidential election year.

"You're holding it for the election?" the clerk persisted in disbelief. "I thought the Supreme Court was supposed to decide cases without regard to elections."

"When you have a major social political issue of this magnitude, timing and public reactions are important considerations, and," Frankfurter continued, "we do not think this is the time to decide it."

Source: David M. O'Brien, *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton, 1993.

Supreme Court intervenes in political conflicts only with great reluctance. Felix Frankfurter and Oliver Wendell Holmes Jr. are two famous justices of the Supreme Court identified with judicial restraint. Frankfurter argued that social improvement should be left to elected officials of the federal and state governments. The Court, he declared, should avoid conflicts with the other branches of the federal government whenever possible.

Judicial activism is the view that the Supreme Court should be a creative partner with the legislative and executive branches in shaping government policy. Judicial activists seek to apply the Court's authority to solving economic and political problems ignored by other parts of the government. In this view, the Court is more than an umpire of the American political game: It is an active participant. The Supreme Court under Earl Warren practiced judicial activism. In its rulings on reapportionment, school desegregation, and the right to counsel, the Warren Court boldly changed national policy.

It is important not to confuse judicial activism versus restraint with liberal versus conservative. Although twentieth-century activist justices, such as Earl Warren and Thurgood Marshall, took liberal positions on issues like race and dissent, this was not always so. John Marshall's court was both activist, in establishing judicial review, and

conservative, in protecting private property rights. The conservative Supreme Court during the 1930s attempted to strike down most of Franklin D. Roosevelt's New Deal program as unconstitutional. On the restraint side, justices Frankfurter and Holmes were political liberals, yet both believed it was not wise for the Court to dive into political battles to support positions they may have personally backed.

In recent times judicial restraint and conservatism have overlapped. Conservative jurists, under the banner of *strict constructionism*, have viewed modern courts as stretching the Constitution for liberal ends, and thereby ignoring the intentions of the framers. This is most apparent in the vast expansion of federal power to regulate the economy, which liberal courts have ruled acceptable under flexible interpretations of the Constitution. However, when the Burger Court found abortion to be constitutional in *Roe v. Wade*, it heated this legal debate to a boil.

Critics of the decision point out that in most countries elected representatives have legalized abortion. But in America this change in policy was done by unelected judges who found a right to abortion in constitutional phrases, hidden for centuries, "... completely unknown to the drafters . . ." as Rehnquist put it. One reason why the debate over abortion may have turned more bitter in this country than elsewhere is because many Americans believe that the courts are "legislating from the bench."

But the conservative judges now in an uneasy majority in the courts also face a dilemma. Abortion has become a legally accepted practice; a precedent embedded in decades of court rulings and legislation. For any court to ban abortion based on a strict reading of the written Constitution would hardly be an act of judicial restraint.

American Apartheid

In the South during the late nineteenth and early twentieth centuries, *Jim Crow laws* (taking their name from a blackface minstrel song) were passed to prohibit blacks from using the same public facilities as whites. These state laws required segregated schools, hospitals, prisons, restaurants, toilets, railways, and waiting rooms. Some communities passed "sundown ordinances" that prohibited blacks from staying in town overnight. Blacks and whites could not even be buried in the same cemeteries.

There seemed to be no limit to the absurdity of segregation. New Orleans required separate districts for black and white prostitutes. In Oklahoma, blacks and whites could not use the same telephone booths. In North Carolina and Florida, school textbooks used by black children had to be stored separately from those used by white children. In Birmingham, Alabama, the races were specifically prohibited from playing checkers together.

CASE STUDY

Separate but Equal?

The evolution of “separate but equal” offers a window into the political role played by the Supreme Court. By first approving racial segregation late in the nineteenth century and later abolishing it in the mid-twentieth century, the Court was central in establishing a national policy that governed relations between the races. The changing but always powerful position of the judiciary in the history of racial segregation demonstrates the influence of the Supreme Court in national politics.

POLITICAL BACKGROUND OF SEGREGATION

The end of the Civil War and the emancipation of the slaves did not offer black people the full rights of citizenship, nor did the passing of the Thirteenth Amendment in 1865 (which outlawed slavery), the Fourteenth Amendment in 1868 (which extended “equal protection of the laws” to all citizens), or the Fifteenth Amendment in 1870 (which guaranteed the right to vote to all male citizens regardless of “race, color, or previous condition of servitude”).

Between 1866 and 1877, the “radical Republicans” controlled Congress. Despite becoming a bad memory in the white South, *Reconstruction* was a time when blacks won political rights. In 1875 Congress passed a civil rights act designed to prevent any public form of discrimination—in theaters, restaurants, transportation, and the like—against blacks. Congress’s right to forbid a *state* to act contrary to the Constitution was unquestioned. But this law, based on the Fourteenth Amendment, assumed that Congress could also prevent racial discrimination by private individuals.

The Supreme Court disagreed. In 1883 it declared the Civil Rights Act of 1875 unconstitutional. The majority of the Court ruled that Congress could pass legislation only to correct *states’* violations of the Fourteenth Amendment. Congress had no power to enact “primary and direct” legislation on individuals—that was left to the states. This decision meant the federal government could not lawfully protect blacks against most forms of discrimination. In other words, white supremacy was beyond federal control.

With this blessing from the Supreme Court, the southern states passed a series of laws legitimizing segregation. These laws included all-white primary elections, elaborate tests to qualify for voting, and other racial restrictions. (See “American Apartheid.”)

SEPARATE BUT EQUAL

Segregation was given judicial approval in the landmark case of *Plessy v. Ferguson* (1896). Here, the Supreme Court upheld a Louisiana law requiring railroads to provide separate cars for the two races. The Court declared that segregation had nothing to do with the superiority of the white race, and that segregation was not contrary to the Fourteenth Amendment as long as the facilities were equal. The doctrine of “separate but equal” in *Plessy v. Ferguson* became the law of the land in those states maintaining segregation.

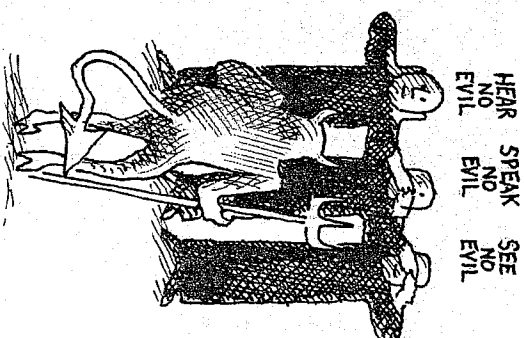
In approving segregation and establishing the “separate but equal” doctrine, the Court was undoubtedly reflecting white

attitudes of the time. To restore the South to the Union, the new congresses were willing to undo the radicals’ efforts to protect blacks. It was the southern black who paid the price—exile halfway between slavery and freedom. Just as the Court was unwilling to prevent these violations of civil rights, so too were the executive and legislative branches.

Plessy v. Ferguson helped racial segregation continue as a southern tradition. For some 40 years, the “separate but equal” doctrine was not seriously challenged. “Separate” was strictly enforced; “equal” was not. Schools, government services, and other public facilities for blacks were clearly separate from tax-supported white facilities but just as clearly inferior to them. The Supreme Court did not even support its own doctrine during this period.

By the late 1930s, the Court began to look more closely at the “equal” part of these separate facilities. In *Missouri ex. rel. Gaines v. Canada* (1938), the Court held that because Missouri did not have a law school for blacks, it must admit them to the white law school. In *Sweatt v. Painter* (1950), a black (Sweatt) was denied admission to the University of Texas Law School on the grounds that Texas was building a law school for blacks. The Court examined the new school carefully, found that it would in no way be equal to the white one, and ordered Sweatt admitted to the existing school.

Thus the *Plessy* doctrine of “separate but equal” was increasingly weakened by judicial decisions. By stressing the “equal” part of the



doctrine, the Supreme Court was making the doctrine impractical. (Texas was not likely to build a law school for blacks equal to its white one.) These decisions also reflected the Court's change in emphasis after 1937 from making economic policy to protecting individual rights.

Still, the Court did not overrule *Plessy*. The Court was following precedent. Paralleling the rulings of the Supreme Court were the actions of the executive branch and some northern states that were increasingly critical of racial segregation. In 1941 Roosevelt issued an executive order forbidding discrimination in government employment. And Truman abolished segregation in the army in 1948. Congress, however, dominated by a conservative seniority system and blocked by southern filibusters in the Senate, was unable to pass civil rights measures. Nonetheless, public attitudes toward segregation were changing, and the Supreme Court's rulings were reflecting that change.

THE END OF SEPARATE BUT EQUAL

In 1954 the Supreme Court finally reversed *Plessy v. Ferguson* in *Brown v. Board of Education*, even while denying it was overturning the precedent. The Court held that segregated public schools violated the "equal protection of the laws" guaranteed in the Fourteenth Amendment. "Separate but equal" had no place in public education, the Supreme Court declared. Drawing on sociological and psychological studies of the harm done to black children by segregation, the Warren Court's unanimous decision stated that, in fact, separate was "inherently unequal." This finding was the beginning of the end of *legal segregation*.

The Court backed up its new equal protection stand in areas other than education. In the years following the *Brown* decision, it outlawed segregation in interstate transportation, upheld legislation guaranteeing voting rights for blacks, reversed convictions of civil rights leaders, and protected civil rights demonstrations by court order. These decisions, though they stirred up opposition to the Court (including demands to impeach Earl Warren), helped a political movement apply pressures to wipe out racial discrimination. Civil rights groups were active in these cases, which shows how results can be gotten from one part of government (the courts) if another part (the Congress) is unwilling to act.

Congress finally joined in by passing Civil Rights Acts in 1957, 1960, and 1964. Both political parties had gained a heightened appreciation for the black voter, especially the large numbers who voted in northern cities. The 1964 act, coming after continuing agitation by civil rights activists, was the first comprehensive legislation of its kind since 1875. The act prohibited discrimination in public accommodations (such as hotels, restaurants, and gas stations) involved in interstate commerce and in most businesses, and enforced equal voting rights for blacks.

The Court encouraged all levels of the government—federal, state, and local—as well as the private sector to move toward full equality. The Supreme Court's support of busing to end the segregation of schools caused by housing patterns aroused opposition in northern cities like Boston. By the 1980s President Reagan was calling *affirmative action* "reverse discrimination" against white males. Yet affirmative action expanded beyond remedies for discrimination to include goals of cultural diversity and racial "balance." It was also applied to groups from the Middle East and Latin America, with little historical claim to its benefits. Judicial and public support for affirmative action waxed and waned. In recent decisions the Supreme Court has both narrowed and upheld affirmative action programs. The current chief justice has declared that the time has come to restrict broad government remedies for racial discrimination. (See "University of Michigan and Affirmative Action," Chapter 6.)

Still, racism remains. And for this, the Supreme Court as well as the rest of the political system must share responsibility. The Supreme Court struck down Civil Rights Acts of the Reconstruction Era and failed to protect the rights of African Americans between 1883 and 1937 when they were most trampled on. And it was the Court that made "separate but equal" the legal justification for white supremacy. Even today the Court has viewed housing patterns—a major cause of segregated public schools—as largely beyond its authority. The Court's effort to put equal rights before the eyes of the nation was in many ways merely undoing its own past mistakes.

Throughout this history of "separate but equal," the Court has acted politically as well as legally and morally. At times the Supreme Court held back efforts at reform, at other times it confused them, and at still others it forced political and social changes more rapidly than many preferred. Yet as the history of "separate but equal" makes clear, the Court is seldom removed too far or for too long from the positions dominating the political game.



WRAP-UP

The federal court system consists of U.S. district courts, courts of appeals, special federal courts, and the U.S. Supreme Court. Although very few of the cases tried in the United States ever reach the Supreme Court, it retains its position as the "final authority" over what the Constitution means. Nevertheless, the Court's decisions have changed over the years, usually at the hands of the Court itself, in part reflecting the changing political climate. Our brief history showed this, as did the case study of "separate but equal," where the Court first allowed racial segregation and then gradually reversed its position.

The practices of judicial activism and judicial restraint are two sides of the debate over how far judicial review and the political involvement of the Court should go. The Supreme Court is limited by a number of its own practices and by its dependence on other parts of the government to enforce its decisions. The Court's respect for these limits, as well as its own great prestige, has given it the strength to overcome most resistance. Recent criticism of its decisions, from both conservatives and liberals, on issues like abortion, religion, and protection of minorities has run up against solid support for the Court.

Secure within its limits and resting on public respect, the Supreme Court of the United States remains a unique political player. No other government can boast a long-held tradition that gives "nine old men" (and women, now)—nonelected and serving for life—the duty of overturning the acts of popularly elected officials. Through this power of judicial review, the Court is deeply involved in setting national policy, limiting how the political game is played, and bringing pressing social issues to the attention of the people and their leaders. Whether the Supreme Court protects individual liberties or partisan interests depends on who are the justices, how they interpret the law, and which political forces prevail in the nation.

THOUGHT QUESTIONS

1. How did the Supreme Court become so important to our system of government? Would John Marshall be pleased or surprised?
2. Are Supreme Court justices influenced too much by their own partisan philosophies? Give some examples.
3. Why did the courts take the lead on civil rights for minorities? Isn't this issue more appropriate for the elected officials of the government?
4. Do judges deserve to be more popular and more respected than other government officials? Why or why not?
5. Why have recent chief justices had so much trouble gaining a clear direction from the Supreme Courts they led? Does this reflect broader political trends?

SUGGESTED READINGS

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The Pulitzer Prize-winning account of the civil rights movement with a focus on Martin Luther King Jr.
- Burns, James MacGregor. *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court*. New York: The Penguin Press, 2009.
A warning by an eminent historian that the power of judicial review has often been used against "the progress of history."

- Lewis, Anthony. *Gideon's Trumpet*. New York: Vintage Books, 1966. Pb.
A short story that traces the development of a case from a Florida jail to the U.S. Supreme Court.
- Rosen, Jeffrey. *The Supreme Court: The Personalities and Rivalries that Defined America*. New York: Holt Paperback, 2007.
A law professor writes a lively history of four personal rivalries that defined the court decisions of their time.
- Toobin, Jeffrey. *Nine: Inside the Secret World of the Supreme Court*. New York: Anchor Books, 2007. Pb.
A revealing look at the politics, personalities, and rivalries that make the current Court's decisions more than just legal scholarship.