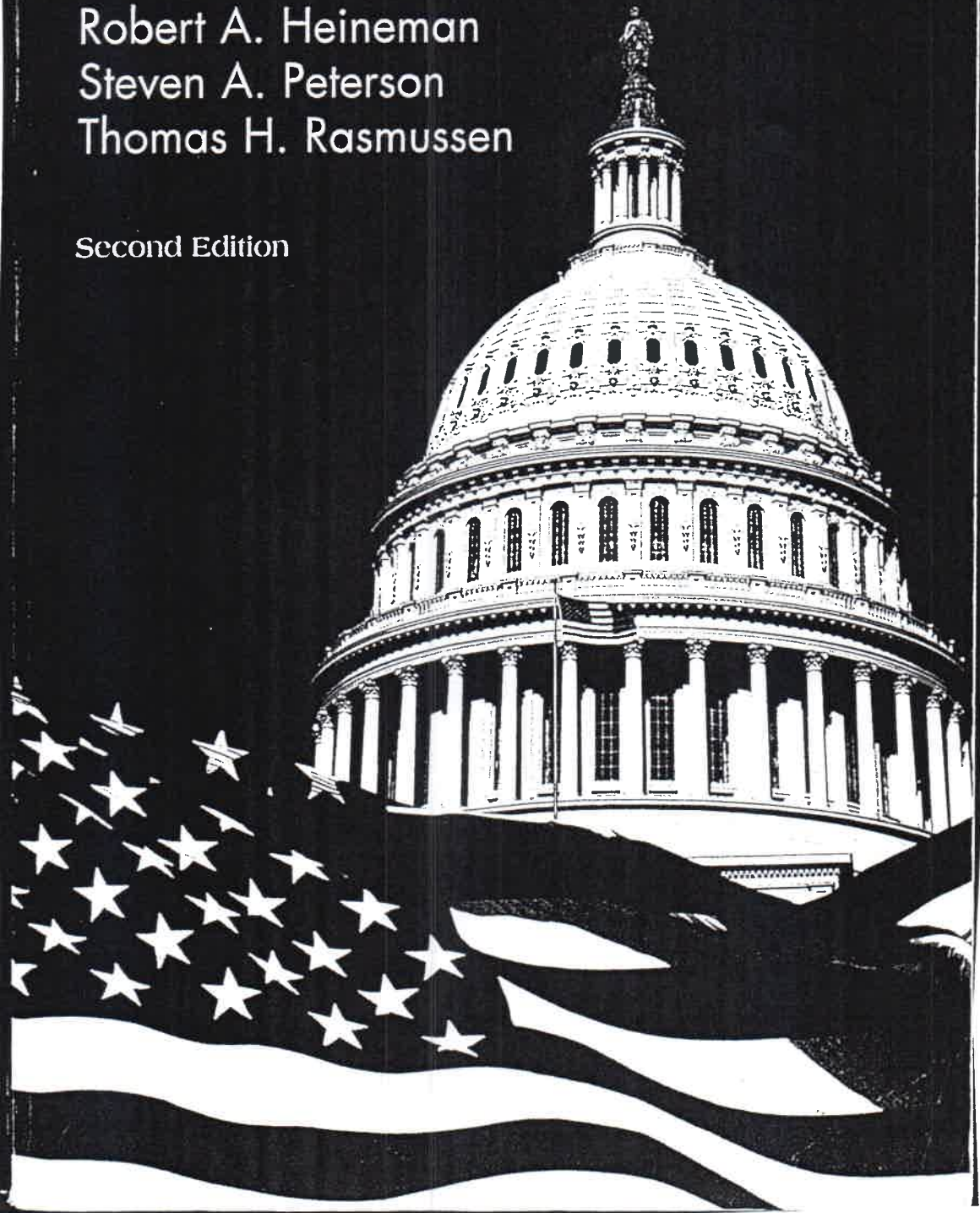


American Government

Robert A. Heineman
Steven A. Peterson
Thomas H. Rasmussen

Second Edition



civil service principle of technical competence and political neutrality. Bureaucrats, accordingly, are partially insulated from close control by our democratically elected president. Bureaucratic decisions are binding upon us and affect our lives, but we citizens have little direct control over them. We do, however, have considerable indirect leverage through our elected members of Congress, who watch over agency activities, appropriate funds annually, and attend to the complaints of their constituents. Citizens also have indirect control through the interest groups they support.

Pluralists assign great importance to these checks on bureaucratic performance to ensure that the ruled have a substantial measure of control over their rulers. Elitists tend to focus on broad policy issues, not the details of policy implementation. For elitists the activities of bureaucrats are of less interest than the policy priorities of their masters.

Recommended Reading

- Anthony Downs: *Inside Bureaucracy*, Little, Brown, Boston, 1967.
 Judith Gruber: *Controlling Bureaucracy: Dilemmas of Democratic Governance*, University of California Press, Berkeley, 1987.
 Kenneth Meier: *Regulation: Politics, Bureaucracy and Economics*, St. Martin's, New York, 1985.
 Gary J. Miller: *Managerial Dilemmas: The Political Economy of Hierarchy*, Cambridge University Press, New York, 1992.
 William Niskanen: *Bureaucracy and Representative Government*, Aldine-Atherton, Chicago, 1971.
 Francis E. Rourke: *Bureaucracy, Politics and Public Policy*, Little, Brown, Boston, 1984.
 Irene Rubin: *The Politics of Public Budgeting*, Chatham House, Chatham, N.J., 1993.
 James Q. Wilson: *Bureaucracy: What Government Agencies Do and Why They Do It*, Basic Books, New York, 1989.

CHAPTER 11

The Federal Judiciary

Eras of Judicial Interpretation

1789–1800	The early Supreme Court period
1800–1835	Marshall Court protects private property and furthers national power
1836–1864	Taney Court supports state police power and is deeply divided by slavery issue
1864–1875	Civil War and Reconstruction lead to decline in the position of the Court
1875–1937	Court increases in status and becomes protective of corporate property against national and state regulation
1937–1953	Court removes itself from determining economic and social policy and begins to expand individual rights
1953–1969	Warren Court expands rights in the areas of speech and association, religion, voting, race, and the criminal process
1969–present	Burger and Rehnquist Courts slow the expansion of individual rights and give greater deference to state power

Of the three branches of government at the national level, the judiciary remains the most insulated from political influence. It is, however, an important part of the policy-making process. Throughout the nation's history, the courts have used the Constitution to protect various interests against the effects of majority power. The authority of courts to interpret the Constitution and statutes often enables them to give the final definition to a policy position.

This chapter describes the structure and operations of the federal courts. It begins with a general explanation of the legal basis for the federal courts and the basic principles of law and legal process within which they operate. Then it examines the structure and operations of the courts themselves. Finally, it discusses the role of the Supreme Court in shaping American public policy.

Legal Framework

Article III

Article III of the Constitution provides the basis for the federal court system. By specifying the kinds of cases that can be heard by these courts, it defines both judicial jurisdiction and the requirements of standing.

Jurisdiction

Jurisdiction refers to the range of cases that a court may hear. If a case does not fall within a court's jurisdiction, it must be pursued in another court. The most basic forms of jurisdiction are original and appellate. A court that has original jurisdiction hears cases for the first time and makes determinations of guilt or innocence. A court that has appellate jurisdiction hears cases on appeal from lower courts and rarely makes determinations of guilt or innocence. Appellate courts normally confine their decisions to questions of proper procedure or interpretation of the law and refer cases that they overrule back to the original court for further proceedings.

Standing

Standing, on the other hand, refers to the criteria that a party to a suit must meet to be able to use a particular court. Article III states that the federal judicial power extends to cases and controversies involving specified subjects or parties. These criteria define both the jurisdiction of the federal courts and the basis on which a party may claim standing to use these courts.

Because Article III was the result of a compromise between those Founding Fathers who wanted strong national power and those who favored state power, it specifies only that a Supreme Court shall be established. The estab-

lishment of lower federal courts is left to Congress. Even more limiting to the Supreme Court is the fact that Article III gives it the power to hear cases in the first instance (original jurisdiction) in only two areas: those cases in which a state is a party and those involving "ambassadors, other public ministers and consuls." Without the establishment of lower courts, these would be the only cases that the Supreme Court could consider. Many of the cases that receive wide publicity today, such as those questioning the constitutionality of statutes, would not be within the jurisdiction of the Supreme Court.

Article VI (Supremacy Clause)

The supremacy clause of Article VI, Section 2, is one of the most important parts of the Constitution because it gives that document preeminent legal status by declaring that the Constitution, all laws "made in pursuance thereof," and all treaties made "under the authority of the United States" are the "supreme law of the land." It further provides, however, that the judges in every state will be "bound thereby." Clearly, in the absence of federal courts other than the constitutionally specified Supreme Court, the Founding Fathers intended that the state courts would be the final interpreters of the Constitution, federal law, and federal treaties, except where the Supreme Court could exercise its original jurisdiction. This would, of course, have left the Supreme Court in a very weak position.

Judiciary Act of 1789

Fortunately for the emergence of uniform interpretation of national law, the first Congress chose to act quickly and comprehensively through the Judiciary Act of 1789 to establish the framework for a powerful national judiciary. First, the act established lower federal courts that could hear the whole range of cases defined as within federal judicial jurisdiction in Article III. These cases could then be heard on appeal by the Supreme Court, if necessary. Second, in Section 25, the act provided that state court decisions involving a "federal question"—a claim under the Constitution, federal law, or federal treaty—then could be appealed to the Supreme Court. By these two actions, the first Congress tremendously increased the power of the federal courts and of the Supreme Court. Not only did cases heard in the lower federal courts become reviewable by the Supreme Court, but state court decisions involving federal power also were made subject to final approval by the Supreme Court.

This last power is particularly important because it establishes the national government as the final determinant of the extent of its powers. Standing

alone, the Constitution would have encouraged a situation where courts in Montana could have interpreted federal law differently from those in Mississippi. Section 25 of the Judiciary Act eliminates this possibility by giving the Supreme Court the power to overrule state court decisions involving the Constitution, federal laws, or federal treaties to provide uniform national interpretation. Furthermore, these state court decisions need not be those of the highest court in the state. If a case involving a federal question cannot proceed beyond a local or intermediate state court because the next-highest court refuses to hear it, that case may be appealed directly to the U.S. Supreme Court. Section 25 of the Judiciary Act has been aptly called the linchpin that holds together the federal system. Without it, the interpretation and application of federal law would at best be a patchwork affair.

Marbury v. Madison—Judicial Review

Ironically, the most important power exercised by the Supreme Court—that of judicial review—has little support in the wording of the Constitution. *Marbury v. Madison* (1 Cranch 137 [1803])¹ is generally conceded to be the basis for the Supreme Court's power of judicial review. Judicial review occurs when a court rules a statute or executive action unconstitutional. It derives from the belief that the courts are specially qualified to interpret the Constitution. This perspective has been a characteristic of American political culture. Other countries have not been willing to grant their judges such powerful status, although a few now grant a limited power of judicial review to specific courts. It remains an anomaly of American politics that nonelected judges with life tenure are allowed to overturn decisions made by a majority of duly elected representatives.

In the *Marbury* case, Chief Justice John Marshall was faced with a dilemma. William Marbury had been denied a judicial appointment to which it appeared he was legally entitled. At the same time, the Court confronted a hostile and powerful President Jefferson and a Congress controlled by him. It was likely that if the Court ordered the president to deliver Marbury's judicial commission, it would be ignored. Such a result would have been exceptionally damaging to the status and authority of the Court as an institution.

Marshall resolved the dilemma by holding unconstitutional the law under which Marbury appealed to the Court. Thus, Marshall avoided a direct confrontation with President Jefferson and at the same time gained status for the Supreme Court by ruling null and void a portion of a congressional statute. A reading of Marshall's opinion will reveal that his reasoning is based largely on the logic derived from the belief that judges are uniquely qualified to in-

terpret the law. It has little basis in the Constitution or in legal precedent. However, the Jeffersonians appear to have accepted the Court's right to declare a congressional statute void, and the Court has retained that power ever since.

The American Legal System

Forms of Law

The American legal system is bound by the Constitution. As Article VI states, the Constitution is the "supreme law of the land." This means that state constitutions and state laws, as well as federal statutes, must conform to the Constitution. Because the Supreme Court is the final interpreter of the Constitution, its decisions regarding the Constitution also become the supreme law of the land. The only formal recourse from Supreme Court decisions in these instances is a constitutional amendment. Because it is so difficult to change a Supreme Court decision based on the Constitution, the Court tries to decide cases on other bases if possible. If the Court simply interprets the meaning of a law without reaching a constitutional issue, Congress is free to pass another law overruling the Court's interpretation.

Common Law

The Constitution, congressional statutes, and agency regulations all are examples of written law. An older form of law that has served as the basis for Anglo-American law for centuries is the common law. Common law differs from statute law in that it is created by judicial decisions. Judicial reasoning from one decision to another forms the core of the common law. As indicated by the term "stare decisis" (Latin for "let the decision stand"), judges are guided by precedents—previous judicial decisions in similar cases—and cases are argued by attorneys in terms of which precedents are most appropriate in a particular case. This form of law must inherently remain uncertain because the rule of law in a case is never definite until the judge makes the decision. The authority of judges to determine the substance of the common law has been an important factor in elevating the status of the judiciary in common-law countries.

It is an interesting twist of judicial history that, despite its long tradition, common law has only limited relevance at the national level. Early in the nineteenth century, the Supreme Court held that there was no federal criminal common law. For an act to be a crime at the federal level, it must be specified in a statute. Thus, when Lee Harvey Oswald was accused of assassinating President Kennedy, he was arrested and held by Texas authorities because there was no federal statute making murder of a president a crime, although that

shortcoming has since been remedied. When noncriminal cases are before the Supreme Court, elements of a common-law approach may appear if a case involves a controversy between two states or citizens of two states, but the Court remains very reluctant to move far beyond the written law. The meaning of important parts of the Constitution has evolved through judicial precedent over the years, but technically, the Court's interpretations remain rooted in the document itself. Common law finds its widest use at the state level, where it remains important in many areas of noncriminal law. However, at any level of government, the basic rule is that where there is a conflict, statute law overrides common law.

Equity Law

A form of law that developed in reaction to the rigidity of the early common law was equity law. Equity law focuses on preventing wrongs that cannot be adequately compensated once they have been committed. It provides judges with considerable discretionary power. An injunction is a common form of equity law. Courts may be asked to enjoin behavior before it occurs to prevent irremedial damage. Thus, unions may be enjoined from striking, or a group may be enjoined from a march or demonstration on the fear that such action would lead to a riot. In recent years, the federal courts have gained fairly extensive equity powers, and these have been broadly used in the area of racial discrimination and on behalf of other disadvantaged segments of society. Federal judges have successfully ordered states, localities, and school boards to comply with their orders in these areas. Judge W. Arthur Garrity in Boston went so far as to act as the school board and essentially ran the Boston schools for a time.²

Statute Law

Although the Supreme Court's exercise of judicial review tends to receive more public attention, most of the Court's work involves interpreting the meaning of statute law, which is law enacted by a legislative body. This can be difficult and controversial because Congress has developed the practice of passing laws that are ambiguous. The problem of assembling majorities to pass legislation has discouraged the use in statutes of specific, precise language that may antagonize particular interests. The consequences of this ambiguity are that final policy decisions are deferred to agencies and finally to the courts. Federal statutes are, of course, the supreme law of the land subordinate only to the Constitution, and state laws and constitutions must conform to them. The Supreme Court's interpretation of the compatibility of state laws and constitutions with federal law has been a source of controversy throughout its history.

Regulations promulgated by federal agencies also have legal standing. Because they draw their authority from either the Constitution or congressional statute, they are superior to state action. Agency regulations can be a problem for the Supreme Court because it must determine not only their meaning and application but also whether they accurately reflect the often ambiguous intent of Congress. B. Guy Peters, for example, points out that phrases such as "maximum feasible participation," "equality of educational opportunity," "special needs of educationally deprived students," and "full employment" are elements of program guidelines established by Congress that are "subject to a number of different interpretations" which could vary considerably from the original intentions of their legislative creators.³

Criminal and Civil Law

Although the distinction is not clear, the major difference between criminal law and civil law is that criminal law involves prosecution by the state that could result in a jail sentence, fine, or other form of punishment. While civil law can involve suits by the government, it predominately involves litigation by private parties. Usually these suits ask for monetary damages of some sort, although they may be attempts to force a party to act in a certain manner. Thus, an individual who has entered into a business contract with another individual might be forced to sue for damages suffered if the contract is not fulfilled. In other instances, professional football clubs have sued players under contract to them to prevent them from playing for other clubs.

Constitutional legal protections come into play primarily in the area of criminal law. Thus, even though a civil lawsuit can cause a defendant serious losses, the courts do not afford that individual the same level of protection that an individual has against state prosecution in a criminal case. Following this same line of reasoning, the standards of proof are less rigorous in civil cases than in criminal cases. In a civil case, one does not have to be found guilty beyond a reasonable doubt to lose, and usually, a unanimous jury verdict is not required.

Legal Processes

The Adversary Process

The American judicial system operates through the adversary process. In its purest form, this means that issues are determined by combat in the courtroom. The theory behind the adversary process is that through the confrontation of the two parties to a suit, the facts of a controversy will be most effectively obtained. The American judicial system gives broad latitude to the two contending parties in a lawsuit and limits the powers of a judge to guide

the proceedings. Such is not the case in England or on the Continent, where judges have far more power to insist that the parties to a trial remain focused on the issues involved.

The adversary process makes an American trial an expensive and uncertain undertaking. In some respects, its most important function may be to encourage the disputing parties to settle their differences without going to court. In fact, in both criminal and noncriminal litigation, most cases are settled before going to trial. This allows certainty in outcome for the litigants, saves them considerable expense, and relieves the case burden on the courts.

The parties to a case are the plaintiff and the defendant. The plaintiff is the party who initiates the action; in a criminal case, the plaintiff is the prosecution, or the government.

Appellate Procedure

The grounds for appeal are laid during the trial. At this time, one of the attorneys may object to an action of the court or of the opposing attorney. If this objection is overruled by the judge, his or her decision on this point may be used as the basis for an appeal. In an appeal, the losing party in a case also may claim other procedural irregularities. These are presented to the appellate court in a written brief that is usually answered by the winning side. The two sides then are normally given the opportunity to summarize their positions in oral arguments before the appellate court. After oral arguments, the appellate court issues a written opinion that may sustain the lower court decision or may overrule it. If the lower court is overruled, the case normally is sent back to that court for correction of the errors found.

It is particularly important to understand that in a criminal case, the prosecution may not appeal an acquittal. A defendant may appeal a conviction, but in doing so, he or she waives the right not to be retried if the conviction is overturned in the appeal. Also, the appellate stage of the judicial process focuses on interpretations of law and procedures. Except for highly unusual circumstances, it does not involve the introduction of new evidence or the interrogation of witnesses.

Court Structure

Constitutional Courts

The backbone of the federal judicial system is the constitutional courts. These courts are established under Article III of the Constitution. Their judges have judicial independence and life tenure. In many respects, the structure of these courts serves as a model of efficiency in comparison with the compli-

cated court systems often found at the state level. The constitutional courts are organized in a three-tiered structure: district courts, courts of appeal, and the Supreme Court.

District Courts

The district courts are the courts of original jurisdiction in the federal judicial system. They hear both civil and criminal cases and hold both jury and nonjury trials. At this level each case is heard by one judge. Each state has at least one judicial district; most contain several districts, and each district may have a number of district court judges. At any one time in these districts, several district court cases may be in progress. Including the states and territories, there are 94 judicial districts.

The federal judicial districts also contain other federal legal staff. The most important of these are the U.S. magistrates, marshals, and district attorneys. The U.S. magistrates are appointed by the district court judges. They perform important pretrial functions for the judges and hear civil cases and nonfelony criminal cases with the permission of the two parties to a case. The district attorney for a district is the federal government's prosecutor and can become quite well known. (Rudolph W. Giuliani, for example, gained a national reputation for his vigorous prosecution of corruption in the New York City area.) U.S. marshals provide some of the basic law enforcement functions for the federal government in the judicial districts. They make arrests, are responsible for prisoners, and serve judicial orders and writs. Both the U.S. attorneys and marshals are appointed by the president with the consent of the Senate.

Courts of Appeal

The U.S. courts of appeal are the first line of appeal from the district courts, and most cases end at this level. The nation is divided into eleven circuits, or appellate districts, that encompass several states each, and the Court of Appeals for the District of Columbia. This latter court is particularly important because it handles much of administrative law involving federal agencies. In 1982, Congress established an additional court of appeals, the Court of Appeals for the Federal Circuit, whose jurisdiction is defined solely by subject matter. The courts of appeal are multijudge courts. Most cases are heard by three-judge panels, but for important litigation, more judges may sit on the case. In addition to appeals from the district courts, the courts of appeal hear cases from federal regulatory agencies.

A hybrid of the district courts and the courts of appeal is the three-judge district court. A three-judge district court is a temporary court with original

jurisdiction appointed to handle particular kinds of cases. Congress may specify that challenges to a law's constitutionality be heard by such a court. Applications for injunctions against legislative reapportionment proposals also must be heard by three-judge district courts. The three-judge district court is normally composed of a court of appeals judge and two district court judges. Its primary advantage is that its decisions can be appealed directly to the Supreme Court. By skipping the intermediate appellate stage, the litigants to a case can receive a final decision much faster.

Supreme Court

Of all the federal courts, the Supreme Court receives the most attention and is the most powerful. Today, the Court consists of nine members, although its size is subject to change by Congress. It originally began as six justices, and at one time during the Civil War period it was expanded to ten. After the Civil War, Congress lowered its size to seven and finally settled on nine members. It has remained at nine since that time.

Routes to the Supreme Court

Writ of Certiorari. Cases come to the Supreme Court primarily through the writ of certiorari. If the Court grants a petition for a writ of certiorari, it has agreed to hear the case being appealed. The advantage of the writ of certiorari is that it allows the Court to control its work load and to select those cases which it deems of national significance. In deciding on whether to grant a petition for a writ of certiorari, the Court operates under the "rule of four," by which only four of the nine justices have to vote affirmatively for a case to be heard. If the Court refuses to hear a case, the lower court decision stands, but the justices have consistently maintained that their refusal does not necessarily mean that they agree with the lower court's decision. Other reasons may lead the Court to refuse to grant a petition for the writ. The justices may think that the facts of the case unnecessarily complicate the issue. Or they may conclude that the issue involved simply does not present a substantial federal question or that the Court is too divided on an issue to render a useful decision.

Right of Appeal. Cases also may be brought to the Court by the right of appeal. In 1988, under its authority to control the appellate jurisdiction of the Supreme Court, Congress severely restricted this route to the Court. Today, those appeals that the Court must hear are limited to decisions of three-judge district courts. Even in these instances, the Court may deal with the case briefly and overturn or affirm the lower court's decision with a short statement.

In Forma Pauperis Petition. Many applications to the Supreme Court are in forma pauperis petitions. These petitions proceed on the basis of a federal statute that permits anyone who completes a pauper's oath declaring indigency to enter a case in a federal court. These petitions need not be in any particular form, and many sent to the Court are simply written up by the petitioners themselves. These are almost always prisoners in state or federal institutions. The Court considers these petitions and may occasionally grant a hearing or otherwise act positively on them. The vast majority of them are frivolous, however, and their number has caused some justices, notably former Chief Justice Warren Burger, to argue that they should be dealt with in some other manner.

Supreme Court Procedure

Once an application for a hearing by the Supreme Court has been granted, the parties to a case file written briefs with the Court. These briefs argue the issues on appeal, urging the justices to either affirm or reverse the lower court. The case is then set for oral arguments, and attorneys for the litigants appear before the Court to state their positions. Today, these oral presentations have strict time limits. Furthermore, an attorney may have carefully prepared his or her presentation only to discover that the justices have questions from the bench that they want answered or considered. This can lead to lively interchanges between the bench and the attorney, who may never get beyond the first few lines of prepared material. The oral argument period presents the justices with an opportunity to raise questions about points in the written briefs, and their questions reflect their interest in the positions suggested there.

Supreme Court Opinions

The term of the Supreme Court is from October through June. During this time the Court is hearing oral arguments and the justices are holding conferences among themselves to decide the cases that have been argued. These conferences are held on Wednesday afternoons and Fridays in the Supreme Court conference room. No one is allowed into the room while the justices are in conference, and throughout history, the justices have been very circumspect about what has happened in that room. One can only speculate that discussion in conference has at times been heated and emotional. What is known is that the chief justice speaks to the case first and that the discussion then proceeds from the most senior justice to the most junior.⁴ If the chief justice is in the majority, the chief justice assigns the justice who will write the opinion; if not, the senior justice in the majority makes the assignment.

The writing of an opinion takes time. Drafts of opinions are circulated among the justices, who make suggestions as to revisions. Occasionally, dis-

sending justices may be drawn onto the majority side with a few changes in wording, and less frequently, a dissenting opinion may be so persuasive that it gains sufficient support to become the majority opinion. When the Court is finally satisfied with the form of an opinion, it is announced from the bench, usually in a summary fashion. Often the most difficult and controversial opinions are not announced until the last week or two of the Court's session, perhaps because it has taken that long for the justices to reach a satisfactory statement.

On the contemporary Court, unanimous opinions have been less frequent than divided ones. Typically, there is an opinion for the Court, which is the majority opinion, but often there are also concurring opinions and dissenting opinions. A concurring opinion is one in which the justice agrees with the outcome of the decision, but he or she would use a different approach in reaching that outcome. A dissenting opinion is just that; it disagrees with the majority's position and may at times be vehement in tone. A per curiam opinion differs from the preceding forms in that it is a short, unsigned statement by the Court acting on an appeal. Normally, it simply cites a previous ruling that settles the issue as far as the justices are concerned. Per curiam opinions may be accompanied by dissents that are signed.

Other Federal Courts

In addition to the constitutional courts, Congress has established other courts. These courts have begun as legislative courts—courts to help Congress implement its legislative powers under Article I of the Constitution. Today, these appear to fit into two categories: those courts which remain essentially legislative in origin and character and those which began from the legislative source but have evolved into constitutional courts.

Legislative Courts

Legislative courts are courts that have been assigned legislative and administrative functions by Congress that the independence of constitutional courts does not allow. Their judges serve for specified terms.

The more clearly legislative courts are the Tax Court, the Court of Military Appeals, the Court of Veterans Appeals, and the territorial courts. The Tax Court hears claims against the Internal Revenue Service. The Court of Military Appeals hears appeals from military tribunals. The Court of Veterans Appeals reviews decisions regarding veterans' benefits made by the Department of Veterans Affairs. The territorial courts are part of Congress's responsibility for administering the nation's territories. They have broad jurisdiction in these territories.

Legislative/Constitutional Courts

The more difficult courts to categorize are those which still have legislative characteristics reflecting their origins but have been given some constitutional status. These are the United States Claims Court, the Court of International Trade (formerly the Customs Court), and a newly created Court of Appeals for the Federal Circuit. The Claims Court hears claims against the national government, which through its establishment has consented to be sued in certain kinds of matters. The Court of International Trade hears cases involving customs disputes, such as the proper classification of imports and questions about the duties levied on imports. The Court of Appeals for the Federal Circuit was created by Congress in 1982 and technically constitutes a thirteenth court of appeals. However, its jurisdiction is defined by subject matter, not by geography. Its functions include those of the previous Court of Customs and Patent Appeals. It hears appeals on customs, appeals from the Patent Office, and personnel issues from the Merit System Protection Board.

Judicial Selection and Removal

The processes of judicial selection and removal have become much more important as the federal courts have become more heavily involved in the policy process. The political activism of the courts has made the political issues involved in the selection of federal judges more salient. These considerations become even more important in light of the recognized difficulty of removing federal judges, whose tenure is protected by Article III of the Constitution.

The Supreme Court

Supreme Court justices are nominated by the president and approved by the Senate. During the nineteenth century, it was not unusual for presidential nominations to the Supreme Court to become heavily involved in congressional politics. Such was not the case during much of the twentieth century. Until the Nixon presidency, only one presidential nomination had, in this century, been rejected by the Senate.

Senate Opposition

The Nixon difficulties were presaged by the failure of Lyndon Johnson's effort to move Justice Abe Fortas from the position of associate justice to the chief justiceship. Technically, this nomination was not rejected by the Senate. It failed because the Johnson forces were not able to break an opposition filibuster against the nomination. Justice Fortas then withdrew as a nominee and resigned from the Supreme Court. Faced with vacancies in the positions of chief

justice and associate justice, President Nixon first filled the chief justice position with Warren Burger. However, his nomination of Clement Haynsworth for the remaining vacancy was defeated by the Senate, as was his next nominee, G. Harrold Carswell. Finally, Nixon nominated Harry Blackmun, who was approved by the Senate. The opposition of the Senate in these instances reflected a more aggressive stance toward presidential Supreme Court nominations.

This willingness to confront a president on his Supreme Court nominations was confirmed by the Senate's treatment of President Reagan's nomination of Robert Bork to the Supreme Court. After Senate Judiciary Committee hearings that were unprecedented in this century in length and bitterness, the Senate rejected the Bork nomination. President Reagan's next nominee, Douglas Ginsburg, withdrew before the Senate could act on his nomination. The president's third nominee, Anthony Kennedy, was quickly and rather easily confirmed by the Senate. The Bork nomination battle was the most obvious instance of the Senate directly disagreeing with the ideological stance of a nominee, but ideological opposition also had formed the basis for much of the Senate opposition to the unsuccessful nominees of Johnson and Nixon. The Bork nomination was further complicated by the perception that the next justice on the Court could very easily prove to be the swing vote on important social issues, including the constitutional status of abortion.

A nominee's stance on abortion continued to be a concern during consideration of the next three appointments to the Court, although in the cases of David Souter and Ruth Bader Ginsburg, opposition on this point was somewhat muted because Souter's stance was carefully ambivalent and by the time of the Ginsburg nomination, a new Court majority supporting abortion had appeared. The close battle over Clarence Thomas's nomination to the Court undoubtedly involved the belief that his conservatism encompassed opposition to abortion, but the immediate and most obvious basis for attacking his nomination was the charge by a former employee, Anita Hill, that as her supervisor ten years previously he had used sexually inappropriate language in discussions with her. After airing these accusations in several days of sensational hearings before the Senate Judiciary Committee that gripped the attention of the nation, the full Senate rather quickly confirmed Thomas's nomination by a vote of 52 to 48, making him the second black justice in the nation's history.

Nomination Considerations

Ideological Compatibility with the President's Views. This is probably the foremost consideration that enters into a nomination to the Court. Presidents naturally want people on the Supreme Court who will be sympathetic

to their policies. Since the Eisenhower presidency, Republican presidents have usually nominated lower court judges to the Supreme Court. Eisenhower argued that a person should not sit on the Supreme Court without previous judicial experience, although during his presidency the appointment of Earl Warren was a conspicuous exception to this rule. The primary attraction of this approach, however, appears to be the predictability that it provides. Presidents can examine a nominee's previous record as a judge and have a pretty good idea of how that individual will act as a Supreme Court justice. On the present Court, Sandra Day O'Connor and David H. Souter were former state court judges (Souter was also a federal judge for approximately six months), and Antonin Scalia, John Paul Stevens, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Stephen G. Breyer all were previously lower federal court judges. Moreover, six of the eight were appointed by Republican presidents.

Geography: Geography also enters into consideration in Supreme Court nominations, but often this is more a reflection of the influence of political interests than it is any conscious attempt to provide geographic dispersion on the Court. Thus, over time the Court tends to represent the shifts in political power in the nation. For a long period, for example, New York State was expected to have at least two seats on the Court, but until the appointment of Justice Ginsburg in 1993, the Court had gone 21 years without a justice from that state. On the other hand, two of the justices—Sandra Day O'Connor and William Rehnquist—are from Arizona, and the western and midwestern states are well represented.

Other Factors. At one time it was thought that one of the seats on the Court should be held by a person of the Jewish faith. That string of justices—Louis D. Brandeis, Felix Frankfurter, Arthur Goldberg, Abe Fortas—was broken by Nixon's appointments to the Court and resumed with the appointment of Ruth Bader Ginsburg. President Clinton's second nominee to the Court—Stephen G. Breyer—was also Jewish. Today, the presence of Clarence Thomas, a black, and two women, Sandra Day O'Connor and Ruth Bader Ginsburg, raises the question of whether gender and race will continue to be important factors in appointments to the Court. In a similar vein, Justice Scalia's easy passage through the nomination process was widely credited to the fact that he was the first Italian-American nominated to the Court.

Lower Federal Courts

Selection of lower federal court judges usually does not receive the public attention given Supreme Court nominations, but these choices can have a

tremendous impact on the legal system and public policy. Because they have original jurisdiction over cases, the district courts in particular have considerable latitude in framing the facts and legal issues in a dispute. Used skillfully, this power can influence heavily the subsequent decisions of appellate courts. District courts have in recent decades also gained a great deal of power over the implementation of judicial decisions. Especially in the area of racial discrimination, they have assumed the authority to order or to prohibit actions by agencies at the national, state, and local levels.

Senatorial Courtesy

Presidential discretion in the appointment of district court judges is severely limited by the practice of senatorial courtesy. In brief, this practice requires that the president appoint someone acceptable to the senators from the same party as the president to any district court vacancies in their state. If the president ignores these senators in making the nomination to a district court in that state, one of them will simply note this fact when the Senate is considering the appointment. The Senate will then reject the nomination in support of their colleague.

Senatorial courtesy is one ramification of the fragmented nature of American political parties. In many states, the political parties have various factions, some of which support the state's senator, others of which may be more supportive of the president. No senator wants a president to intervene in his or her state's politics with patronage appointments to district court positions. Thus senators will maintain a united front on this issue to protect themselves. If, on the other hand, there are no senators from the president's party from a state, the president has considerably more leeway in making a district court appointment, although the party leaders in the state may be consulted as a courtesy. Appointments to the courts of appeal allow the president more flexibility in selection because one or two senators do not have a veto power.

Evaluation of the Candidates

All these judicial nominations are considered first by the Senate Judiciary Committee, which may make a recommendation to the Senate as a whole. At this point as well, the American Bar Association will provide a recommendation as to whether, in their view, the candidate is exceptionally well qualified, well qualified, qualified, or not qualified. (Nominees to the Supreme Court receive one of the last three ratings.) Nominees also must undergo investigation by the FBI.

The Reagan administration, to a greater degree than any previous administration, made a concerted effort to select conservative judges. Nominations of individuals were preceded by extensive interviews and investigations. With

the Senate in Republican control, all but one of the president's nominees were approved. When the Democrats gained a Senate majority in 1986, action on Reagan nominees slowed perceptibly. Nonetheless, President Reagan placed over 300 judges on federal courts, more than any previous president had appointed, and their influence over judicial policy is expected to extend into the twenty-first century.

Judicial Removal

One of the concerns that enters into the selection and approval of federal judges is the fact that they have tenure during good behavior, meaning in essence that they are appointed for life.

Impeachment

The primary method for removing a federal judge remains the exceedingly cumbersome impeachment process. No Supreme Court justice has ever been removed through impeachment, and as of 1992 only seven lower court judges had been so removed.

Some of the recent impeachment convictions have had rather bizarre aspects. One of these involved District Court Judge Harry E. Claiborne of Nevada, who, even though he had been convicted of a crime and was serving a prison term, refused to resign from the bench. Under these circumstances, in October 1986, an outraged Senate made short work of his impeachment trial, convicted him, and removed him from the federal bench. In 1989, Alice L. Hastings was removed from the federal bench through impeachment and conviction, although he had been acquitted of the criminal charges against him; and in 1992, he returned to public office as a duly elected member of Congress from Florida. In 1993, the Supreme Court upheld the constitutionality of the Senate's use of a 12-member committee to hear evidence regarding impeachment charges and then make a recommendation to the full Senate. This streamlined approach, which avoids tying up the entire Senate in an impeachment proceeding, was first used against Judge Claiborne.

In other instances of judicial misconduct, the judicial councils of courts of appeal have removed cases from judges, allowing them to remain as judges but depriving them of any opportunity to act judicially. Congress appears to have supported such actions by passing legislation enabling judicial councils to discipline judges in their circuits.

Retirement

Another approach to providing some movement on the federal bench has been to encourage retirement. Chief Justice Warren left the Court because he

believed that judges should not remain active after age 75, although he was 78 when he finally left the Court. The same sort of thinking may have influenced his successor, Chief Justice Warren Burger, who also retired at age 78. Others have not been of the same view, as demonstrated by Justices William Brennan and Thurgood Marshall, who retired at ages 84 and 83 respectively.

In the past, the Court itself has acted to encourage retirements. Thus, as a junior justice in the middle of the nineteenth century, Justice Stephen J. Field was called on to suggest to Justice Robert Grier that it was time to retire. Justice Grier, who would occasionally break into song while attorneys were arguing before the Court, accepted Field's suggestion and retired. Later, in his nineties, Justice Field refused a similar suggestion from his brethren and remained on the Court with varying degrees of lucidity until his death.⁵ Modern medical technology has complicated the problem, and Justice William O. Douglas, determined to establish the record for Court tenure, remained on the Court in a greatly reduced capacity with the aid of such technology. His tenure of 36 years did set a record for Court service, although it seems a bit unfair to justices such as John Marshall, who served almost as long without the benefit of antibiotics and life-support systems.

The Supreme Court in History

Students of the Supreme Court have generally agreed that the Court has evolved through a number of fairly definable eras, or phases, of interpretation. These eras have reflected the political climate of the nation. This is to be expected, since the Court has responded to appointments by presidents, who, in turn, have been popularly elected. Moreover, as an institution, the Court has found it wise to remain somewhat sensitive to community feelings. When the justices have lagged too far behind changes in public sentiment or have moved too far in advance, the Court has been subjected to severe attacks.

The Marshall Court

Although the early Supreme Court rendered a few decisions of importance, it lacked both a sense of institutional identity and a national status. This changed dramatically under the chief justiceship of John Marshall from 1801 to 1835. During this period, Marshall had a tremendous influence on the Court and on the nation. Discarding the tradition of having each justice issue an opinion in a case, Marshall instituted the practice of giving one opinion for the Court, and for the first decade of his tenure, that opinion was usually written by him. Furthermore, Marshall was adept at obtaining agreement among the justices and discouraging dissenting opinions. Thus, the Court was able to present a more cohesive image to the public in its decisions.

Under Marshall's tenure as chief justice, the Supreme Court had the opportunity to interpret for the first time many provisions of the Constitution. This allowed Marshall to build the constitutional basis for a powerful national government. Marshall's first concern was the protection of private property. He was convinced that the most certain route to such protection was a strong national government that could withstand and limit the threats posed to people of property by the state legislatures. Most of Marshall's major decisions can be explained within this simple framework: the protection of private property through support for strong national government.

The Taney Court

Roger Brooke Taney (pronounced "Tawney") headed the Supreme Court from 1836 to 1864 and reflected the growing concern for state power during this period. The Taney Court was largely responsible for building the constitutional basis for state police power, which is the inherent power of a state to act for the health, welfare, morals, and safety of its citizens. Concern for state power also grew out of attempts to deal with the slavery issue. The Taney Court was never able to resolve the slavery controversy, and its attempts to do so were one of the reasons why it was less cohesive than the Marshall Court. The low point of the Taney era was the infamous *Dred Scott* decision, in which Taney held that a Negro could never become a citizen of the United States (*Dred Scott v. Sandford*, 19 Howard 393 [1857]). This decision caused Justice Benjamin Curtis to resign from the Court in protest.

Civil War and Reconstruction

During the Civil War and Reconstruction period, the Supreme Court was overshadowed by the war and the ensuing control of Congress by the Radical Republicans. The Republican control of Congress enabled them to ignore much of what President Johnson attempted to do and to manipulate the Supreme Court. When it appeared that the Court might declare unconstitutional the Reconstruction statutes governing the occupied southern states, Congress simply repealed the appellate jurisdiction for the case and thereby removed it from the Court's jurisdiction. To prevent President Johnson from having the opportunity to nominate anyone to the Supreme Court, Congress reduced the size of the Court to seven, and then with President Grant in office, it increased the size of the Court to nine.

The Era of Corporate Power

From about 1890 until 1937, the Supreme Court's approach to constitutional interpretation was sympathetic to the growth of corporate power in the

United States. The Court tended to view the Constitution as a limit on reform attempts to regulate corporations. Its decisions limited both the national government and the states. This was a period in which the nation underwent vast industrialization and growth, but it also was a period when the working classes and minorities, especially blacks, found little support in the law of the land as interpreted by the Supreme Court.

The onset of the Great Depression and the election of Franklin D. Roosevelt to the presidency were to bring a historic confrontation between the Court and the presidency. Through his New Deal program, Roosevelt initiated extensive governmental measures to alleviate the effects of the depression. The Court, however, was not receptive to the dramatic move toward greater government activity. During the first term of the New Deal, it ruled unconstitutional numerous New Deal statutes. When Roosevelt was reelected in 1936 by a huge majority, he resolved to move against the Court, the one remaining obstacle to his New Deal program. He proposed to Congress that the Court be enlarged to 15 members. This would allow him to appoint sufficient new justices to give him a Court favorable toward the New Deal. Even though Roosevelt had just won a popular mandate and had large majorities in both houses of Congress, there was considerable public discomfort with his proposal. It was viewed as an effort to “pack” the Court in his favor.

As events worked out, the Court itself acted to undermine support for the president’s proposal. While Congress was considering the plan, the Court began to uphold the constitutionality of state and national laws regulating economic activity. With the major reason for enlarging the Court removed, Congress defeated the attempt to increase its size to 15. Thus, while President Roosevelt was defeated on his specific proposal, he achieved the more important goal of making the Court supportive of his programs.

The essential point for the student of American politics is that the confrontation in 1937 was a major turning point in constitutional history. Since that time, the Supreme Court has consistently refused to rule against economic or social legislation (unless it involves threats to civil rights or liberties).⁶ Its position has been that these issues are properly determined through the political process.

The Warren Court

The next major recognizable era of Supreme Court interpretation occurred under the leadership of Chief Justice Earl Warren (1953–1969). During these years, the Court was dominated by a liberal majority that did not hesitate to interpret the Constitution in favor of the disadvantaged. The most important decision of this period was *Brown v. Board of Education* (349 U.S. 294

[1954]), which invalidated racial segregation in public education. The Court also acted vigorously in the areas of free expression, voting discrimination, criminal protections, and separation of church and state. The Warren Court stimulated a major restructuring of American society and, from the perspective of many, moved further and faster than was desirable. Running for the presidency in 1968, Richard Nixon articulated these feelings with his call for a “strict constructionist” Court, by which he appeared to mean a Court that was less willing to effect social change through its decisions. The era following the Warren Court has been one of greater conservatism on the part of the Court, but none of the principal Warren Court decisions have been directly overruled.

The Burger and Rehnquist Courts

Under Chief Justices Warren E. Burger (1969–1986) and William H. Rehnquist (1986–) the Supreme Court has counterbalanced the activist, nationalistic tendencies of the Warren Court. During the Burger and Rehnquist years, the Court has expanded some individual rights, particularly in the areas of abortion and gender issues. Moreover, it has strongly supported First Amendment free expression rights. Primarily, however, during the 1970s and 1980s, the Court fairly consistently deferred to state courts and policy processes, encouraging a variety of approaches toward fundamental legal rights in contrast to the national standards promulgated by the Warren Court. Thus, in cases involving capital punishment, obscenity, criminal procedure, and homosexual rights, the Court has given the states much greater leeway in determining individual rights. And, while it has not overturned major Warren Court precedents, in areas such as obscenity, abortion, and criminal procedure it has trimmed them by allowing the states flexibility in their interpretation and application.

Also under the Burger and Rehnquist Courts there has been increasing concern for maintaining the formal constitutional boundaries of the three branches of government. Much of the Court’s activity in this area has been directed at Congress. Thus, it has ruled that the legislative veto (the negation of agency decisions without passing a statute) and the use of the General Accounting Office (GAO) to enforce budget cuts were unconstitutional attempts by Congress to circumvent the allocation of powers in the Constitution. On the other hand, it has upheld Congress’s use of the independent counsel and the Senate’s approach toward the impeachment of federal judges. With regard to the president, the Court confirmed that the exercise of executive privilege (the confidentiality of conversations with the president) has a constitutional basis at the same time that it insisted that in a criminal judicial proceeding the president must release

taped conversations relevant to that proceeding. The Court has also declared that presidents are immune from civil liability for any actions taken while they are in office acting as presidents. These decisions are important for the substantive law that they have articulated, but, taken in total, they also indicate a greater willingness on the part of the Court to assert its power to define the constitutional limits of the authority of the president and of Congress.

Major Early Decisions

As previously noted, the Marshall Court rendered a number of original interpretations of constitutional clauses. These provided early support for rational power and are still seen as having legal significance.

McCulloch v. Maryland

While that Court's *Marbury v. Madison* decision established judicial review limiting congressional power in favor of the Court, its decision in *McCulloch v. Maryland* (4 Wheaton 316 [1819]) provided a broad base for congressional power. At issue was the power of the national government to charter a national bank under the "necessary and proper" clause of the Constitution. The Constitution specifically limits Congress to those powers "herein granted," but at the end of its listing of powers it provides that Congress shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In the *McCulloch* case, Marshall decided that the "necessary and proper" clause should be interpreted expansively and as an additional grant of power to Congress, not as a limit on congressional power. If Congress can establish that a program is related to carrying into effect one of its specifically delegated powers, then that activity can be justified by the "necessary and proper" clause. The Supreme Court's continued support of Marshall's broad definition of that clause has allowed Congress to undertake programs such as the vast hydroelectric complex of the Tennessee Valley Authority and the interstate highway system on the grounds that they bear some relationship to providing for the national defense and other delegated powers.

Gibbons v. Ogden

In *Gibbons v. Ogden* (9 Wheaton 1 [1824]), the Supreme Court rendered the first interpretation of the scope of the clause giving Congress power to regulate commerce "among the several states," which is usually termed the interstate commerce clause. In this decision, Marshall ruled that Congress's power over interstate commerce was clearly superior to state power in this area. Furthermore, commerce did not have to cross state boundaries to become subject to national regulation; it needed only to "concern more states than

one." Although succeeding Courts' interpretations of Congress's commerce power restricted and expanded its scope, Marshall's early expansive approach has survived as the basis for extensive exercise of national power. Today, there are few areas of economic activity that Congress could not regulate under its commerce power if it chose to do so.

The Courts and Public Policy

Throughout its history, the Supreme Court has functioned as a policymaking institution. Because its interpretations of the Constitution have been accepted as definitive, it has inevitably become another part of the policy process involving the president and Congress. Although it has assumed a powerful policy position, this position has always been more tenuous than those of the president and Congress. Unlike the president and Congress, the Court cannot claim the legitimacy of electoral support, nor does it have the means to implement its decisions. The Court must remain dependent on general public support to be effective, and when it is under sustained attack, its status as an institution is endangered.

Judicial Activism/Judicial Restraint

An issue that has received attention throughout the twentieth century is the extent to which the Court should actively engage in the making of public policy. This has often been cast in terms of judicial activism versus judicial restraint. The judicial activist uses his or her power as a judge to overrule legislative judgments. The disciple of judicial restraint, on the other hand, tends to defer to the decisions of elected bodies. In this respect, Justice Oliver Wendell Holmes, Jr., might be taken as one model of judicial restraint. Holmes personally did not favor active government reform or intervention in the economy, but he was unwilling in most instances to interpose his personal judgment in place of that of elected officials.⁷ Although Holmes left the Court in 1932, the Court's withdrawal from economic and social policy in 1937 was compatible with his views. Up to that time, the Court had been active in substituting its views of the value of limited government for those of Congress and the president. Later, the Warren Court demonstrated another form of activism by advancing individual protections, often in the absence of legislative or executive support.

Two Approaches toward Constitutional Interpretation

In the 1980s, the judicial activist/judicial restraint debate took a somewhat different twist. In this debate, Attorney General Edwin Meese and Jus-

tice William Brennan were two of the major protagonists. Meese argued that the Supreme Court should interpret the Constitution based on its specific words and as far as possible on the intentions of those who wrote those words. In his view, the Warren Court engaged in judicial legislation that moved beyond constitutional authority, and nonelected judges have no right to impose their particular views on the nation. Justice Brennan, an important member of the Warren Court majority, argued, in opposition to the Meese view, that the Constitution must be treated as a flexible document that allows judges to make decisions relevant to contemporary circumstances. Further, Justice Brennan saw the Court as the primary protection for minority interests in society.

The reader will have to decide which position seems to be more sensible. An important question to be considered, however, has to be what constitutes the basis for effective democracy: Can a democratic majority be trusted to govern effectively and fairly, or are there fundamental rights that require judicial protection from majority control if a democracy is to realize its full potential? How one stands on this question will have a direct bearing on how one views the proper role of the judiciary in the American political system.

Article III of the Constitution provides for the Supreme Court and specifies its original jurisdiction. Other courts and appellate jurisdiction are left to the discretion of Congress. In the Judiciary Act of 1789, Congress established the basic framework of the federal judicial system, and it retains control over the structure, size, and jurisdiction of the federal courts. In the twentieth century, these courts have used the power of judicial review to play an important role in the formulation of national policy. This position and the difficulty of removing federal judges have made the selection of judges an increasingly important and ideologically sensitive process. Throughout the nation's history, the Supreme Court's views of national power and of the extent of its own powers have gone through recognizable phases. Today, observers of the Court are again engaged in debate over the proper role of the judiciary in a democracy.

Recommended Reading

- Henry J. Abraham: *The Judicial Process*, 6th ed., Oxford University Press, New York, 1993.
- Lawrence Baum: *American Courts*, 2d ed., Houghton Mifflin, Boston, 1990.
- Craig R. Ducat and Harold W. Chase: *Constitutional Interpretation*, 5th ed., West, St. Paul, Minn., 1992.
- Jerome Frank: *Courts on Trial*, Atheneum, New York, 1963.

- John A. Garraty: *Quarrels That Have Shaped the Constitution*, Harper & Row, New York, 1987.
- Alfred H. Kelly, Winfred A. Harbison, and Herman Belz: *The American Constitution*, 7th ed., Norton, New York, 1990.
- William H. Rehnquist: *The Supreme Court*, Morrow, New York, 1987.
- Stephen L. Wasby: *The Supreme Court in the Federal Judicial System*, 3d ed., Nelson-Hall, Chicago, 1988.
- Bob Woodward and Scott Armstrong: *The Brethren*, Simon and Schuster, New York, 1979.

24. Frederick Mosher, *Democracy and the Public Service*, Oxford University Press, New York, 1982.
25. *New York Times*, August 19, 1987.
26. New York State Department of Environmental Conservation, Memorandum #87-14: Source Separation and Recycling, June 15, 1987.
27. Charles Peters, *How Washington Really Works*, Addison-Wesley, Reading, Mass., 1993.

Chapter 11

1. An explanation of Supreme Court citations is appropriate at this point. In these citations, the first number is the volume number and the second is the page number on which the case begins. In cases since the late 1800s, these numbers for the official Court citations are separated by the initials *U.S.* designating the government's printing of the decisions. Before this, the names of the Court's reporters were used. Thus in this citation Cranch was the Court reporter, and the case can be found in volume I at page 137. There are also two major private publishers of Supreme Court decisions: West Publishing Company in St. Paul, Minnesota, and The Lawyers Co-operative Publishing Company in Rochester, New York. Instead of the initials *U.S.*, West uses a *S. Ct.* citation and the Lawyers Co-operative uses *L. Ed.* (for volumes since the mid-1950s, *L. Ed. 2d.*) These editions of the Supreme Court's decisions include law notes, case summaries, and other information not included in the official Supreme Court reports.
2. George R. Metcalf, *From Little Rock to Boston*, Greenwood Press, Westport, Conn., 1983, pp. 197-220.
3. B. Guy Peters, *American Public Policy*, 2d ed., Chatham House, Chatham, N.J., 1986, p. 86.
4. William H. Rehnquist, *The Supreme Court*, Morrow, New York, 1987, pp. 289-290.
5. Carl Brent Swisher, *Stephen J. Field*, Archon Books, Hamden, Conn., 1963, pp. 443-444.
6. William B. Lockhart, et al., *The American Constitution*, 6th ed., West, St. Paul, Minn., 1986, p. 264.
7. See Samuel J. Konetsky, *The Legacy of Holmes and Brandeis*, Collier Books, New York, 1961.

Chapter 12

1. Charles O. Jones, *An Introduction to Public Policy*, Brooks/Cole, Monterey, Calif., 1984, p. 25.

2. Matthew Crenson, *The Un-Politics of Air Pollution*, Johns Hopkins University Press, Baltimore, 1971.
3. David R. Morgan and Robert E. England, "White Enrollment Loss," *American Politics Quarterly*, 12:241-264, 1984.
4. Paul E. Peterson, *City Limits*, University of Chicago Press, Chicago, 1981. While this formulation is directly applied to local government, Peterson also notes its applicability to state and national decisions and the interactions among the various levels of government.
5. The diagram is based on Charles O. Jones, "The Policy Process," paper presented at the Northeastern Political Science Association meeting, Newark, N.J., November, 1993.
6. Jones, *op. cit.*, p. 38.
7. John W. Kingdon, *Agendas, Alternatives, and Public Policies*, Little, Brown, Boston, 1984, p. 106.
8. Anthony Downs, "Up and Down with Ecology—The 'Issue Attention' Cycle," *The Public Interest*, 28:38-50, 1972.
9. Kingdon, *op. cit.*, p. 207.
10. E. E. Schattschneider, *The Semi-Sovereign People*, The Dryden Press, Hinsdale, Ill., 1975, p. 69.
11. Charles Lindblom, "The Science of Muddling Through," *Public Administration Review*, 19:79-88, 1959.
12. Steven A. Peterson, "Why Policies Don't Work," in Elliott White and Joseph Losco, eds., *Biology and Bureaucracy*, University Press of America, Washington, D.C., 1984.
13. Kingdon, *op. cit.*, p. 209.
14. Eugene Bardach, *The Implementation Game*, Cambridge, Mass., MIT Press, 1977.
15. Jeffrey Pressman and Aaron Wildavsky, *Implementation*, University of California Press, Berkeley, 1973.
16. Graham Allison, *Essence of Decision*, Little, Brown, Boston, 1971.
17. George C. Edwards III, *Implementing Public Policy*, Congressional Quarterly Press, Washington, D.C., 1980.
18. Erwin L. Levine and Elizabeth M. Wexler, *PL 94-142. An Act of Congress*, Macmillan, New York, 1981.
19. For instance, see Carol H. Weiss, "Utilization of Evaluation" and "The Politicization of Evaluation Research," in Carol H. Weiss, ed., *Evaluating Action Programs*, Allyn and Bacon, Boston, 1972.