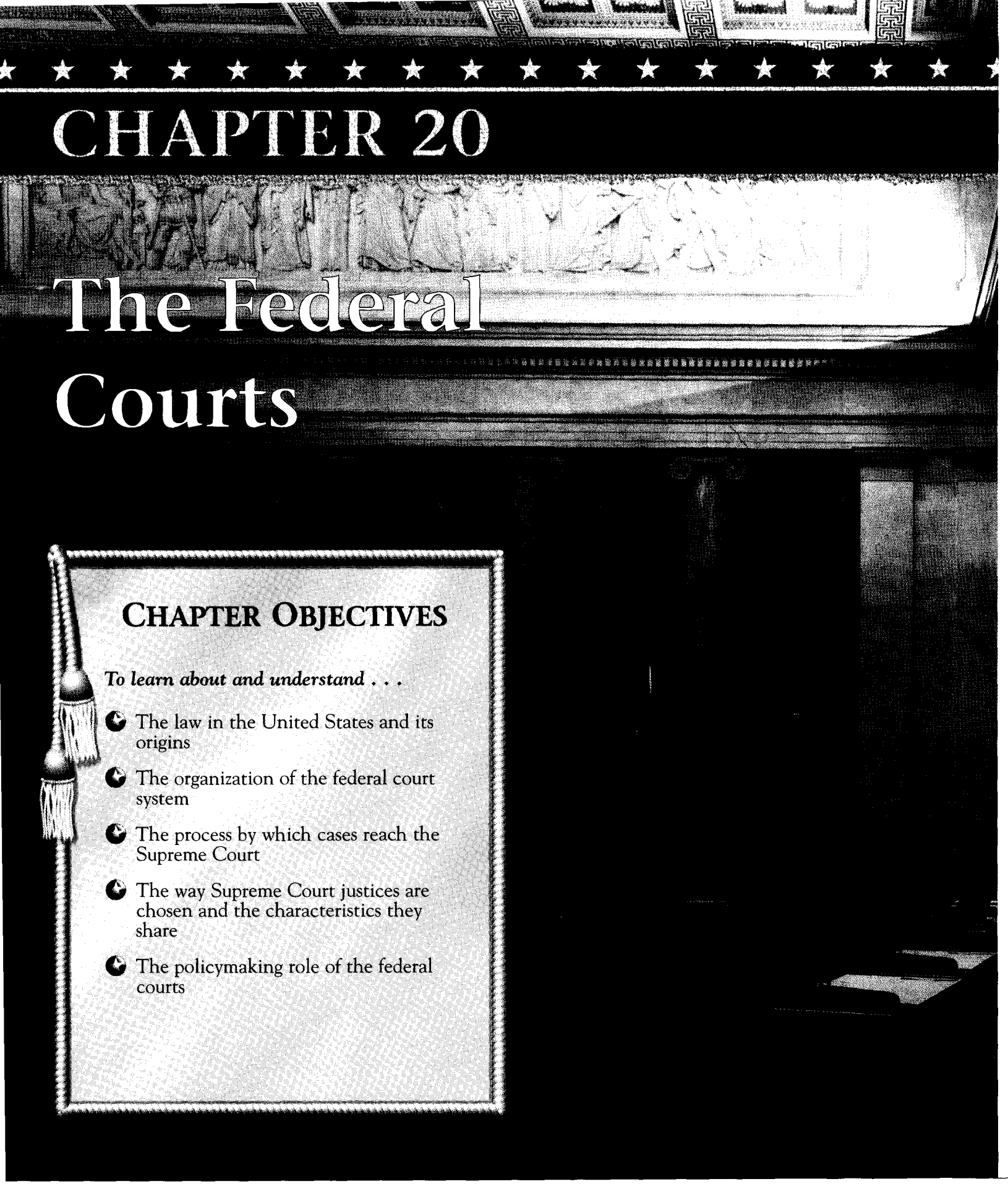
CHAPTER 20

The Federal Courts



CHAPTER OBJECTIVES

To learn about and understand . . .

- The law in the United States and its origins
- The organization of the federal court system
- The process by which cases reach the Supreme Court
- The way Supreme Court justices are chosen and the characteristics they share
- The policymaking role of the federal courts

SECTION 1

Sources of American Law

Preview Questions:

- What is the difference between the common law and statutory law?
- What is constitutional law?
- What is the difference between civil law and criminal law?

Key Terms:

common law, case law, precedent, statutory law, civil law, criminal law

The federal court system was established by the founders in Article III of the Constitution. Section 1 of that article reads as follows:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.*

Congress was thus given the power to control the number and kind of "inferior" courts, which include all courts other than the Supreme Court. Since the Constitution was ratified, Congress has created an extensive network of federal courts.

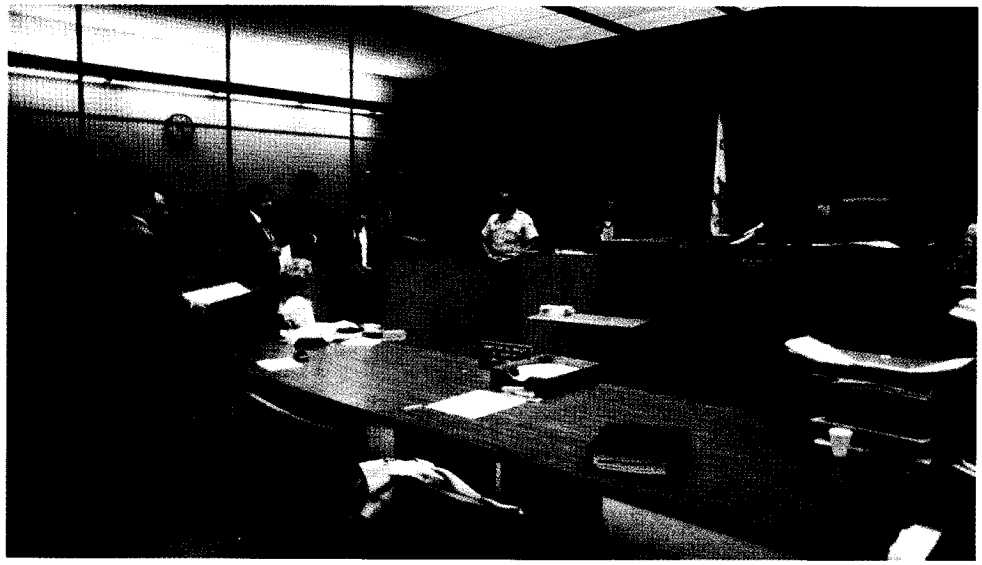
The federal courts interpret not only the Constitution but all federal laws, including acts passed by Congress. When Congress passes a new law, the law necessarily must be phrased in rather broad terms. It is up to the courts to decide how the law should apply to specific situations when disputes arise over the meaning of the law. The federal courts thus play a prominent role in our legal system.

Because of our English heritage, our legal system is similar to that of England. In this section, we look first at the origins and development of the English (and American) common law tradition. We then discuss some basic classifications of law.

Common Law

In 1066, the Normans conquered England, and William the Conqueror and his successors began the process of unifying the country under Norman rule. One of the means they used to do this was the establishment of the king's court, or *curia regis*. Before the Norman conquest, disputes had been settled according to local customs. The king's court sought to establish a

▶ *The American criminal justice system is designed to safeguard the rights of the accused and to punish the guilty. What is the difference between civil and criminal law?*



THE GLOBAL VIEW

Legal Systems in Other Countries

Each country has its own legal system, just as it has its own type of government. Basically, though, most of the world's legal systems fall into two categories: common law systems and civil law systems. England, the United States, and most of the countries that were once colonies of England have common law systems. Civil law systems predominate in Europe and in the Latin American, African, and Asian countries that were colonized by European nations. Japan and South Africa also have civil law systems, and elements of the civil law system are found in the Islamic courts of Muslim countries. In the United States, the state of Louisiana, because of its historical ties to France, has in part a civil law system.

A civil law system is based on Roman civil law, or "code law." The term *civil law,* as used here, does not refer to civil as opposed to criminal law. Rather, it refers to *codified* law—an ordered grouping of legal principles enacted into law by a legislature or governing body. In a civil law system, the primary source of law is a statutory code, and case precedents are not judicially binding, as they normally are in a common law system. Although judges in a civil law system often refer to previous decisions as sources of legal guidance, they are not required to follow precedents.

THINKING GLOBALLY

Would judges be likely to have more power to influence policy in a common law system or a civil law system? Explain.

common, or uniform, set of customs for the whole country. As the number of courts and cases increased, the most important decisions of each year were gathered together and recorded in *Year Books*.

Judges, in settling disputes similar to ones that had been decided before, used the *Year Books* as the basis for their decisions. For cases that were unique, judges had to create new laws. Whenever possible, though, they based their decisions on the general principles suggested by earlier cases.

The body of judicial law that developed under this system is still used today and is known as the **common law**—the law that developed from custom and court decisions in England and the United States.

The common law, then, began centuries ago in England. The English colonists, of course, brought the common law with them to America.

An important part of the common law that has developed in the United States since the American Revolution is the case law that has been decided in our nation over that period. **Case law** consists of rules of law announced in court decisions. It includes all reported court cases that interpret statutes, regulations, and constitutional provisions. These interpretations become part of the official law on the subject and serve as a **precedent,** or an example for future cases.

Constitutional Law

Constitutions are important sources of law. The national government and each state government have constitutions that set forth their general organization, powers, and limits. The U.S. Constitution is the supreme law of the land. A law in violation of the U.S. Constitution, no matter what its source, will be declared unconstitutional and will not be enforced. Similarly, unless it conflicts with the U.S. Constitution, a state constitution is supreme within the state's borders. The U.S. Constitution defines the powers and limitations of the national government. All powers not granted to the national government are retained by the states or by the people.

Statutory Law

Statutes enacted by the U.S. Congress and the various state legislative bodies make up yet another source

of law. This type of law is generally referred to as **statutory law.** Statutory law also includes laws passed by cities and counties, none of which can violate the U.S. Constitution or the relevant state constitutions. Today, legislative bodies and regulatory agencies assume an ever-increasing share of lawmaking. Much of the work of modern courts consists of interpreting what the legislators meant when the law was passed and applying it to a present set of circumstances.

Civil versus Criminal Law

Laws can generally be classified as either civil or criminal. **Civil law** spells out the duties that exist between persons or between citizens and their governments. Law concerning contracts for business transactions, for example, is part of civil law. If you sign a contract to purchase a car on credit, the law governing that transaction is civil law. The object of a civil lawsuit is to obtain compensation (such as money damages) for harms suffered because of another's wrongful action.

Criminal law, in contrast, has to do with wrongs committed against the public as a whole. Criminal acts are prohibited by local, state, or national government statutes. In a criminal case, the government seeks to impose a penalty (fines and/or imprisonment) on a person suspected of having violated a criminal law. When someone robs a convenience store, that person has committed a crime and, if caught and proven guilty, will normally spend time in prison.

SECTION 1 REVIEW

1. What is the common law, and what are the origins of the common law tradition?
2. How does statutory law differ from case law? How does statutory law differ from constitutional law?
3. What are some differences between civil law and criminal law?
4. **For Critical Analysis:** Do traffic laws fall into the category of civil law or criminal law? Explain.

★ ★ ★ ★ ★ **SECTION 2** ★ ★ ★ ★ ★

The Federal Court System

Preview Questions:

- How is the federal court system organized?
- What is the difference between a trial court and an appellate court?
- What does the term *jurisdiction* mean, and in what circumstances can a federal court exercise jurisdiction?

Key Terms:

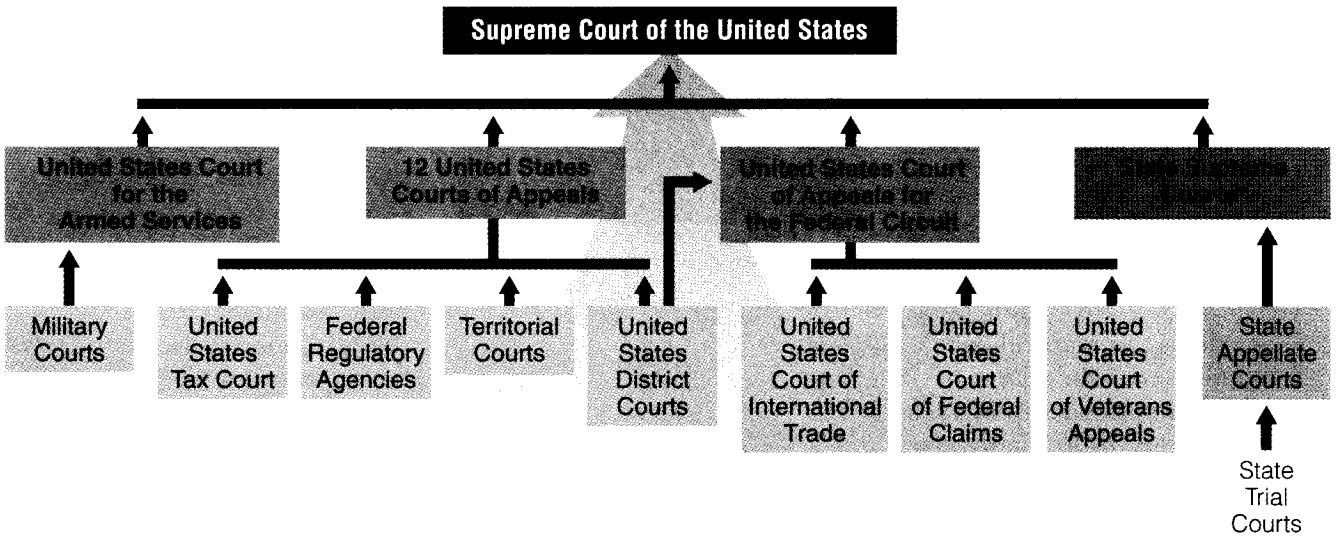
trial courts, appellate court, judicial circuit, jury duty, hung jury, jurisdiction, original jurisdiction, appellate jurisdiction, federal question, diversity of citizenship, concurrent jurisdiction, exclusive jurisdiction

The Structure of the Federal Court System

The federal court system is basically a three-tiered structure that consists of U.S. districts courts, U.S. courts of appeals, and the U.S. Supreme Court. There are also specialized federal courts that handle only certain types of claims, such as tax claims. Figure 20–1 on page 537 shows how the federal court system is organized.

U.S. District Courts On the bottom tier of the federal court system are the U.S. district courts. The district courts are **trial courts.** As the term implies, these are courts in which trials are held. At a trial, each party (or usually, each party's attorney) submits evidence to support its side and to convince the court to rule in its

FIGURE 20–1 The Federal Court System This chart shows the organization of the federal court system. From looking at the table, what do you know about the relationship of the United States Court of Federal Claims to the United States Court of Appeals for the Federal Circuit?



*The state supreme court is usually the court of last resort, but this is not the case in every state. When an issue based on the federal Constitution, a treaty, or a federal statute is involved, it might be possible to take the appeal of a state supreme court decision to the Supreme Court of the United States.

favor. Evidence may take the form of testimony, exhibits, videos, or other demonstrations. After the trial concludes, the jury (if it is a jury trial) decides on the facts of the case—that is, on what conclusion should be reached based on the evidence. If it is not a jury trial, the judge makes this decision.

There is at least one federal district court in every state. The number of districts can vary over time, according to population changes and the size of caseloads. Currently, there are ninety-four judicial districts.

U.S. Courts of Appeals A party who loses his or her case in a district court normally can appeal the decision to a federal court of appeals, or **appellate court.** The U.S. courts of appeals are *intermediate* appellate courts. They are located on the middle tier of the system, between the district courts and the Supreme Court. These courts are also known as circuit courts of appeals because each appellate court is located in a **judicial circuit.** Over time, Congress has established thirteen judicial circuits. The appellate court in each circuit hears appeals from the district courts located within that circuit. Figure 20–2 on page 540 shows the geographical boundaries of the U.S. district courts and the courts of appeals.

Just the Facts

During much of 1997, 100 of the 830 federal judgeships in the United States remained vacant, and 30 of these judgeships had been vacant for more than 18 months.

Unlike the federal district (trial) courts, appellate courts do not hear testimony or examine other evidence. Rather, an appellate court reviews the record of the lower court's proceedings and other records relating to the case to determine whether the lower court made any mistake. Appellate courts are thus *reviewing* courts.

The U.S. Supreme Court The U.S. Supreme Court is the highest level of the three-tiered federal court system. The Supreme Court consists of nine justices, who are nominated by the president and confirmed by the

Serving on a Jury

If you are an American citizen of sound mind and have never committed a serious crime, you may one day be summoned by a state or federal court for **jury duty.** Names of jurors are usually chosen from tax assessor's rolls, lists of registered voters, and driver's license registrations.

In most states, if your name is chosen, the clerk of the court will send you a jury qualification form, which you must fill out and return. You will then receive a summons requiring you to appear in court at a particular time and place. If for some reason you cannot be there, you must explain this to the court. There are few valid reasons for being excused. Being employed is not a valid excuse to be exempted from jury duty. The law protects you from being fired from your job or penalized in any way for the time you spend serving on a jury.

When you appear in court, you may be asked to wait in a room with other prospective jurors until you are called. Then you will be escorted to the courtroom. You will be asked to take an oath that you will answer questions truthfully. Lawyers on both sides, the prosecution and the defense, will ask you questions. If one of the lawyers finds a reason why you may be biased in the case, you will be disqualified by the judge.

If you are accepted to serve on the jury, you will take another oath in court along with the other jurors. Then you will be told when you are to reappear for the trial.

When the trial begins, you must listen carefully to all of the testimony. When both sides have presented their cases, the judge will instruct you about the law to be applied. Then you and the other jurors will be asked to decide the facts of the case.

You and the other jurors will be taken to a private room. You will have the opportunity to share your views about the evidence you have heard. You must listen to the other jurors' views and may try to persuade the others to take your position.

Senate. We will examine the Supreme Court in more detail shortly.

Jurisdiction of the Federal Courts

In Latin, *juris* means "law," and *diction* means "to speak." Thus, *jurisdiction* literally refers to the power "to speak the law." In other words, **jurisdiction** is the authority of a court to decide a certain case. Before any court can hear a case, it must have jurisdiction over the persons, property, or subject matter of the dispute. A court has **original jurisdiction** when it can hear a case for the first time. Trial courts, for example, have original jurisdiction. A court has **appellate jurisdiction** when it functions as a reviewing court. Courts of appeals normally only have appellate jurisdiction.

Each state maintains its own court system, which is separate from the federal court system. Generally, a state court's jurisdiction is limited to the geographical boundaries of the state in which it is located. (See Chapter 24 for a discussion of other situations in which state courts can exercise jurisdiction.)

Because the national government is a government of limited powers, the jurisdiction of the federal courts is also limited. Basically, the federal courts can only decide cases involving federal questions or diversity of citizenship.

▲ *A jury listens attentively as a lawyer makes his point. How are juries selected?*

A jury that cannot agree on a verdict is called a **hung jury.** In that case, either another trial is held with a different jury or the matter is dropped.

Most juries are able to come to a unanimous decision. When all of the jurors agree on the verdict, the jury members will be ushered back into the courtroom. They will announce their decision. This decision is final, and the trial is ended. Generally, the judge thanks the jury and dismisses it.

Serving on a jury can be interesting and educational. It is also an opportunity to participate in our system of equal justice under the law.

TAKING ACTION

1. Stage a mock trial in your class. Choose a prosecuting attorney, a defense attorney, a defendant, a judge, and a jury.
2. Attend a jury trial. Listen to the evidence presented, and determine what your verdict would be if you were on the jury.

Federal Questions Article III, Section 2, of the Constitution states as follows:

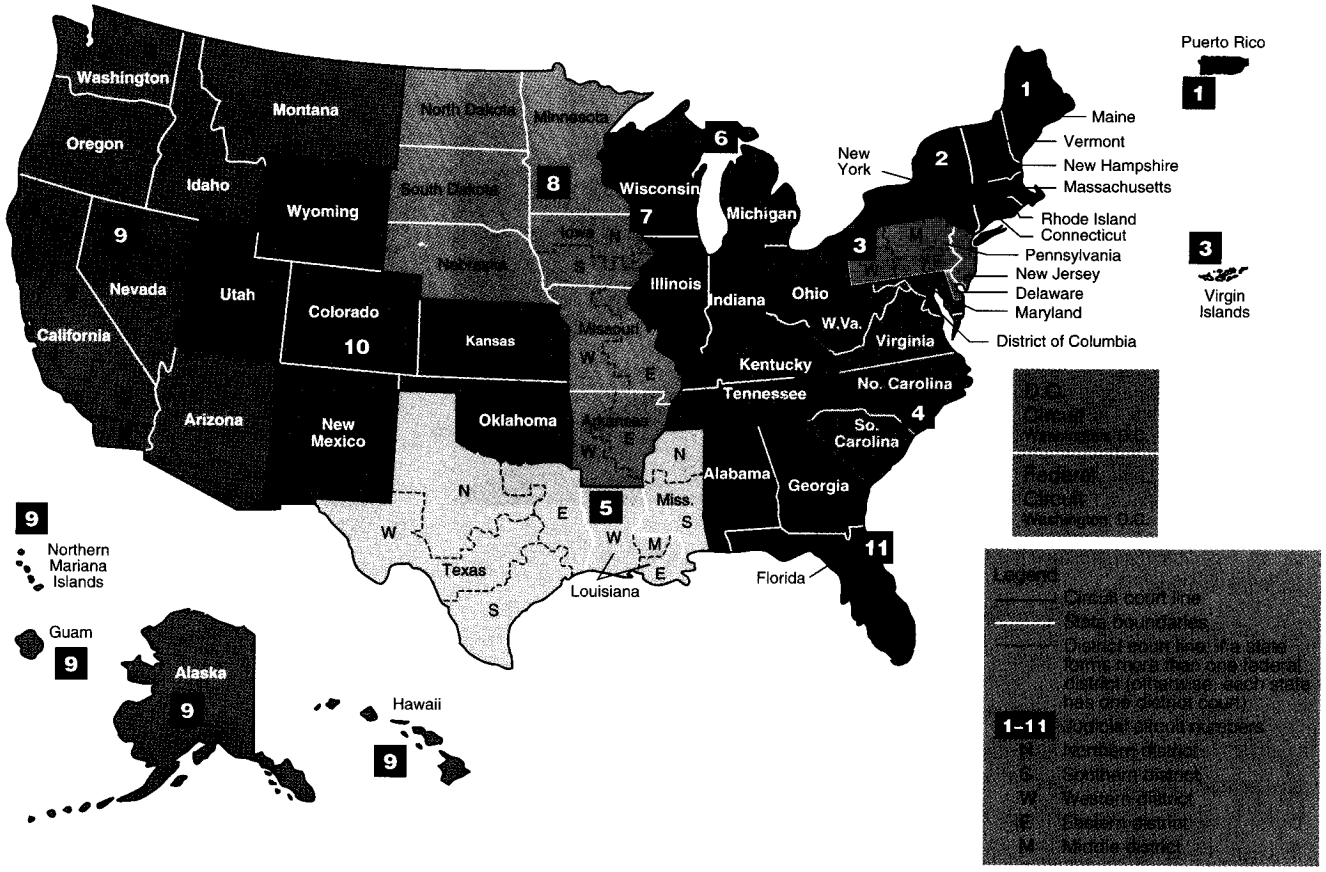
> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.*

Whenever a case involves a claim based on the Constitution, a treaty, or a federal law, a **federal question** arises. Any lawsuit involving a federal question can originate in a federal court. A person who claims that his or her constitutional rights have been violated can bring a lawsuit in a federal court. So can a person who claims that some person or firm has violated his or her rights under a federal law, such as a law protecting employees from discrimination.

Diversity of Citizenship Federal courts can also hear cases involving **diversity of citizenship.** Such cases may arise when the parties in a lawsuit live in different states or when one of the parties is a foreign government or a foreign citizen. Before a federal court can take jurisdiction in a diversity case, however, the amount in controversy must be more than $75,000.

For example, suppose that you are a California resident. While you are traveling in Texas, a car driven by a New York resident crashes into your vehicle. You could sue the New York driver in a federal court on the

FIGURE 20–2 Boundaries of the Judicial Districts and Circuits The map shows the U.S. district courts and the U.S. courts of appeals, or circuit courts. How many judicial circuits make up the U.S. circuit courts?



basis of diversity jurisdiction—*if* the harms you sustained were valued at more than $75,000. Otherwise, the suit normally must be brought in a state court.

Concurrent and Exclusive Jurisdiction When both federal and state courts have the power to hear a case, as is true in suits involving diversity of citizenship, **concurrent jurisdiction** exists. **Exclusive jurisdiction,** in contrast, exists when a case can be tried only in a state court or only in a federal court. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights. Federal courts also have exclusive jurisdiction in certain other circumstances, such as in suits against the United States. States have exclusive jurisdiction in such areas as divorce and adoptions.

SECTION 2 REVIEW

1. Describe the basic structure and organization of the federal court system.
2. What is the constitutional basis of the federal court system?
3. What is jurisdiction? Over what kinds of cases can the federal courts exercise jurisdiction?
4. **For Critical Analysis:** If you are involved in an auto accident in another state, you may have to undergo a trial in that state. You might prefer to bring your suit in a federal court located nearer to your home. But unless the amount in controversy is over $75,000, you cannot ask for a federal trial. Is this fair? Why or why not?

SECTION 3

The Supreme Court

Preview Questions:

- What is a writ of *certiorari*, and in what situations may the Supreme Court issue one?
- What are the four types of opinions issued by the Supreme Court?
- What procedures are followed by the Supreme Court in performing its work?

Key Terms:

writ of *certiorari*, oral arguments, opinion, unanimous opinion, majority opinion, concurring opinion, dissenting opinion

Because of its importance in the federal court system, the United States Supreme Court deserves special attention. Here we look at how cases reach the Supreme Court, how the decisions of the Court are put into written form, and how the Court performs its work.

How Cases Reach the Supreme Court

Many people are surprised to learn that there is no absolute right of appeal to the United States Supreme Court. The Supreme Court is given original

▲ *In 1998, the justices of the U.S. Supreme Court included (seated, left to right) Antonin Scalia, John Paul Stevens, Chief Justice William Rehnquist, Sandra Day O'Connor, and Anthony Kennedy; (standing, left to right) Ruth Bader Ginsburg, David H. Souter, Clarence Thomas, and Stephen Breyer.*

CASE STUDY

Government in Action

Students and the First Amendment

In May 1983, Robert Reynolds, the principal of Hazelwood East High School, near St. Louis, Missouri, ordered that two articles scheduled to appear in the school-sponsored student newspaper, the *Spectrum*, be deleted. One article dealt with student pregnancy. The other discussed the effects of parents' divorces on Hazelwood High students. The principal argued that the articles didn't properly protect student identities and dealt with subjects not suitable for younger students. He also asserted his right to censor the paper.

Three students working on the paper sued the school district, arguing that their First Amendment right to freedom of expression had been violated. The U.S. District Court for the Eastern District of Missouri decided that the students' First Amendment rights had not been violated. The court held that school officials may restrain students' speech when this seems "reasonable" and when it is related directly to a school activity.

The case was appealed. The U.S. Court of Appeals for the Eighth Circuit disagreed with the district court judge's decision. The appellate court held that the newspaper was a public forum because it was intended as a "conduit for student viewpoint" and

◀ *After her high-school principal refused to allow several controversial articles to appear in the student newspaper,* Spectrum, *editor Cathy Kuhlmeier took her case to court. What law did Kuhlmeier claim her school district had violated?*

jurisdiction in a small number of situations. In all others, it acts as an appeals court. Thousands of cases are filed with the Supreme Court each year. On average, though—at least in recent years—it hears fewer than one hundred cases each year.

To bring a case before the Supreme Court, a party must request the Court to issue a writ of *certiorari*. A **writ of *certiorari*** [pronounced sur-shee-uh-*rah*-ree] is an order sent by the Supreme Court to a lower court requesting the record of the case in question. Parties can petition the Supreme Court to issue a writ of *certiorari*, but whether the Court will do so is entirely within its discretion. In no instance is the Court required to issue a writ of *certiorari*.

Most petitions for writs of *certiorari* are, in fact, denied. A denial is not a decision on the merits of a case, nor is it an indication of agreement with a lower court's opinion. The Court will not issue a writ unless at least four justices approve of it. This is called the "rule of four."

Typically, the Court grants writs only in cases that raise important policy issues that need to be addressed.

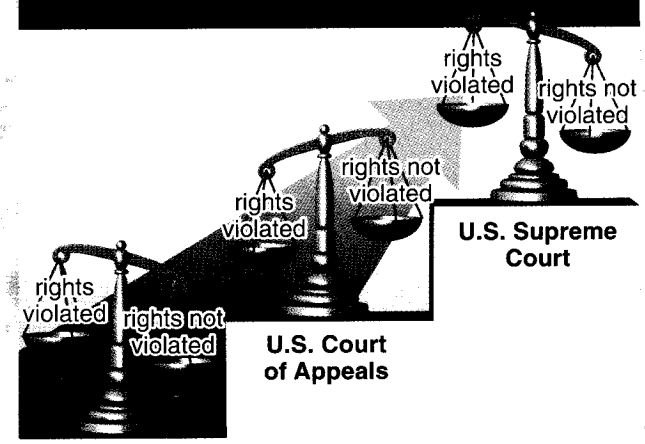
that school officials were entitled to censor only if the publication could have resulted in a lawsuit.

In January 1988, the United States Supreme Court, in *Hazelwood School District v. Cathy Kuhlmeier*, reversed the lower court's ruling by a vote of five to three. Justice Byron White, writing for the majority, argued that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." The majority also noted that students' rights "are not automatically coextensive with the rights of adults in other settings."

In his dissent, Justice William Brennan (joined by Justices Thurgood Marshall and Harry Blackmun) said that the decision might make public schools into "enclaves of totalitarianism."

This Supreme Court decision prompted several state legislatures to consider writing specific state laws to spell out students' rights and, in some cases, to grant student publications specific privileges against censorship.

Hazelwood School District v. Cathy Kuhlmeier The figure below shows the decision of each court that heard *Hazelwood School District v. Cathy Kuhlmeier.* The scales of justice indicate which side of the dispute outweighed the other in the eyes of each court involved.



THINK ABOUT IT

1. Do you think that the principal's action violated the student-editors' rights?
2. To what extent does a school principal have the obligation to prevent students from publishing material that may be offensive to other students or harmful to school policy?

For example, in a recent term, the Court heard a case involving the pressing issue of whether the constitutional right to privacy includes a right to commit assisted suicide. It also heard a case concerning indecent speech on the Internet and whether a law passed by Congress to curb such speech violated the right to free speech. Also, if the lower federal courts are issuing conflicting opinions on an important issue, the Supreme Court may review a case involving that issue to define the law on the matter. It is in this way that current legal issues undergo constitutional scrutiny.

Decisions and Opinions

The Supreme Court normally does not hear any evidence. As mentioned, this is generally true in all appellate courts. The Court's decision is based on the written records of a case. The attorneys, however, can present **oral arguments**—arguments presented in person rather than on paper. The case is then privately examined by the justices.

After reaching a decision, the Court writes an opinion. The **opinion** sets forth the Court's reasons for its

▶ *When the Supreme Court reaches a decision, final opinions are quickly printed and handed to the press by the Supreme Court's public information officer. As shown here, members of the press eagerly wait to receive and then to read their copies of the decisions. Supreme Court opinions are also published almost immediately on the Internet.*

decision, the rules of law that apply, and the judgment. There are four types of written opinions. When all of the justices agree on an opinion, the opinion is written for the entire Court and can be deemed a **unanimous opinion.** When there is not a unanimous opinion, a **majority opinion** is written. This opinion outlines the views of the majority of the justices involved in the case. Often, a justice who feels strongly about making or emphasizing a particular point that was not made or emphasized in the majority opinion writes a **concurring opinion.** The justice writing the concurring opinion concurs (agrees) with the conclusion given in the majority opinion but for reasons that are different from those stated in the majority opinion. Finally, dissenting opinions are usually written by justices who did not agree with the majority. The **dissenting opinion** is important because it often forms the basis of arguments used years later that cause the Court to reverse the previous decision and establish a new precedent.

The Supreme Court at Work

The Supreme Court begins its regular annual term on the first Monday in October and usually adjourns in late June or early July of the following year. Special sessions may be held after the regular term is over, but only a few cases are decided in this way. More commonly, cases not heard in one term are carried into the next term.

Cases that are appealed to the Court are scheduled for oral argument or denied a hearing in a written "orders list." Orders lists are released on Mondays. Generally, arguments are heard during seven two-week sessions scattered from October to April or May. The justices hear oral arguments on Monday, Tuesday, Wednesday, and sometimes Thursday. Recesses are held between periods of oral arguments to allow the justices to consider the cases and handle other Court business. Oral arguments run from 10 A.M. to noon and again from 1 to 3 P.M., with thirty minutes allowed for each side's argument, unless special exceptions are granted. All statements and the justices' questions are tape-recorded during these sessions. Lawyers addressing the Supreme Court can be questioned by the justices at any time during oral argument, a practice not followed in most courts.

Each Wednesday and Friday during the annual Court term, the justices meet in conference to discuss cases under consideration and to decide which new appeals and petitions the Court will accept. These conferences take place in an oak-paneled chamber and are strictly private—no secretaries, tape recorders, or video cameras are allowed.

When each conference is over, the chief justice, if in the majority, will assign the writing of opinions. When the chief justice is not in the majority, the most senior justice in the majority assigns the writing.

After the necessary editing and the publication of preliminary prints, the official Court decision is placed in the *United States Reports*, the official record of the Court's decisions, which is available in many libraries. The decisions are also printed in West Publishing Company's *Supreme Court Reporter*, which is available about a year sooner. Additionally, Supreme Court decisions are now released immediately for online publication. You can access these decisions at **www.ssctplus.com/online/index.htm**.

SECTION 3 REVIEW

1. Explain writ of *certiorari* and how it is used.
2. What is an opinion of the Court? What four types of opinions may the court issue?
3. **For Critical Analysis:** As noted, no one has the unconditional right to have his or her case heard before the Supreme Court. Do you think this means that our judicial system is flawed? Why or why not?

SECTION 4

Supreme Court Appointments and Ideology

Preview Questions:

- How are Supreme Court justices appointed?
- Once appointed, how long does a Supreme Court justice remain in office?
- How are federal judges paid?
- What characteristics do most Supreme Court justices share?
- Are the judges nominated by the president always confirmed by the Senate?

All federal judges, including the justices of the Supreme Court, are appointed. (In contrast, state court judges are often elected.) Article II, Section 2, of the Constitution authorizes the president to appoint the justices of the Supreme Court with the advice and consent of the Senate. Laws passed by Congress provide that the same procedure be used for appointing judges to the lower federal courts as well.

According to Article III, Section 1, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." This means that, in effect, Supreme Court justices—and all federal judges—are appointed for life. Federal judges who engage in clearly illegal conduct, such as bribery, may be removed from office through impeachment, but this rarely occurs. Normally, federal judges serve in their positions until they resign, retire, or die.

Article III, Section 1, also states that judges "shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." In other words, federal judges, while in office, cannot have their salaries lowered. Congress determines the salaries for the judges of the federal court system, including the salaries of the justices of the Supreme Court. Current salaries are shown in Figure 20–3 on page 546. In addition, federal judges receive retirement benefits.

Just the Facts

Six of the nine current Supreme Court justices reported assets of around $1 million on recent financial disclosure forms.

Who Becomes a Supreme Court Justice?

Although the Constitution sets no specific qualifications for those who serve on the Supreme Court, all who

have served share certain characteristics. The make-up of the federal judiciary is far from typical of the American public. Figure 20–4 summarizes the backgrounds of all of the 108 Supreme Court justices to 1998.

As you can see in this table, the majority of the justices were in private legal practice or state or federal judgeships at the time of their appointment. Most justices were in their fifties when they assumed office, although two were as young as thirty-two and one as old as sixty-six. The average age of newly sworn justices is about fifty-three. In general, the justices have belonged to the same political parties as the presidents who appointed them.

Just the Facts

George Washington appointed more Supreme Court justices (ten) than any other president.

Note that the great majority of justices have had a college education. By and large, those who did not attend college or receive a degree lived in the late eighteenth and early nineteenth centuries, when a college education was much less common than it is today. In recent years, justices have typically had degrees from such prestigious institutions as Yale, Harvard, and Columbia.

The religious background of Supreme Court justices is strikingly atypical of that of the American population as a whole, even making allowances for changes over time in the religious composition of the nation.

ARCHITECTS of Government

Ruth Bader Ginsburg (1933–)

A native of Brooklyn, New York, Ruth Bader Ginsburg attended Cornell University as well as Harvard and Columbia Law School. She taught law at Columbia, Rutgers, and Stanford, among others. On August 10, 1993, she became the second woman to serve on the United States Supreme Court.

HER WORDS

"A prime part of the history of our Constitution is the story of the extension of constitutional rights and protections to help people once ignored or excluded."

(From the decision in United States v. Virginia, *June 26, 1996)*

"[A] sovereign may tax the entire income of its residents."

(From the decision in Oklahoma Tax Commission v. Chickasaw Nation, *June 14, 1995)*

DEVELOPING CRITICAL THINKING SKILLS

1. In the first quotation, to what "history" was Justice Ginsburg referring?
2. What does the word *sovereign* mean in the second quotation?

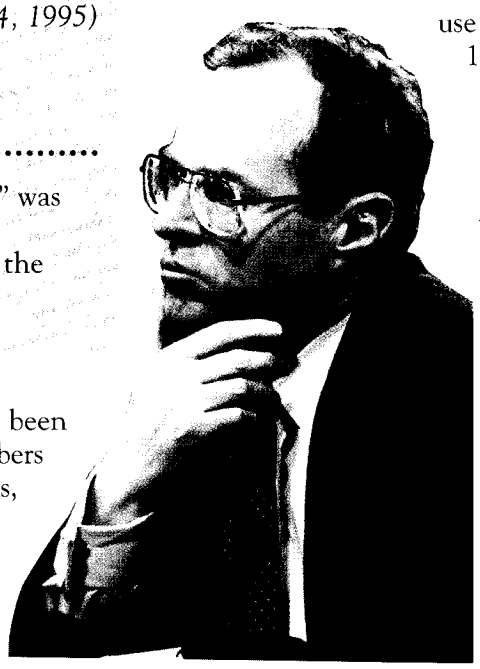
Ideology and Judicial Appointments

The power to nominate Supreme Court justices belongs solely to the president. This is not to say, however, that the president's nominations are always confirmed. In fact, almost 20 percent of presidential nominations to the Supreme Court have been either rejected or not acted upon by the Senate. Many bitter battles over Supreme Court appointments have occurred when the Senate and the president have not seen eye to eye about political matters.

From the beginning of Andrew Jackson's presidency in 1829 to the end of Ulysses S. Grant's presidency in 1877, the U.S. Senate often refused to confirm the president's judicial nominations. During the long period from 1893 until 1968, the Senate rejected only three Court nominees. From 1968 through 1986, however, there were two rejections of presidential nominees to the highest court. These persons had been nominated by President Richard Nixon.

President Ronald Reagan had two of his nominees for a Supreme Court vacancy rejected by the Senate. Both were then judges in the courts of appeals. In 1987, he nominated Robert Bork, who faced sometimes hostile questioning by the Senate on his views of the Constitution. Next, Reagan nominated Douglas Ginsburg. Ginsburg ultimately withdrew his nomination when the press leaked information about his alleged use of marijuana during the 1970s. Finally, the Senate approved Reagan's third choice, Anthony Kennedy.

President George Bush nominated two justices to the Supreme Court—David Souter and Clarence Thomas. Both were confirmed. In 1993, the Senate confirmed President Bill Clinton's nomination



◀ *Supreme Court nominee Anthony Kennedy appears before the Senate Judicial Committee on the first day of his confirmation hearing. Who nominates individuals to serve on the Supreme Court?*

Catholics, Baptists, and Lutherans have been underrepresented compared with their numbers in the population as a whole. Episcopalians, Presbyterians, and Methodists have been overrepresented among the justices, as have Unitarians. Typically, there have been one Catholic justice and one Jewish justice on the Court.

of Ruth Bader Ginsburg, who became the second woman to sit on the Supreme Court (the first was Sandra Day O'Connor, who was appointed by President Reagan in 1981). In 1994, Clinton nominated Stephen Breyer, who was also confirmed without significant opposition.

Ideology plays an important role in the president's choices for the Supreme Court. It also plays a large role in whether or not the Senate confirms those choices. Political party affiliation is an important part of ideology where presidential appointments are concerned. In the long history of the U.S. Supreme Court, fewer than 14 percent of the justices nominated by a president have been from an opposing political party.

SECTION 4 REVIEW

1. Name some common characteristics of the people who have served on the Supreme Court.
2. Why might the Senate reject a presidential nomination for the Supreme Court?
3. **For Critical Analysis:** If Supreme Court justices are supposed to make decisions that are free from political bias, why has the Senate confirmation of justices become such an ideological battle?

★ ★ ★ ★ ★ SECTION 5 ★ ★ ★ ★ ★

The Federal Courts as Policymakers

Preview Questions:

- How do the courts make policy?
- What is the power of judicial review, and why is this power significant with respect to policymaking?
- What is judicial activism? What is judicial restraint?
- What checks the power of the federal courts?

Key Terms:

judicial review, judicial activism, judicial restraint

The framers probably expected the Supreme Court to play an important role in the national government. Yet they surely did not expect the federal courts to play such a large role in public policymaking. Indeed, in *Federalist Paper* Number 78, Alexander Hamilton stated that "the judiciary is beyond comparison the weakest of the three departments of power." Certainly, during its first decade, the Supreme Court handled few important matters. In 1800, John Jay refused to serve a second term as chief justice. He explained why in a letter to President John Adams:

> *I left the [Supreme Court] perfectly convinced that under a system so defective it [the Court] could not obtain the energy, weight, and dignity which are essential to its affording due support to the national government; nor acquire the public confidence and respect which, as a last resort of the justice of a nation, it should possess.*

Clearly, things have changed since then. Today, the courts play a significant policymaking role in government.

How Do the Courts Make Policy?

The function of the courts, of course, is to interpret and apply the law, not to make the laws—that is what the legislative branch of government does. Yet judges do make law. At times, this is unavoidable. For example, sometimes courts hear cases that are not covered by any law that currently exists. This may happen when new technology, such as the Internet, leads to disputes that are not covered by existing law. In such cases, a Supreme Court decision may become the law until Congress passes legislation to cover the matter. Perhaps the most important policymaking tool of the courts, however, is the power of judicial review. This is particularly true of the Supreme Court.

Judicial review is the process by which a court determines whether or not a law is contrary to the mandates of the Constitution. The courts have the

authority and power to determine whether a particular law violates the Constitution.

The Constitution did not specifically provide for judicial review. Most constitutional scholars, however, believe that the framers intended the federal courts to have this power. In *Federalist Paper* Number 78, for example, Alexander Hamilton stressed the importance of the "complete independence" of federal judges and their special duty to "invalidate all acts contrary to the manifest tenor of the Constitution." Hamilton thought that without judicial review, there would be nothing to ensure that the other branches of government stayed within their constitutional limits when exercising their powers.

Chief Justice John Marshall shared these views. In 1803, Marshall claimed this power for the Courts. In *Marbury v. Madison*, Marshall wrote the following words:

> *It is emphatically the province and duty of the Judicial Department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . So if the law be in opposition to the Constitution . . . [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.*

With these words, Marshall established the power of the federal courts to determine whether a law passed by Congress violates the Constitution.

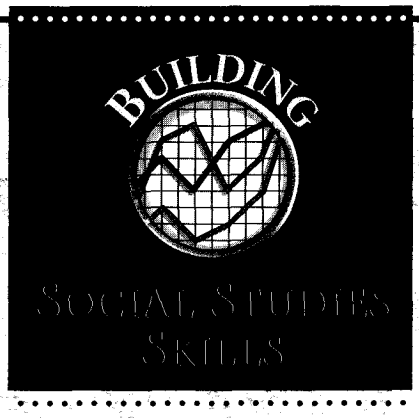
Judicial Activism and Judicial Restraint

Judicial scholars like to characterize Supreme Court justices as being either activist or restraintist. Justices who practice **judicial activism** believe that the Court should use its power of judicial review to alter the direction of the activities of Congress, state legislatures, and administrative agencies, such as the Federal Trade Commission. Justices who practice **judicial restraint** believe that the Court should only rarely use its powers of judicial review. In other words, decisions made by popularly elected legislators should not be changed by the Supreme Court, so long as the legislative actions are clearly not unconstitutional.

Just the Facts

The Liberty Bell cracked when it was rung at the funeral of John Marshall in 1835.

◀ *As government steps in to rescue a nation suffering from the effects of the Great Depression, the resulting increase in federal powers appears to make this 1930s cartoonist nervous. Do you think the man in the cartoon represents business interests or the common person?*



Distinguishing between Fact and Opinion

When investigating issues, it is important to distinguish between statements of fact and statements of opinion. It is also important to recognize that statements of fact that appear to be true may be based on inaccurate or false information. A *fact* is a statement that can be proved by evidence, such as records, documents, and unbiased historical sources. An *opinion* contains value-based statements that cannot be proved.

Consider the following statement: "The State Endowment for Humanities provides state funds to artists and writers." This statement is factual because it can be easily verified by state government records. Now consider this statement: "The State Endowment for Humanities funds ugly art." Whether or not the art is ugly is an opinion based on personal values. It cannot be proved with facts and leaves room for disagreement.

Use these guidelines when distinguishing between fact and opinion:

- Ask yourself what idea the writer or speaker wants you to accept.
- Pinpoint the statements being used to communicate or support the idea.
- Ask yourself if and how these statements can be verified or proved.

Practicing Your Skills

Find a copy of a speech made by a politician. (Look in *Vital Speeches of the Day*, which you can find in your school or local library or on the Internet. You can also find excerpts from speeches in the *New York Times*.) Read at least two pages of the speech. Make a list of statements of fact and statements of opinion, and tell why you identified each statement as you did. Finally, explain why you agree or disagree with the view presented.

Judicial activism can take either a liberal or a conservative direction. In the early 1930s, for example, the Supreme Court was activist and conservative, ruling that extensive regulation of business was unconstitutional. In the 1950s and 1960s, the Court was activist and liberal. Many of the Court's critics believed it should exercise more restraint. They criticized the 1954 *Brown v. Board of Education of Topeka* decision (see Chapter 7) on the grounds that the highest court settled a problem of school racial segregation that should have been resolved by Congress or left to the states.

In the 1980s and 1990s, the pendulum seemed to swing again in the other direction. Some contend that the Supreme Court of the 1990s was an activist conservative Court, especially with respect to issues concerning states' rights. In *United States v. Lopez* (1995), for example, the Court ruled that Congress had exceeded its constitutional authority under the commerce clause when it passed the Gun-Free School Zones Act in 1990. This was the first time in sixty years that the Supreme Court had limited the national government's regulatory authority under the commerce clause.

In several later cases, the Court similarly placed limits on Congress's powers. In *City of Boerne v. Flores* (1997), for example, the Court declared that Congress had exceeded its power when it passed the Religious Freedom Restoration Act of 1993. In *Printz v. United States* (1997), the Court ruled that certain sections of the Brady Handgun Violence Prevention Act of 1993 unconstitutionally burdened state governments.

Today's courts are sometimes referred to as "mini-legislatures" because of their policymaking powers. The power of the federal courts to shape law is not limited to the Supreme Court. In particular, the federal appellate courts exercise a good deal of policymaking power

How the Supreme Court Applies the Constitution

The Supreme Court of the 1950s and 1960s took a different view of what the Constitution means than the Supreme Court of the 1990s.

THEN (1950s–1960s)	NOW
The Supreme Court decided around 150 cases per year.	The Supreme Court decides between 75 and 90 cases per year.
The Supreme Court exercised judicial activism to promote civil rights.	The Court is more restrained with respect to civil rights and criminal procedures but more activist with respect to states' rights.
Virtually all affirmative action programs were considered constitutional.	Some affirmative action programs are subject to strict scrutiny, and many have been held to violate the equal protection clause.

because their decisions are often final. Unless the Supreme Court overturns an appellate court's decision, the appellate court's decision becomes the law in that judicial circuit. As discussed in Section 3 of this chapter, the Supreme Court does not—and cannot—review all appellate court decisions.

Critics contend that the powers of the federal courts should be checked. Currently, there is a movement in Congress to rein in the power of the federal courts, particularly judicial activism. Others, however, believe that there are already enough checks on the power of the courts.

What Checks Our Courts?

Our judicial system is probably the most independent in the world. But the courts do not have absolute independence, for they are part of the political process. Political checks limit the extent to which courts can exercise judicial review and make activist changes. These checks are exercised by the legislature, the executive branch, other courts, and the public.

◀ *The Supreme Court made headlines with the* Dred Scott *decision of 1857, which outraged many Americans in the North. What checks exist to limit the power of the highest court in the land?*

Legislative Checks Courts may make rulings, but often the funds to carry out those rulings must be appropriated by legislatures at the local, state, and federal levels. When such funds are not appropriated, the courts in effect have been checked. A court, for example, may decide that prison conditions must be

The Rights of the Accused

The rights of persons accused of crimes have been expanded by Supreme Court decisions, particularly in the 1960s. For example, in 1963 the Court ruled that criminal defendants have the right to an attorney, even if the government must pay the attorney's fees. In 1966, the Court held that all suspects in criminal cases have the right to be informed of their constitutional rights, including the right to be silent. This is known as the *Miranda* ruling. In 1968, the Court granted the right to a jury trial in all criminal cases in which the penalty for conviction is more than six months' imprisonment.

Some believe that the Supreme Court has gone too far in defending the constitutional rights of the accused. Has it?

Yes, the Supreme Court Has Gone Too Far, Say Some

Those who believe that the Supreme Court has gone too far in protecting the rights of the accused point out that the increase in crime in the United States since World War II has paralleled the increase in the rights of the accused. They argue that protecting these rights ties the hands of the police and public prosecutors, thereby reducing the effectiveness of the government's war against crime.

Furthermore, they argue that because the rights of the accused have been so well publicized, actual and potential criminals are aware of their ability to get off on a "technicality" (such as a procedural error). Thus, they are on the watch for any improper action on the part of law enforcement personnel. Consequently, the expected punishment of those committing crimes has fallen, leading to more crime.

No, the Supreme Court Has Not Gone Too Far, Say Others

Others argue that the Supreme Court has not gone too far in protecting the rights of accused persons. In fact, claim these people, Court decisions during the 1980s have threatened the rights of the accused, particularly under the exclusionary rule. (Remember from Chapter 6 that under this rule, any evidence obtained illegally—such as without a search warrant if one is required—will not be admitted at trial.) For example, in an important case in 1984, *United States v. Leon,* the Supreme Court allowed a conviction to stand even though a judge had issued a warrant without firmly establishing probable cause. In this case, the Court created the *good faith exception* to the exclusionary rule. As long as the police are acting in good faith, they may not have violated the rights of the accused.

improved, but if a legislature does not find the funds to carry out the ruling, the decision has little effect.

Court rulings can also be overturned by constitutional amendments at both the federal and state levels. Many amendments to the U.S. Constitution check the state courts' ability to allow discrimination, for example. Recently, however, proposals to amend the Constitution in order to reverse court decisions on school prayer, flag burning, and abortion have failed.

Finally, legislatures can pass new laws that overturn court rulings. This may happen when a court interprets a statute in a way that Congress did not intend. The legislature can pass a new statute to counter the court's ruling.

Executive Checks The president has the power to change the direction of the Supreme Court and the federal judiciary by appointing new justices and judges whose ideologies are more in line with those of the current administration. Furthermore, a president,

◀ *A police sergeant guards the intersection near a private residence in Detroit after three officers were shot and hospitalized during an attempted search for illegal narcotics. In an effort to obtain evidence legally, the officers had brought a search warrant, issued by the judge after they had firmly established probable cause. One person in the house came out firing a gun. Were the gunman's rights being violated?*

Additionally, the Supreme Court has slowly eroded the *Miranda* ruling. Today, confessions are admissible even without clear evidence that they were voluntary. Confessions by criminal suspects who have not been fully informed of their legal rights may be taken into consideration. The Court has also ruled that when "public safety" requires action, police can question a suspect before advising that person of his or her right to remain silent.

YOU DECIDE

1. In your opinion, has the Supreme Court gone too far in protecting the rights of accused persons?
2. Who would suffer the most if the Supreme Court were to reverse the decisions of previous Courts with respect to the rights of the accused?

governor, or mayor can refuse to enforce a court's rulings. As President Andrew Jackson once said, in response to a ruling by Chief Justice Marshall concerning Native Americans, "John Marshall has made his decision. Now let him enforce it."

The Rest of the Judiciary Higher courts can reverse the decisions of lower courts, but lower courts can also put a check on higher courts. The Supreme Court, for example, cannot possibly hear all of the cases that go through the lower courts. Lower courts can directly or indirectly ignore Supreme Court decisions by deciding in the other direction in particular cases. Only if a case goes to the Supreme Court can the Court correct such a situation.

Public Checks History has shown members of the

Just the Facts

The Supreme Court originally had just six members and has had as many as ten.

▲ *Chief Justice Roger B. Taney wrote the majority opinion in the* Dred Scott *decision. How did the southern loyalties of the justices influence the decision in this case?*

Supreme Court that if their decisions are noticeably at odds with public opinion, the Court will lose its support and some of its power. Perhaps the best example was the *Dred Scott* decision of 1857. In that decision, the Supreme Court held that slaves were not citizens of the United States and were not entitled to the rights and privileges of citizenship. The Court ruled, in addition, that the Missouri Compromise banning slavery in the territories was unconstitutional. Most observers contend that the *Dred Scott* ruling contributed to making the Civil War inevitable.

Observers of the court system believe that the judges' sense of self-preservation forces them to develop self-restraint. Some observers even argue that this self-restraint is more important than the other checks previously discussed.

Section 5 Review

1. How do the courts make policy?
2. Briefly describe the practices of judicial activism and judicial restraint.
3. What checks are placed on the courts?
4. **For Critical Analysis:** What type of president normally wants to nominate a Supreme Court justice who exercises judicial restraint?

★ ★ ★ ★ Chapter Summary ★ ★ ★ ★

Section 1: Sources of American Law

- The common law began centuries ago in England and today, in the United States, includes the case law made in this country since the Revolution.
- Constitutions are another source of law. In the United States, the Constitution is the supreme law of the land.
- Another source of American law is statutory law—law enacted by state legislatures and the U.S. Congress.
- Civil law spells out the duties that exist between persons or between citizens and their governments. Criminal law has to do with wrongs committed against the public as a whole.

Section 2: The Federal Court System

- The federal court system is a three-tiered structure that consists of district courts, courts of appeals, and the Supreme Court.
- U.S. district courts are trial courts. Decisions of district courts may be appealed to U.S. courts of appeals. Each of these is located in a judicial circuit, and there are thirteen circuits.
- Jurisdiction refers to the authority of a court to decide a certain case. Federal courts have jurisdiction in cases involving federal questions or diversity of citizenship.
- Concurrent jurisdiction exists when a case can be heard in either a federal or a state court. Exclusive jurisdiction exists when a case can be heard only in a federal court or only in a state court.

Section 3: The Supreme Court

- Thousands of cases are filed with the Supreme Court each year, yet on average, it hears less than one hundred.
- To bring a case before the Supreme Court, a party requests the Court to issue a writ of *certiorari*, which is an order issued to a lower court requiring it to send the record of the case in question. Whether the Court will issue the writ is entirely within its discretion.
- The Court's decisions are written in opinions. When all justices agree, the opinion is unanimous. If there is no unanimous opinion, concurring and dissenting opinions may be written.
- During the Court's annual term, the justices meet regularly in conference to discuss cases under consideration and to decide which new appeals and petitions the Court will accept.

Section 4: Supreme Court Appointments and Ideology

- Supreme Court justices are nominated by the president and confirmed by the Senate.
- Ideology plays an important role in the president's choices and in the Senate's confirmation.

Section 5: The Federal Courts as Policymakers

- Today's courts play a significant policymaking role in government, particularly by exercising the power of judicial review, which allows the courts to determine whether a law or presidential action is constitutional.
- Those practicing judicial activism believe the Court should use its power to alter the direction of the activities of Congress, state legislatures, and administrative agencies.
- Those practicing judicial restraint believe the Court should only rarely use its powers of judicial review.
- Political checks limit the extent to which courts can exercise judicial review. The legislature, the executive branch, other courts, and the public all place checks on the courts.