Chapter 12
The Federal Courts: Activism versus Restraint

Focus Questions

Q1 What are the main differences between the civil code tradition and the common law tradition?

A1 Common law is based upon the previous rulings of judges while civil law is the collection of clear statutes that lay out key legal principles and commands in plain language that citizens can understand and obey. The job of the civil law judge is to apply these codes to legal problems. However, in the common law tradition, judges base their rulings upon the facts of the case and use legal precedents or past rulings to dispose of current court cases. Following stare decisis, which means “let the decision stand,” the legal system is arguably more stable due to the continuity precedent provides.

Q2 How did the theory and practice of judicial review arise in the United States?

A2 While judicial review is not enumerated in the U.S. Constitution, Alexander Hamilton suggests that the role of the new national court should include the power of intermediary between the people and the legislature to ensure the power of the latter did not become too great. The theoretical underpinning of a judiciary with the power of reason to determine the constitutionality of congressional acts was put into practice under the leadership of John Marshall in 1803. In the Supreme Court case of Marbury v. Madison, Chief Justice John Marshall invalidated portions of the Judiciary Act of 1789, and in doing so, defined the power of the Court as an institution that would determine the constitutionality of congressional acts. In effect, Marshall’s opinion declared it was the role of the Court “to say what the law is.”

Q3 Has the idea of individual rights replaced the idea of property rights at the heart of American judicial practice?

A3 An ardent nationalist, the Marshall Court was responsible for determining the Court’s role and powers in national government through the decision in Marbury v. Madison (1803) thereby establishing the role of the Court in determining the constitutionality of congressional acts. This case established SCOTUS’s power of judicial review. The Marshall Court established an expansive interpretation of national supremacy in McCulloch v. Maryland upholding the “necessary and proper” clause while also using its power to uphold property rights. With the appointment of Roger Taney as Chief Justice, after John Marshall’s death in 1835, the focus of the Supreme Court changed from an institution
promoting property rights to one advancing the broader concerns of the community (except for the Dred Scott decision in 1857). After the Civil War, the Republican controlled Congress and a series of Republican presidents radically changed the structure of the federal court system (Justices did not ride circuits, numerous federal judges appointed were politically motivated to support high tariffs and back “hard currency”) and advocated laissez-faire economic policies. In the 1905 *Lochner* case, the Supreme Court determined the right to contract was implicit in the due process clause of the Fourteenth Amendment to the U.S. Constitution. However, the Great Depression and FDR’s appointment of New Deal Democrats to the Court in the 1930s began to change the nature and role of the Court to take a more active role in regulating the economy. The advent of the Warren Court in the mid-1950s and the Burger Court of the 1970s shifted the Court’s focus to address issues of individual rights and civil liberties. Yet, the pendulum seems to be swinging back to favor a Court whose focus is on protecting property rights and limiting individual freedoms given SCOTUS’s rulings upholding Congress’ partial birth abortion ban, freedom of speech issues, and rulings against mandating integration in public schools under the leadership of Chief Justice John Roberts.

**Q4** What is the place of the Supreme Court in the judicial system of the United States?

**A4** Article III, section 1, of the Constitution enumerated the establishment of the Supreme Court. Yet, the structure of inferior courts is left to the discretion of Congress. The federal court system is designed in a hierarchical fashion. At the bottom are the district courts, then the courts of appeal. The Supreme Court is the superior court and has the power over “all Cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.” The Supreme Court has both original and appellate jurisdiction. Some 99 percent of those cases heard by the Court are through the appeals process. The Court is not compelled to hear cases, as are lower courts. Most cases reach the Court through a writ of *certiorari*. Four Justices must agree to hear the case. After hearing arguments from both sides, the Justices meet in conference to decide the merits of the arguments in correlation with the Constitution. In addition, within conference, the Justices determine who will write the opinions. Traditionally, the most senior Justice writes the majority, minority, unanimous, concurring, or dissenting opinion. However, this depends upon the particular Court and Chief Justice (for example, William Howard Taft assigned opinions based upon the Justices’ knowledge and expertise). The majority opinion is known as the opinion of the Court and may reverse or affirm a lower court’s ruling. In addition, the Court may remand the case to the lower court, with suggestions, for further consideration.

**Q5** How have the climate and tone surrounding the process of nomination and confirmation to judicial posts changed since the mid-1950s?

**A5** In general, nominations and confirmations of judicial appointees have become more contentious because of ideological polarization among members of Congress. As the
Supreme Court is a powerful political institution, public policy is furthered or defeated through the rulings of the Court. Interest groups including the American Bar Association (ABA) and the Justice Department have been very influential in the nomination and confirmation process. The ABA accumulates a large amount of information on the nominees and ranks them. Interest groups who have a political interest in a nominee’s success or failure in the confirmation process try to influence the member of the Judiciary Committee through demonstrations, lobbying, or letter campaigns in order to persuade the members to oppose or support a specific nominee.

Q6  Is judicial activism necessary because some issues are just too difficult for the political branches of the government to confront?

A6  The Warren Court has been identified as the most activist Supreme Court. However, scholars have suggested certain Justices in the Burger and Rehnquist Courts have also been “guilty” of activism albeit to uphold property rights and advance state rights issues. The danger of judicial activism is the propensity of unelected judges to place their own opinions and preferences in the place of democratically elected legislators. Yet, it is often difficult to ascertain what motivates or influences individual Justices’ opinions. Interestingly, legal scholars, including Keith Whittington, Cornell Clayton, Howard Gillman, and Lawrence Baum, point to the relationships among the three branches of government whereby the Court protects the legitimacy of institutions and popularly elected officials from unpopular decisions while also ruling to please a particular audience or constituency (see: Suggested Lectures below).
Chapter Outline
I. The Federal Courts
   The power of courts in the United States has increased remarkably since the inception of
   the present system of government in 1789. Comparatively, American courts and judges are
   more powerful than their counterparts in other countries primarily due to our adherence to a
   written Constitution, which is the foundation of U.S. democracy. Law is defined as
   authoritative rules enacted by government and enforced by the community. The hierarchy
   of U.S. law is based upon the source from which it flows. The Constitution represents the
   most fundamental law in the United States. Next, legislation or codified laws are
   subordinate to the laws of the Constitution. Finally, executive orders (decrees) and rules
   enacted by regulatory agencies are subordinate to the Constitution. Courts provide a venue
   for disagreements between parties to be resolved civilly without a digression into a state of
   nature.

II. The Common Law Origin of the American Legal System
   Two legal systems have influenced American adjudication: The civil code tradition of
   ancient Rome and the common law tradition found in the English legal system.
   A. The civil code is the legal tradition which envisions a complete and fully articulated
      legal system based on clear statutes which lay out legal principles and commands in
      plain language that citizens can understand and obey.
      1. This type of legal system originated in the Roman Empire.
      2. In the fourth century, the Roman Emperor Justinian established a detailed set of
         laws known as Justinian’s Code.
      3. This legal code formed the basis for ecclesiastical law of the Roman Catholic
         Church.
      4. The civil code also influenced the Napoleonic Code that may be seen in the
         legal systems of France, Thailand, Cambodia, Spain, Germany, and Egypt.
   B. The legal system of the United States is based upon common law or judge-made law
      developed over time as judges consider particular legal disputes and then future
      judges cite earlier decisions in resolving similar issues.
      1. The common law tradition involves an incremental accumulation of court
         decisions which determines precedent or judicial decisions that serve as a guide
         for deciding later cases of a similar nature. Consequently, the principle of stare
         decisis, meaning “let the decision stand,” is the practice of using precedents to
         decide similar cases.
      2. While judges decide court cases based upon precedent, the power of American
         courts is largely undefined in the U.S. Constitution. Yet, the basis of American
         jurisprudence can be seen in the common law tradition of England and the
         early colonial courts.
         a. The common law tradition developed over an extended period of time
            and preserves the rights of individuals against government power.
         b. Common law refers to the proclamation made by the king’s judges that
            were germane to the entire country.
c. The role of the courts to establish acts of Parliament (in America, the Legislature) “null, void or unenforceable” is known as judicial review. The role of the courts to determine the rightness or wrongness of an action or behavior substantially decreased the power of the monarch. The impetus for judicial review is identified with Bonhams’ Case in 1610, in which Sir Edmund Coke, Chief Justice of the King’s Bench, declared the King “could not adjudicate any case.”

II. The Criminal Law and the Civil Law
   A. Criminal law prohibits certain actions and assigns penalties for those who engage in prohibited activities.
      1. Murder, rape, and burglary are examples of actions violating criminal law.
      2. In these aforementioned situations, the government (state) accuses (charges) the individual (accused/defendant) of violating the agreed upon rules (laws) of the community (polis). In turn, violations of criminal law result in fines (including court ordered restitution), imprisonment, or death (in thirty-eight states in America).
   B. Civil law deals with interactions between individuals or organizations.
      1. Examples include contractual disputes, marriage, and family law and buying and selling property.
      2. Violations of civil law often result in monetary recompense.
   C. The text provides a good illustration of the differences between civil and criminal law via the O.J. Simpson saga in the middle 1990s.
      1. Simpson was acquitted (found not guilty) of criminal charges (two counts of murder brought by the state of California) because a jury of his “peers” determined the prosecution (lawyers for the state of California) did not provide evidence proving “beyond a reasonable doubt” (the legal threshold for a guilty verdict [decision]) that he murdered his wife, Nicole, and Ronald Goldman.
      2. However, after being found not guilty of two counts of first-degree murder, Simpson was charged and convicted of “wrongful death” in a civil trial brought by the families of Ron Goldman and Nicole Simpson. The threshold for a guilty verdict in civil cases is much lower than criminal cases. The penalty imposed on Simpson was monetarily based upon damages incurred that were to be paid to the families of the deceased, Nicole and Ron. Incidentally, O.J. Simpson has not paid the families!

III. Cases and the Law
   A. The American legal system is set in motion when two parties are in disagreement. The court acts as the governmental institution in charge of determining the outcome of the dispute.
      There are four conditions for a case:
      1. The Adversary Process
         a. There are two sides to the dispute.
b. Both parties have standing or eligibility to come before a court based upon actual harm.
2. Justiciability meaning that an issue or dispute is appropriate for or subject to judicial resolution.
3. Ripeness addresses questions of timeliness (statute of limitations) and intent (was a party harmed in any way or is there an imminent threat posed to the party or the public based upon the charges brought forward). Consequently, did this action constitute a violation of the law?
4. Disposition: Can the court resolve or otherwise rectify the differences between the parties and dispose of the issue.

IV. The Birth of the American Legal System
In Article III of the U.S. Constitution the federal judiciary is established with the following statement: “The judicial powers of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress from time to time ordain and establish.” Hence, the judicial power is enumerated to the Supreme Court; however, the structure of the federal court system was left to the discretion of Congress. It is important to note that the exact powers and design is not mentioned in the governing document. Yet, the powers of a federal judiciary were explained, albeit theoretically, in Federalist Papers 78–83 (see Lecture Suggestion, Theoretical Focus below). Writing as Publius, Hamilton believed “the courts would act as an intermediate body between the people and the legislature to keep the latter in limits assigned to their authority.” The creation of the federal court system incorporated all three branches of government. The president appointed Justices, the Senate confirmed the appointees, and Congress gave the authority and structure to the “inferior” (lower) federal courts. Nonetheless, it took an active judiciary to define its role and powers in the New Republic.

A. The Judiciary Act of 1789
1. The Judiciary Act of 1789 established the structure and basis for the federal court system. Enacted by the First Congress, the Act:
   a. Designed the Supreme Court to include six Justices.
      1) Two Justices were to sit on one of three circuit courts.
      2) Circuits represented geographic areas and held appellate jurisdiction.
   b. Created a two-tiered federal court system.
   c. Section 25 of the act allowed federal courts to review state decisions and legislation for compatibility with federal statutes.
   d. Established district courts. Each state would have at least one district court, which was essentially a trial court with federal jurisdiction.

B. The Marshall Court (1801–1835)
1. The Federalist, John Marshall, served as Chief Justice for thirty-four years.
2. An ardent nationalist, Marshall was responsible for determining the Court’s role and powers in national government through the decision in Marbury v. Madison (1803) thereby establishing the role of the Court as determining the
constitutionality of congressional acts. This case established SCOTUS’s power of judicial review.

3. The Marshall Court established an expansive interpretation of national supremacy in *McCulloch v. Maryland* (1819) upholding the “necessary and proper” clause (Article I, section 8, of the U.S. Constitution). In turn, state law is subordinate to federal law per Article VI of the U.S. Constitution.

C. Judicial Review

1. Judicial Review
   a. *Judicial review* is the power of any federal court to hold any law or official act based on law to be unenforceable because it is in conflict with the Constitution.
   b. This power is used sparingly, but provides a check on the actions of Congress and the president.

2. Judicial Review of Congressional Legislation
   a. The Supreme Court has only determined (“struck down”) 160 acts of Congress as unconstitutional.
   b. The vast majority of these rulings have come after 1960.

3. Judicial Review of State Legislation
   a. James Madison believed the federal courts were necessary to “review” state laws *before* they were to take effect. Known as the “universal negative,” this idea was rejected by the delegates to the Constitutional Convention of 1787.
   b. Yet, the Supreme Court has declared almost 1,300 state laws unconstitutional since 1790. With the rise of *New Federalism* in the 1970s and 1980s, the Supreme Court has been more reluctant to overturn state laws. However, SCOTUS’s respect for states’ rights depends upon the issue in dispute.

4. Judicial Review of Lower Court Actions
   a. About 66 percent of those cases reviewed by the Supreme Court involve invalidating the rulings of lower federal courts (district courts, appellate courts).
   b. In turn, SCOTUS uses its power of judicial review in discretionary cases quite frequently.

V. The Supreme Court and the Evolution of Individual Rights

With the appointment of Roger Taney as Chief Justice, after John Marshall’s death in 1835, the focus of the Supreme Court changed from an institution promoting property rights to one advancing the broader concerns of the community (except for the *Dred Scott* decision in 1857). After the Civil War, the Republican controlled Congress and a series of Republican presidents radically changed the structure of the federal court system (Justices did not ride circuits, numerous federal judges appointed were politically motivated to support high tariffs and back “hard currency”) and advocated laissez-faire economic policies. In the 1905 *Lochner* case, the Supreme Court determined the right to contract was implicit in the due process clause of the Fourteenth Amendment to the U.S. Constitution.
However, the Great Depression and FDR’s appointment of New Deal Democrats to the Court in the 1930s began to change the nature and role of the Court to take a more active role in regulating the economy. The advent of the Warren Court in the mid-1950s and the Burger Court of the 1970s shifted the Court’s focus to address issues of individual rights and civil liberties. Yet, the pendulum seems to be swinging back to favor a Court whose focus is on protecting property rights and limiting individual freedoms given SCOTUS rulings upholding Congress’s partial birth abortion ban, freedom of speech issues, and rulings against mandating integration in public schools under the leadership of Chief Justice John Roberts.

A. The Taney Court and State’s Rights
1. The Taney Court ushered in a new era for the Supreme Court.
   a. Less emphasis was placed on advancing property rights and federal supremacy.
   b. Under Chief Justice Taney, SCOTUS advanced the rights of the community.
2. In the 1837 decision, Charles River Bridge v. Warren Bridge, the Court limited the expansive property rights precedents decided in the Marshall Court. SCOTUS concluded that any ambiguity within a contract (in this case a lack of protection for a monopoly) should be interpreted to benefit the public interest, asserting the legality of competitors to build a bridge that would provide for the needs of the community.
3. However, the Taney Court is better known for its ruling in the 1857 case, Dred Scott v. Sandford, determining blacks could not be citizens and slaves were property even if they fled to free territories or states that passed laws making slavery illegal. This ruling was the final nail in over 57,000 coffins as any attempt to halt an inevitable civil war among the “free” Northern states and the agrarian Southern states was unlikely.

B. Laissez-faire and Property Rights
1. The post-Civil War Reconstruction era reinvigorated rights of corporate property and national supremacy.
2. The Supreme Court followed suit by declaring that most governmental intervention in the economy violated substantial due process per the newly ratified Fourteenth Amendment. In the 1886 case, Santa Clara County v. Southern Pacific Railroad, the Supreme Court ruled that the word “persons” in the Fourteenth Amendment applied to corporations as well as individuals.
3. Throughout the rest of the nineteenth century and into the early twentieth century, the Supreme Court strengthened property rights while abandoning any protections for individual rights, which freed black slaves desperately needed.

C. Nine Old Men and the Switch In Time
1. When Franklin Roosevelt was elected president in 1932, Republican appointees dominated the Supreme Court (The Four Horseman of the Apocalypse: Butler, Van Devanter, Sutherland, McReynolds). These Justices upheld property rights and bitterly opposed government involvement in economic issues.

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3. In retribution for their opposition, Roosevelt threatened to change the composition of the Court to include Justices that were more “compliant.” This was FDR’s Court packing plan. This did not come to fruition as the Court ruled it unconstitutional.

4. After 1937, the Court rarely intervened (struck down) in cases of federal economic regulation. *Wickard v. Filburn* (1942) extended Article I, section 8: The Commerce Clause, allowing the federal government to regulate those economic activities within a state (intrastate commerce) if they have a substantive impact on interstate commerce. This extended the federal government’s commerce power.


The Court under Earl Warren began an activist phase in the Court’s history. Individual rights were expanded in the areas of criminal law, free speech, civil rights, and due process.


Warren Burger replaced Earl Warren in 1969. Southern democrats and republicans thought that this conservative jurist would overturn several of the Warren Court cases. This did not happen. In fact, in some areas of law, like criminal law, rights were expanded.

F. The Rehnquist Court (1986–2004)

This Court has been more conservative. Several Warren and Burger era court cases have been modified to be supportive of states’ rights. An example is the abortion case of *Webster v. Reproductive Health Services*, which modified *Roe v. Wade*. In addition, the Rehnquist Court ruling in *Bush v. Gore* (2000) signified one of the most unusual political circumstances in American political history in which the Supreme Court played a significant role in determining the winner of the 2000 presidential election.

G. The Roberts Court (2005–present)

The pendulum seems to be swinging back to favor a Court whose focus is on protecting property rights and limiting individual freedoms given SCOTUS rulings upholding Congress’ partial birth abortion ban in April of 2007, freedom of speech issues, and rulings against mandating integration in public schools under the leadership of Chief Justice John Roberts. However, given the even ideological split among the Justices on the Court, Justice Kennedy’s vote is paramount to determine the outcome of many Supreme Court cases.

VI. The Structure of the Federal Judicial System

Article III, section 2, enumerated the structure and powers of the federal judiciary. The federal court system is organized in three layers. The district courts are the trial courts where the majority of federal cases originate. Intermediate or Appeals Courts are in the middle. These courts hear federal criminal and civil cases, cases where the U.S.

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government is a party, and civil cases involving citizens of different states. Finally, the Supreme Court is the superior court. Moreover, federal judges are appointed by the president and confirmed by the Senate. The judges have life tenure yet may be impeached and removed from office if their actions are deemed to be improper or illegal.

A. The Lower Federal Courts

The lower courts of the federal system are the ninety-four U.S. District Courts and thirteen Appellate Courts.

1. District Courts

There are ninety-four district courts with at least one in each state, the District of Columbia and American territories. One judge decides most cases, but a panel of three judges reviews some cases. There are 674 federal court judges including 300 retired judges who continue to hear cases. In 2006, these courts decided 260,000 civil cases and 69,000 criminal cases.

2. Special Courts

Special courts include the U.S. Tax Court, the Court of Military Appeals, Administrative Courts, the U.S. Court of Veteran Appeals and bankruptcy courts. Each court has legislative judges, bankruptcy judges and magistrate judges who assist in pretrial motions and decide minor civil and criminal cases.

B. Courts of Appeals

1. As stated earlier, originally Courts of Appeals were comprised of two judges and one Supreme Court Justice. This was known as riding circuits. This organization was changed in 1891 primarily to decrease the influence of the Southern Democrats who dominated five circuits. Consequently, the Southern circuits were reduced to three.

2. Currently, there are thirteen Appellate Courts (twelve circuits and one appeals court for the trade cases) to review disputed cases from the district courts. These courts heard approximately 67,000 cases in 2006.

3. Every court of appeals has six to twenty-eight judgeships (with the Ninth Circuit being the largest) producing a total of 179 federal appellate judges. Normally, cases are decided by a three-judge panel, however in important cases judges sit “en banc” with all members participating.

4. Appeals are made based strictly upon rulings made and procedures followed in trial courts. Judges on the appellate courts correct errors in district court proceedings. There are no jurors, witnesses or cross-examinations. The proceedings involve judges and lawyers. Appeals are based upon the rulings made and procedures followed. No new facts are admitted into evidence. Thus, when judges interpret laws they modify existing laws; in turn, judges decide and make public policy. Finally, appellate judges establish a great deal of precedent for subsequent court cases.

C. The U.S. Supreme Court

1. The U.S. Supreme Court is the highest court in the American judicial system.
2. In 2005, 8,500 parties petitioned the Supreme Court for review. The Supreme Court decided sixty-nine cases.
3. The Court has both original and appellate jurisdiction.
   a. *Original jurisdiction* of the Supreme Court as enumerated in Article III, section 2, of the Constitution. Original jurisdiction extends to cases affecting Ambassadors, between American citizens and foreign states or individuals, controversies between two states, in cases where the United States is a party and disputes between citizens of two different states.
   b. *Appellate jurisdiction* derives from the Court’s responsibility to review the decisions appealed from the lower courts.
4. The vast majority of cases come by way of a writ of *certiorari* (“cert” requests) or a formal request that the Court review a case.
5. The Court also has complete discretion over its docket through the *Rule of Four* in which four justices must decide to accept the case.
6. The Supreme Court convenes its annual term beginning the first Monday in October and ends its term in May.
   a. Arguments are heard Monday through Wednesday; with justices meeting in conference Thursday and occasionally Friday.
   b. Each case receives one hour for *oral arguments*, which gives lawyers for both sides the opportunity to present legal arguments before the Court (thirty minutes each) with the Justices often interrupting to ask questions.
   c. Prior to oral arguments, the Justices read *legal briefs* or written arguments prepared by lawyers in a case outlining their view of the relevant law and the decision that should be rendered based on the law.
   d. Cases accepted to be reviewed attract attention from other interested parties. These parties often prepare *amicus curiae briefs* or arguments filed with the court by parties interested in a case but not directly involved in it as a contending party. *Amicus curiae* is a Latin term meaning “friend of the court.”
   e. The Supreme Court’s written decision is called an *opinion*.
      1) Different strategies and motivations influence the decision of the Court (see Suggested Lectures, Behavioral Focus below).
      2) *Majority Opinions* constitute the decision of the Court.
      3) The Justices are also free to express disagreement in *Dissenting Opinions* or accept the ruling of the Court but disagree with the Majority Opinion and write a *Concurring Opinion*.
      4) After deliberations, The Supreme Court can:
         (a) *Affirm* or agree to uphold the lower court’s decision.
         (b) *Reverse* or overturn the decision of the lower court.
         (c) *Remand* or send the case back to the lower court for further consideration.

VII. Judicial Nomination and Appointment
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Federal judges are nominated by the president and confirmed by the Senate. Once confirmed, judges hold their position for life “during good behavior.” However, they can be impeached and convicted as any other public officer.

A. Backgrounds of Members of the Federal Judiciary
Nominees have been overwhelmingly white and male. Successful Justices have had extensive experience in legal matters with the vast majority previously working within the federal legal system or other legal professions.

B. The Nomination Process
1. District court judgeships are subject to senatorial courtesy or the expectation that the president will affirm federal district court judgeship appointments with senators of his party from the state in which the judge will serve.
2. Nominees are evaluated by the American Bar Association (ABA) as well as the Justice Department.
3. After the president nominates the candidates, the ABA ranks them.

C. The Confirmation Process
1. Next, nominees are questioned by the Senate Judiciary Committee. This is known as the confirmation hearing in which nominees for federal judicial positions appear before the Senate Judiciary Committee to respond to questions from the members.
2. The committee can either recommend or vote to oppose the nomination.
   a. Confirmation hearings can be intense affairs.
      1) Nominees are careful not to expose ideological preferences.
      2) Senators often suggest preferred policy positions or issues that may come before the Court to “test” the nominee and expose his or her biases.
   b. The candidate may be questioned for several days.
3. If approved by the committee, it goes to a floor vote.
4. Thirty-five of the 145 Supreme Court nominees have not been confirmed.
5. Since 1900, only six of sixty-five nominations have failed.
6. In general, Senators take their voting cues from the recommendation of those on the Senate Judiciary Committee and vote according to the nominee’s qualifications. Yet, there are certain Senators who vote based upon ideological preferences.

VIII. The Disputed Role of the Federal Judiciary
A. Limits on Judicial Activism
The courts lack access to both the purse of the legislative branch and the sword of the executive. There are many limits upon the judiciary from other institutions and through public opinion.
1. Presidential Influence
   Changing the makeup of the courts is a successful limitation. Presidents can also refuse to enforce decisions of the courts.
   a. Andrew Jackson did not enforce the protection of Indian tribes in 1832.
b. Dwight Eisenhower did not support the Court after the 1954 *Brown v. Board of Education* decision in which the Supreme Court declared the racial segregation of public schools unconstitutional.

2. Legislative Reaction and Court Curbing
   a. The legislature controls the budgets, the number of federal judges, their salaries, and the appellate jurisdiction, and it can propose constitutional amendments.
   b. It also has the power to create and abolish federal courts. However, Congress cannot abolish the Supreme Court!

3. Public Sentiment
   a. The Supreme Court is the most popular branch of the federal government with a 78 percent job approval rating based upon several public opinion polls.
   b. In general, the Court’s decisions represent public sentiment. Occasionally, the Court rules contrary to public opinion as in the 1989 case, *Texas v. Johnson*, which dealt with the constitutionality of flag burning. While the public overwhelmingly opposes this action, the Supreme Court has consistently ruled it is a protected form of political speech.
   c. Yet, as Robert McCloskey asserts, the Supreme Court has seldom, if ever, flatly and for very long resisted an unmistakable wave of public sentiment. It is, after all, a political institution.
Lecture Suggestions

Behavioral Focus: Approaches to Studying Judicial Behavior

I. Introduction
There are various approaches to studying the role of the American courts.
A. Inherent to academia, competing paradigms have set out to explain judicial behavior.
B. American jurisprudence has been strengthened by the role political science has played in addressing the role ideological differences, institutional design, historical events, and political actors influence judicial behavior.

II. Approaches to Understanding Judicial Behavior
A. Legal Model (Classical Reasoning Model):
   1. The legal model relies on precedent and fixed rules for adjudication.
   2. The classical reasoning model states court rulings should be based upon objective facts, legal precedents and decided by an impartial jury or judge.
   3. Judges should follow a formula when deciding any case:
      a. Rules of law \( R \) + precedent \( P \) = decision \( D \)
      b. This is known as mechanical jurisprudence whereby court cases are decided in an objective manner promoting clear precedents and following standardized rules. Consequently, judges must consider precedents in deciding future cases.
   3. The legal model is characterized by established rules and procedures:
      a. Objectivity in judges’ decisions.
      b. Legal restraint: Judges should not attempt to make policy.
      c. Precedent dictates the outcome of similar cases.

B. Legal Realism:
   1. Legal realism is the antithesis of the legal model: Turns the legal model “on its head.”
   2. Legal realists recognize informal norms (non-trial negotiations), psychological predispositions of legal actors, sociological factors (non-legal arguments allowed in testimony), and “contested” truths affect court proceedings and the dispensation of trials in the United States.
   3. In this tradition, law is relative to a specific court case.
      a. Justice becomes subjective to the needs of society or parties involved in the particular case.
      b. Legal precedents are subordinate to the concerns of the litigants and beliefs and values of the judges.
   4. The conclusion (decision) drives what facts and procedures will be allowed in the course of the trial.
   5. Thus, the formula may be seen as:
      a. Decision = facts + rules of law + precedent
         1) Stare decisis is downplayed or ignored.
         2) The outcome determines the procedures and rules.
6. Legal realism may be characterized by:
   a. Judicial subjectivity
   b. Judicial activism: Courts are active in policy-making.
   c. Idiosyncratic reasons determining judicial rulings.

C. Critical Legal Studies (an offshoot of legal realism)
1. The legacy of legal realism may be attributed to the advent of European post-
   modernist theory, critical theory, deconstructionist philosophy, post-
   Marxist politics and the social movements of the 1960s and 1970s. These
   counter-culture movements provided an opportunity for political liberals and
   radicals to address economic and social inequalities within the law.
   Subsequently, the critical legal studies (CLS) movement originated at a
   meeting at the University of Wisconsin-Madison in 1977.
2. CLS set out to use the law “as a tool to overturn the hierarchical structure of
   domination” which is inherent to the power relationships in a capitalistic
   society (www.law.cornell.edu/wex/criticallegalstudies).
3. Proponents of CLS:
   a. View the law as perpetuating the current system that is based upon power
      relationships and dominated by males.
   b. Therefore, the legal system is inherently unfair and biased to elites.
   c. Subsequently, one should not look for justice in the current legal
      structure as these power relationships are perpetuated through laws
      schools, which indoctrinate law students to further these oppressive and
      biased procedures and beliefs.
   d. So, proponents of CLS suggest changing the legal system (through
      various strategies) to make it more responsive to everyone.

D. The Attitudinal Model
1. The attitudinal model is developed from the tradition of legal realism.
2. Attitudinalists take into account the psychological, sociological, and
   ideological policy preferences of the judges when deciding cases.
3. In turn, judges are political actors who interject political ideology into
   decisions: Judicial activism! These subjective decisions are influenced by:
   a. ideology
   b. public opinion
   c. political socialization.
4. Leading proponents of the attitudinal model are Harold Spaeth and Jeffrey
   Segal who have developed the Supreme Court Attitudinal Model (SCAM) to
   predict how a judge will “vote” on a given case.
   a. SCAM uses ordinal measurements to compile aggregate votes of each
      justice, based upon ideological constructs (liberal and conservative), to
      determine if they applied their personal policy preferences when
      deciding court cases.
   b. SCAM has successfully predicted 74 percent of the Supreme Court
      decisions since the late 1970s.
1. The strategic model extends the legal realist’s argument that public opinion, institutional legitimacy, and the aspirations of justices as political actors must be considered to accurately study the behaviors of Supreme Court justices.

2. The strategic model advocates judicial behavior is largely subjective.

3. In turn, judges may be appealing to audiences or constituency when ruling on a case.

4. Judges may act to legitimize the role and power of the institution through their rulings.

5. Judges use the facts of a case to further a desirable end, position themselves for future legal battles; therefore, they may not “vote” according to their ideal preference, but make compromises when deciding cases.

F. Historical Institutionalism

1. Historical institutionalists emphasize the role political regimes, as well as the organizations and political actors who comprise the governing institutions, play in the legal system.

2. Institutional approaches allow one to escape the metaphorical black box applied to the procedures and interactions of the Supreme Court to explore to what extent historical events, other branches of government, and political parties affect judicial behavior.

3. Legal scholars and political scientists have examined the interrelation of the three branches of government and their effect on the role and disposition of cases by the Supreme Court.

4. So, to understand judicial behavior, specifically the behavior of Supreme Court Justices, one must consider:
   a. Historical or external events.
   b. Relations with other institutions (Congress, president, bureaucracy, polity).
   c. Judges are political actors who bring ideology into their decisions.
   d. The role the Constitution, federalism, separation of powers, political actors (i.e. the Solicitor General) and the general character of the regime must be considered when exploring what cases are accepted by the Supreme Court and how these cases are decided.

II. Implications for Further Scholarship on Judicial Behavior

A. Empirical and qualitative research methodologies exploring the similarities and differences between courts in America and other countries will only strengthen scholarship on judicial behavior and the judiciary.

B. Thus, comparative approaches to studying courts have become more prominent in academic journals.

Theoretical Focus: Federalist #78

I. Introduction

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A. In *Federalist Papers* #78–83, Publius deals with three facets of the proposed judicial branch:
   1. The mode of appointing federal judges.
   2. The tenure by which they “hold their places” (office).
   3. The partition of the judicial authority among different courts and the other branches of the national government.

B. Hamilton is careful not to address the life-tenure of federal judges along with the mode of appointment because it suggests that the judiciary may be seen as anti-republican. Why?
   1. The people do not elect members of the judiciary.
   2. The president (executive) appoints members (and the executive is indirectly elected by the people via the electoral college).
   3. Senators are elected via the state legislature(s) and are also indirectly elected.

C. Therefore, Hamilton is careful not to “flood” the debate with aristocratic characteristics so as to attempt to persuade those who won’t listen (the Anti-Federalists).

So, what is the duty of the judicial branch and how do we control an “independent” and “un-elected” judiciary?

II. **Mode of Appointment**
   Referring to *Federalist Papers* #76–77, Alexander Hamilton states that appointing federal judges should be considered the same as other appointed federal officials:
   A. Executive nomination.
   B. Senate confirmation.
   C. Hamilton proposes the same process for the judges who will comprise the federal judiciary.

III. **Tenure: Life Terms**
   A. The tenure of federal judges should hold their offices during “good behavior” etc. and if not they can be impeached and tried for their “high crimes and misdemeanors.”
   B. Publius then has to counter the Anti-Federalist concern that an un-elected, life-tenure national judiciary will not compose a tyrannical element or succumb to despotism.
   C. Hamilton believes the duration of life terms ensures impartiality because the judiciary does not control the purse (money) or the sword (military). The judiciary “is the least dangerous branch.”

The Anti-Federalist believed a federal judiciary would threaten the sovereignty of the state courts.

IV. **Judicial Review**

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A. Publius never mentions “judicial review.” In fact, Hamilton refers to *Federalist #22* by quelling fears that the judiciary will not be active in foreign policy issues.

B. Moreover, he points to the lack of judicial power as a shortcoming of the Articles: “Crowns the defects of the [Articles of] Confederation.”

C. Hamilton expounds the need for the judiciary to declare acts of the legislature “void when they conflict with the Constitution” because if there is no final arbitrator then “we must affirm (grant) that the deputy (Legislative Branch) is greater than his principle (the Constitution).”

1. Thus, the rule of law is paramount and the role of the national judiciary is to decide this, i.e. *judicial review*!

2. Consequently, the judicial branch power (will) is to determine what law is and it provides a check on the constitutionality of the other two branches.

3. In turn, reason is the power of the judiciary branch according to Hamilton.

4. Consequently, men of reason are to make judgments, what he calls “moral imperatives.”
Projects, Exercises, and Activities

1. Research concerning administrative courts is minimal. If possible, have students research
administrative law judges and their role in deciding cases concerning bureaucratic policies.
Moreover, how do these judges and the decisions actually formulate public policy? In your
opinion, is this a proper function of courts? What problems does this pose to a democracy
based upon a written Constitution? Does this violate the separation of powers? Why or why
not?

2. Have a federal prosecutor or judge speak to the class and discuss the legal environment and
duties he or she performs. Specifically, does the academic literature capture the reality of
the American judicial system? In addition, how do political actors and non-political actors
(law enforcement) influence court decisions?

3. Have the students sit in on an actual court case at a local courthouse, state court, or federal
district court. Have them observe the interaction between the parties and report their
findings to the class.

4. Ask students to visit Minnesota’s Restorative Justice program
(http://www.doc.state.mn.us/rj/default.htm). Once they have summarized the key points of
the restorative justice system, pose additional questions:
a. What are the merits and drawbacks of restorative justice?
b. Could this model be implemented in federal cases? If so, how? If not, why
not?
c. Consider a prominent court case in your local area, describe how restorative
justice might work in this scenario.
**Additional Resources**

**Supplemental Readings**


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**Websites**

**Common Law**
This site offers publications addressing legal history, philosophy, and theory. Writings from prominent legal scholars are also featured.

**Cornell Law**
This website is a great source for information on Supreme Court cases.

**Finance Law**
Access this site for questions concerning the federal courts, court cases, specific laws, and court transcripts.

**Federal Judicial Center**
This website is sponsored by the Federal Judicial Center.

**U.S. Courts**
This site provides information on the structure of the federal court system, current judges, and Supreme Court justices and is a good source for any questions regarding American jurisprudence. This site also provides access to videos covering various topics related to the federal judiciary, like constitutional interpretation, international law, and retrospectives on
seminal justices as well as Supreme Court cases.

**U.S. Supreme Court**
This site is the main Web page for the U.S. Supreme Court containing its docket, briefs, arguments, judicial calendar, general information, decisions, and a photo gallery. It is a good general reference and one you want to highlight to students doing background research on the Court.

**PBS Supreme Court Series**
This site provides access to a series of videos from a PBS program on the Supreme Court that discusses the evolution of the court from the 1930s through the present day. It is an excellent set of narratives with which to discuss the employment of judicial review in the context of judicial philosophy as well as in the specific instances of seminal cases.