

CHAPTER 14

The Courts

PARALLEL LECTURE 14.1

- I. The role of the courts in American government
 - A. American courts shape policies that form the heart of American democracy.
 1. Because judges tend to accept the rulings of other courts in similar cases, judges in effect make policy with their decisions.
 2. The Supreme Court, for example, makes fundamental decisions vital to the preservation of freedom, order, and equality.
 - B. The courts can undo the work of representative institutions.
 - C. This thwarts democratic theory, which argues that the majority should rule.
- II. The conferral of power on the federal courts
 - A. The Constitution established “one Supreme Court”, but left it to Congress to structure the federal judiciary.
 1. The first Congress adopted the Judiciary Act of 1789. It provided for a system of federal courts that would coexist with the courts of each state, but be independent of them.
 2. In the first decade or so under the Constitution, the Supreme Court was not especially powerful.
 - a) The first chief justice, John Jay, resigned for lack of power.
 - b) Several statesmen refused appointment.
 - B. Judicial review led to the ascendancy of the Supreme Court.
 1. The Court’s power was boosted under the fourth chief justice, John Marshall, who authored the opinion in *Marbury v. Madison*.
 - a) *Marbury* established the power of **judicial review**: the power to declare congressional acts invalid if they conflict with the Constitution.
 - b) Subsequent cases extended the power of judicial review to the invalidation of presidential acts
 2. The power of judicial review appears to run counter to democratic theory: an unelected branch (the judiciary) checks an elected branch (executive or legislature) in the name of the Constitution.
 3. The Supreme Court also exercises judicial review over state laws and executive actions. In short, the Court holds the power to invalidate actions of the states and actions of coordinate branches of the federal government.
 - C. Hamilton anticipated the power of judicial review and discussed it in *Federalist* No. 78.
 1. He sought to minimize people’s fear of that power, declaring that the courts would be the least dangerous branch since they have “neither **force** nor **will**, but only judgment.”
 2. Hamilton also pointed to two checks on that power: impeachment and constitutional amendment. But both require **extraordinary majorities**.
- III. The organization of the court system today (see Figure 14.1)
 - A. The state courts

1. Each state) has its own court system, and no two are alike.
2. State courts co-exist with the federal court system, and individuals fall under the jurisdiction of both.
3. The state courts handle and resolve the vast majority of legal disputes.

IV. How the courts work

A. Court Fundamentals

1. A crime is a violation of a law that forbids or commands some designated activity. Each state has its penal code. Some crimes are on the books of every state; others –only in certain states.
 - a) As crime is a violation of public order, the government (usually state and local government) maintains order by prosecuting **criminal cases**.
 - b) Most criminal cases are prosecuted in the state courts.
 - c) National crime-fighting measures, however, have begun to usurp areas that used to be under state authority.
2. **Civil cases** stem from disputed claims to something of value. They involve private disputes arising from such matters as accidents, contractual obligations, and divorce. Government can be a party to such disputes.
3. Few cases ever go to trial. Most cases are settled out of court; some are abandoned.
 - a) The defendant’s lawyer and the prosecutor may plea bargain.
 - b) The parties may settle or resolve between themselves
4. When a judge decides a case, it is **adjudicated**.
 - a) To support their decisions, judges may give reasons in writing, called **opinions**.
 - b) If the circumstances of the case are novel, judges may publish their opinions, thus setting precedent and adding to the body of **common, or judge-made, law**.
 - (1) If they are not, they go by legislative acts, which involve judicial interpretation called *statutory construction*.
5. The federal courts
 - a) The federal courts are like a pyramid: the Supreme Court is at the apex, the U.S. courts of appeals occupy the middle, and the U.S. District Courts serve as the base.
 - b) The courts of appeals and the Supreme Court are appellate courts.
 - c) Most federal courts hear and decide civil and criminal cases.

B. The U.S. District Courts

1. There are 94 district courts; each state has at least one, and no district crosses state boundaries.
2. More than one judge may sit in each district court, but each case is heard by a single judge, sitting alone
3. Magistrate judges assist district judges, but they lack independent judicial authority.
4. District court judges appoint magistrate judges (either full-time or part-time).
5. The district courts cover federal criminal cases, civil cases that allege violation of national law, civil cases brought against the national government, and some civil cases between citizens of different states.

C. Cases litigated beyond the federal district courts usually go to one of the 13 **U.S. Courts of Appeals**.

1. Each appeal court hears cases from a geographical area known as a *circuit*. The United States is divided into 12 circuits.

2. The 13th court, **the US Court of Appeals for Federal Circuit**, is not a regional court. It specializes in appeals involving patents, contract claims against the national government, and federal employment cases.
 3. Judges on the regional courts sit in panels of three. They receive written arguments (*briefs*). Often they may hear oral arguments.
 - a) A published appellate opinion has influence reaching beyond the immediate case.
 - (1) A **precedent** is a decision in one case that provides a reason for deciding a similar case in the same way.
 - (2) **Stare decisis**, which means “Let the decision stand,” is decision making according to a precedent rather than some other rule.
 - b) Judicial policymaking occurs
 - (1) When judges correct errors in district court proceedings and interpret the law.
 - (2) When judges interpret the law, they often modify existing laws.
 2. Because the circuit courts are not bound to consult with each other about application of the law, there may be variance in their interpretations. Such conflicts are corrected by review at the Supreme Court level.
- V. The Apex: Access and Decision Making in the Supreme Court
- A. The mottos inscribed on the Supreme Court building capture the Court’s difficult task: providing **equal justice under law** while making **justice the guardian of liberty**.
 1. Flag burning as a form of political protest pits the value of order (government’s interest in maintaining a peaceful society) against the value of freedom (an individual’s right to vigorous and unbounded political expression).
 2. School desegregation pits the value of equality (equal educational opportunities for minorities) against the value of freedom (parents’ interest in sending their children to neighborhood schools).
 - B. The work of the Court is determined by access.
 1. The Court’s jurisdiction falls into two categories: original and appellate.
 - a) The Constitution specifies the Court’s **original jurisdiction**. The Court is the first and only forum for the resolution of the very few original jurisdiction cases.
 - b) **Appellate jurisdiction** is subject to congressional control; it is also the primary source of cases entering the Court from the U.S. court of appeals or the state courts of last resort. (See Figure 14.2.)
 - (1) Cases being appealed from state courts must have reached the end of the line in the state court system and must also raise a **federal question**, an issue covered under the Constitution, federal laws, or treaties.
 - (2) The Court exercises nearly complete control over its **docket**, or agenda.
 - (3) It takes the votes of four justices to grant a case full consideration. This is known as the **rule of four**.
 - c) The decision to grant or deny review is affected by a “little-known” executive official, the solicitor general.
 - (1) The solicitor general represents the federal government before the Court. His duties include determining whether the government should appeal lower court decisions and deciding whether the government should file a “friend of the court,” or **amicus curiae**, brief in an appellate court.

- (2) Appointed by the president, the solicitor general is an advocate for the president's policies, as well as an officer of the Court. They traditionally defend the institutional interests.
 - (3) Given the solicitor general's influence on the Court's agenda setting, it is not surprising that they are often regarded as "the tenth justice."
- C. Once the Court grants review, attorneys submit written arguments (briefs). Oral arguments usually follow.
 - 1. The justices reach a tentative decision only after they have met in conference.
 - 2. How do justices make their voting decisions?
 - a) The principle of judicial restraint maintains that legislators, not judges, should make the laws. Judges are said to exercise judicial restraint when they hew closely to statutes and previous cases in reaching their decisions.
 - b) The principle of judicial activism maintains that judges should interpret laws loosely, using their power to promote their preferred social and political goals (this approach may further either the liberal or the conservative agenda).
 - 3. The voting outcome is the **judgment**.
 - 4. After voting, the justices in the majority draft an opinion setting out the reasons.
 - a) The **argument** states the reasons for the opinion.
 - b) A justice can agree with a judgment for different reasons than those stated in the argument. This kind of agreement is called **concurrence**.
 - c) A justice can **dissent** if she or he disagrees with a judgment.
 - d) Both concurring and dissenting opinions may be drafted, in addition to the majority opinion
 - 5. After the conference, the chief justice writes the majority opinion or assigns that responsibility to another justice in the majority.
 - 6. After the decision is officially announced in the Court, the justices who wrote the opinion read or summarize their views in the courtroom.
 - 7. Slip opinions (printed and electronic copies of the opinion) are then distributed to interested parties, the public, and the press.
 - 8. Justices in the majority try to encourage institutional cohesion.
 - 9. Today, unity is not easy to obtain.
- D. We should expect typical political behavior from justices as they attempt to stamp their own policy views on the cases they review.
- E. Although he is only one of nine justices, the chief justice has several unique and important functions based upon the authority of that office.
 - 1. The chief justice may provide social leadership by generating solidarity within the group or by providing intellectual or policy leadership.
 - 2. Through his or her power to control the docket and direct conferences, the chief justice may exercise control over the discussion of issues.

PARALLEL LECTURE 14.2

In the first lecture in this chapter, we argued that the courts are powerful political institutions. We described the structure of the courts and their means of exercising power. Now that we have explained why judges are powerful political actors, we consider how a person becomes a judge, what the person does in the act of judging, and the relationship of the legal profession to the political system. We also confront the problem of political power exercised by institutions that lack strong democratic controls.

- I. How does a person become a judge?
 - A. The mechanics of appointment are nomination and confirmation.

1. The president makes nominations when vacancies or new positions occur in the federal judiciary.
 2. The Senate must confirm the president's nomination. This is known as the advice-and-consent function.
 - a) In accordance with the norm of **senatorial courtesy**, nominees for the district courts or the courts of appeals must be acceptable to the senior senator of the president's party from the state in which the vacancy arises.
 - b) The practice of senatorial courtesy thus forces a president to share the nominating power with members of the Senate.
 - (1) The Justice Department now requires that senators submit more than a single name for a judgeship.
 - (2) President Bush Sr. asked Republican senators to seek out more qualified female and minority candidates. President Clinton accelerated that search.
 - c) The Chairman of the Senate Judiciary Committee exercises a measure of control in the appointment process that goes beyond senatorial courtesy.
 - d) Beginning with the Carter administration, judicial appointments below the Supreme Court have proved a new battleground, with a growing proportion of nominees not confirmed and increasing delays in the process
 3. The American Bar Association (ABA) is the largest association of lawyers in the United States.
 - a) Although the ABA has been stripped of its *formal* power to evaluate nominees for federal judgeships, it continues to make its opinions of nominees well known.
 - b) The ABA occasionally renders a "not qualified" assessment of a nominee.
 - c) For the most part, however, the vast majority of appointees have had the association's blessings.
- B. Recent presidents have made their marks on the federal judiciary.
1. Carter wanted to base appointments more strongly on merit. He also wanted the judiciary to be more representative of the general population.
 2. Reagan did not share Carter's second objective and appointed far fewer minorities and women.
 3. Although Bush Sr.'s record in the appointment of minorities and women to federal judgeships was better than Reagan's, neither approached Carter's appointment record in this regard.
 4. Clinton's appointments stood in contrast to those of Reagan and Bush. Clinton's nominees reflect his quest for greater ethnic and gender diversity on the bench. More than half of his appointees were minorities or women.
 5. Political ideology lies at the heart of judicial appointments; presidents tend to appoint nominees who share similar value preferences.
 - a) The Reagan/Bush Sr. ideology-driven appointments will probably shape the judiciary into the twenty-first century.
 - b) Carter-appointed judges were the most liberal, whereas Reagan-and Bush-appointed judges were the least liberal.
- C. Supreme Court justices exercise great power; their appointments become important political events.
1. Presidents are not restrained by senatorial courtesy when making Supreme Court appointments, but presidents probably face more restraint from public opinion when they make such appointments.
 2. All told, 146 men and 2 women have been nominated to the Court; 28 -or only about 1 in 5 have failed to receive Senate confirmation.

3. 16 out of the 22 successful Supreme Court nominees since 1950 have had prior judicial experience in federal or state courts. Promotion from within the judiciary may be based on the idea that a judge's previous opinions are good predictors of his or her future opinions on High Court.
4. Clinton left his imprint on the Court by appointing the second woman, Ruth Bader Ginsburg in 1993, and by appointing Stephen Breyer in 1994.
5. The fight for the Court's ideological future is intense. Moderate-to-liberal minority can become smaller if President George W. Bush appoints additional Republicans to the nation's highest court.

II. The consequences of judicial decisions

- A. Lawsuits are just the tip of the iceberg; most disputes do not end up in court.
 1. Many civil cases end with settlements.
 2. Most criminal cases end by **plea bargaining**, in which defendants admit guilt, usually in return for some reduction in punishment.
 3. The fact that a judge sentences a defendant to a period of imprisonment or a jury awards a plaintiff \$1 million is no guarantee that the offender will serve that time in prison or that the plaintiff will receive payment.
- B. The Supreme Court relies on others to implement its policies.
 1. The creation of a majority or unanimity on the High Court forces justices to compromise. This may result in ambiguity, which creates uncertainty about implementation.
 - a) Some lower court judges dragged their feet when faced with enforcing the Court's "all deliberate speed" desegregation order in 1955 .
 - b) School prayer continued in many places despite the Supreme Court's ban in the early 1960-s. State court judges and attorneys general reinterpreted the decision to mean that only **compulsory** prayer or Bible reading was unconstitutional and that state-sponsored voluntary prayer or Bible reading was acceptable.
 2. The Supreme Court confronts issues loaded with conflicting values or fundamental political beliefs; its decisions have impact beyond the immediate parties.
 - a) The Court's decision in *Roe v. Wade* legalized abortion and generated heated public reaction, including piles of hate mail and proposals to overturn the decision by constitutional amendment.
 - b) In 1989, the Court abandoned its strong defense of abortion rights by recognizing the government's power to limit the exercise of the right.
- C. Despite its seemingly undemocratic character, the Supreme Court is not usually out of line with national public opinion.
 1. A study of public opinion polls from the mid-1930s through the mid-1980s revealed that the Court reflected public opinion majorities or pluralities in over 60 percent of its rulings.
 2. This convergence is not a coincidence.
 - a) The Court shows deference to national laws and policies, which typically reflect public opinion.
 - b) The Court moves closer to public opinion during times of crisis.
 - c) Rulings that reflect public opinion are subject to being revisited less often than rulings that are at variance with public opinion.
 3. Despite a large gap in the Court approval rating between Democrats and Republicans following the 2000 presidential election, today there is virtually no difference in support for the Court across political party affiliation.

III. The role of the courts in American democracy

- A. The majoritarian view of democracy confines judging to the letter of the law.
- B. The pluralist view of democracy regards judging as simply another form of policymaking; individual values and interests of judges should advance the different values and interests of the population at large.
 - 1. This view is supported by the procedure called **class action**, in which claims or defenses of similarly situated individuals are assembled so they can be tried as a single lawsuit.
 - 2. Whether the U.S. Supreme Court leans conservative or liberal, each of the fifty states has a state supreme court that can fashion legal decisions that may move precedent in the other direction. The multiplicity of courts and levels of justice reinforce the pluralist model of democracy.