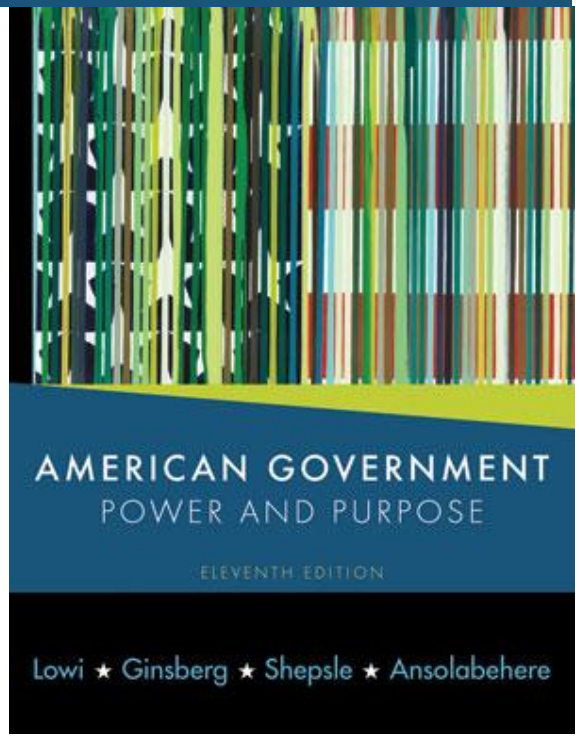
8

The Federal Courts: Structures and Strategies

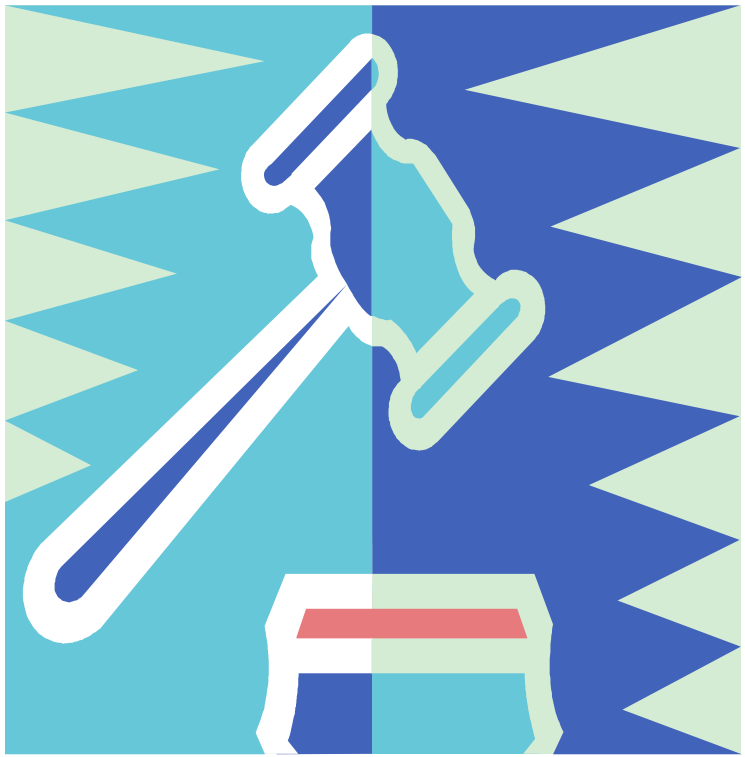
AMERICAN GOVERNMENT

POWER AND PURPOSE

Lowi ◆ Ginsberg ◆ Shepsle ◆ Ansolabehere



Judicial Politics



The proper role of the American judiciary is a subject of continuing controversy in American politics.

During the twentieth century, liberals have generally defended judicial activism while conservatives have decried it.

Bush v. Gore (2000)

Still controversial, the court battle over the Florida recount in the 2000 presidential election, in which the Supreme Court issued a "stay" of a vote recount and ended Al Gore's quest for the presidency in a ruling on December 12, 2000, led to a reversal, at least in part, of these criticisms.

Liberals charged conservatives on the Court with overreach and judicial activism after the Court's conservative majority used the authority of the national government to overturn a decision by a state court.

According to the ***Rationality Principle***, *all political behavior has a purpose and all political actors have goals.*

To what extent do the individual goals of judges and justices impact the decisions emanating from the national judiciary?

According to the ***Policy Principle***, *political outcomes are the products of individual preferences and institutional procedures*.

How is the federal judiciary constructed and what are its key institutional features?

How must the goals of judges and justices, as political actors, be reconciled with the overall institutional demands of the federal judiciary?

The Founding and the Federal Judiciary

When the Antifederalists charged that the Constitution gave the judiciary too much power, the Federalists countered that the judiciary was, in fact, the “least dangerous branch” of the national government.

"The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them . . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."

—Alexander Hamilton,
Federalist 78

"The judiciary is beyond comparison the weakest of the three departments of power."

—Alexander Hamilton, *Federalist 78*

Judicial Power was comparatively weak:

- The judiciary lacks the "force" to enforce its decisions.
- Insulated from political forces, the judiciary lacks "will."

The judiciary was constructed to have a wholly different character from the Congress and the presidency.

In terms of **judicial selection**, judges and justices were to be insulated from political considerations.

- Judges and justices have life terms ("during good behavior"), conducive of judicial independence.
- As nonelected officials, judges and justices have more leeway to protect minority rights and interests.

Courts also have **structural limitations** that legislatures and executives lack.

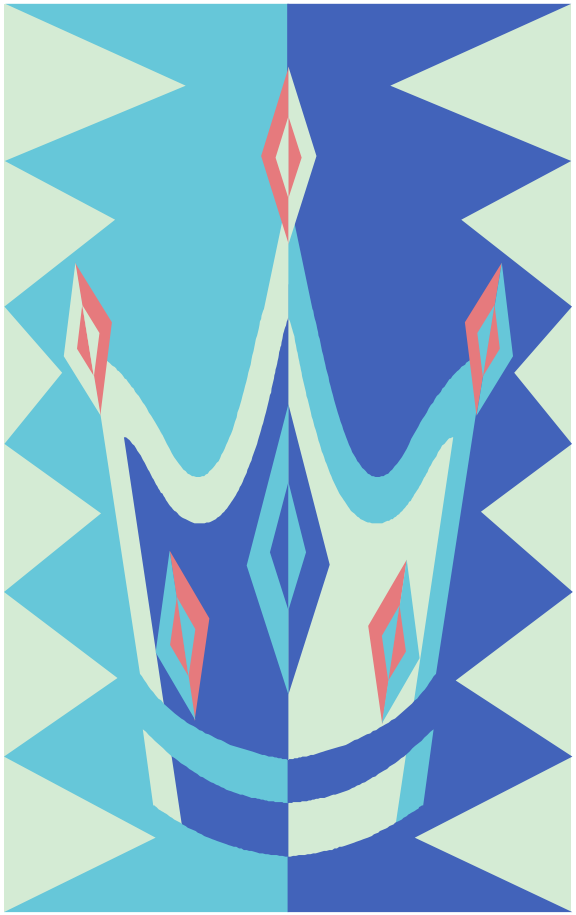
Traditionally, courts cannot provide general relief to constituencies; they can only provide relief to specific litigants.

A second structural limitation is that Courts lack initiative; they must wait for actual cases and controversies to be brought to them by litigants with *standing* before they can act.

The Judicial Process

Traditionally courts were places where kings governed; this governing included judging wrongdoing as well as ruling on disputes between underlings and citizens.

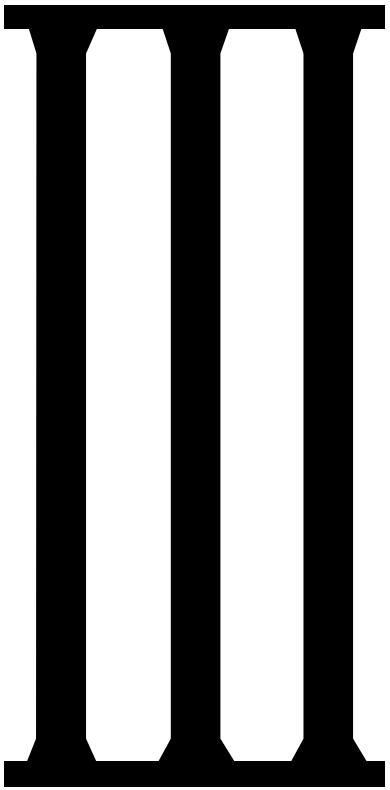
By analogy, contemporary American courts judge violations of the law and disputes between citizens as well as rule on the rights of citizens and the extent of governmental power.



Types of Laws and Disputes

Type of Law	Type of Case or Dispute	Form of Citation
Criminal law	Cases arising out of actions that violate laws protecting the health, safety, and morals of the community. The government is always the plaintiff.	*U.S. (or state) v. Jones* *Jones v. U.S. (or state)* if Jones lost and is appealing
Civil law	Law involving disputes between citizens or between a government and a citizen where no crime is alleged. Two general types are contract law and tort law. Contract cases are disputes that arise over voluntary actions. Tort cases are disputes that arise out of obligations inherent in social life. Negligence and slander are examples of torts.	*Smith v. Jones* *New York v. Jones* *U.S. v. Jones* *Jones v. New York*
Public law	All cases in which the powers of government or the rights of citizens are involved. The government is the defendant. Constitutional law involves judicial review of the basis of a government's action in relation to specific clauses of the Constitution as interpreted in Supreme Court cases. Administrative law involves disputes over the statutory authority, jurisdiction, or procedures of administrative agencies.	*Jones v. U.S. (or state)* *In re Jones* *Smith v. Jones* if a license or statute is at issue in their private dispute

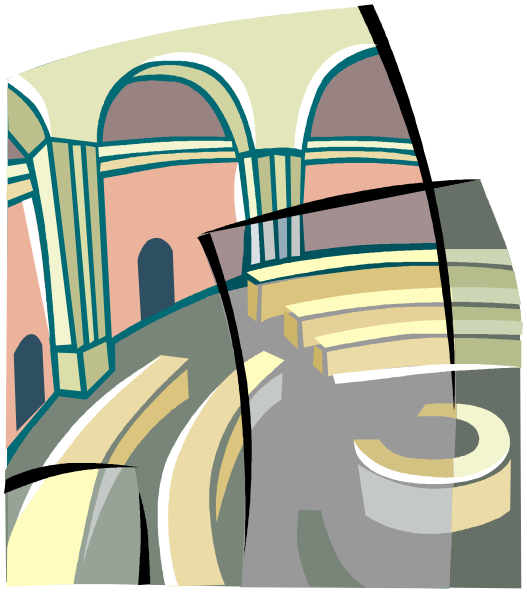
The Structure of the Federal Judiciary



A complex of institutional courts and regular processes has been established to handle these laws in the American system of government.

Article III of the Constitution vests the "judicial power of the United States" in the United States Supreme Court.

Structural features of the federal judiciary, including the number of justices and judges and the number and structure of lower federal courts, are determined by acts of Congress like the Judiciary Act of 1789 and the Judiciary Act of 1925.

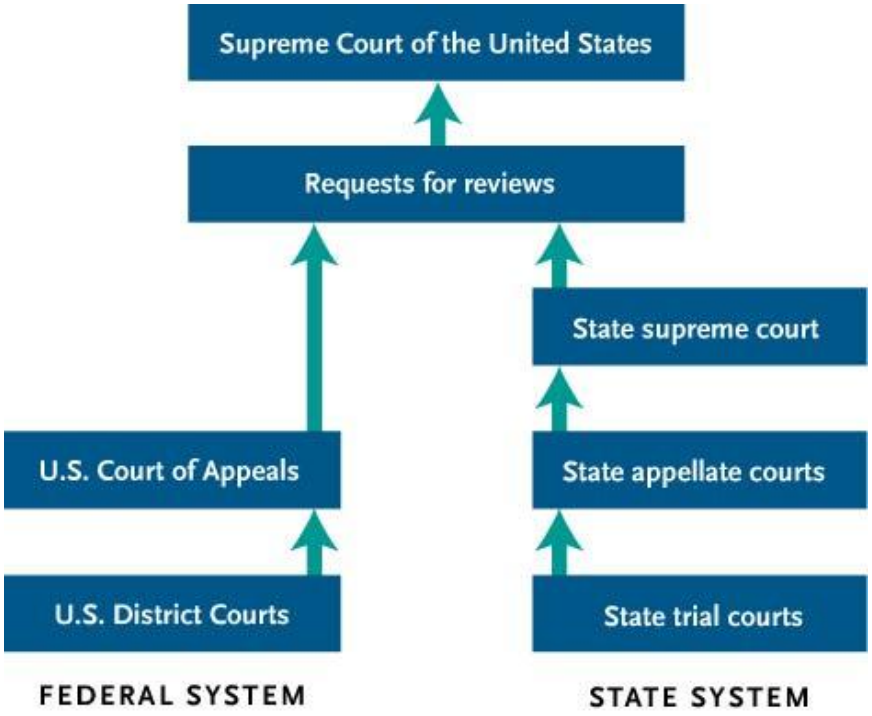


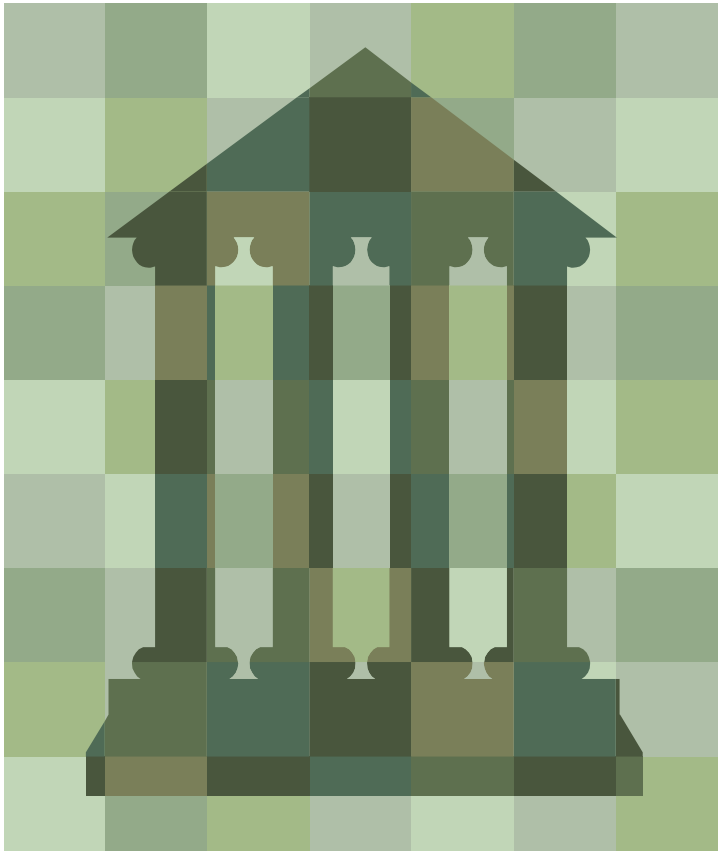
Trial courts are generally the first courts to hear criminal and civil cases.

Appellate courts hear the appeals of trial court decisions.

Supreme courts (both the United States Supreme Court and state supreme courts) are the highest courts in the system, and they usually serve appellate functions.

The U.S. Court System



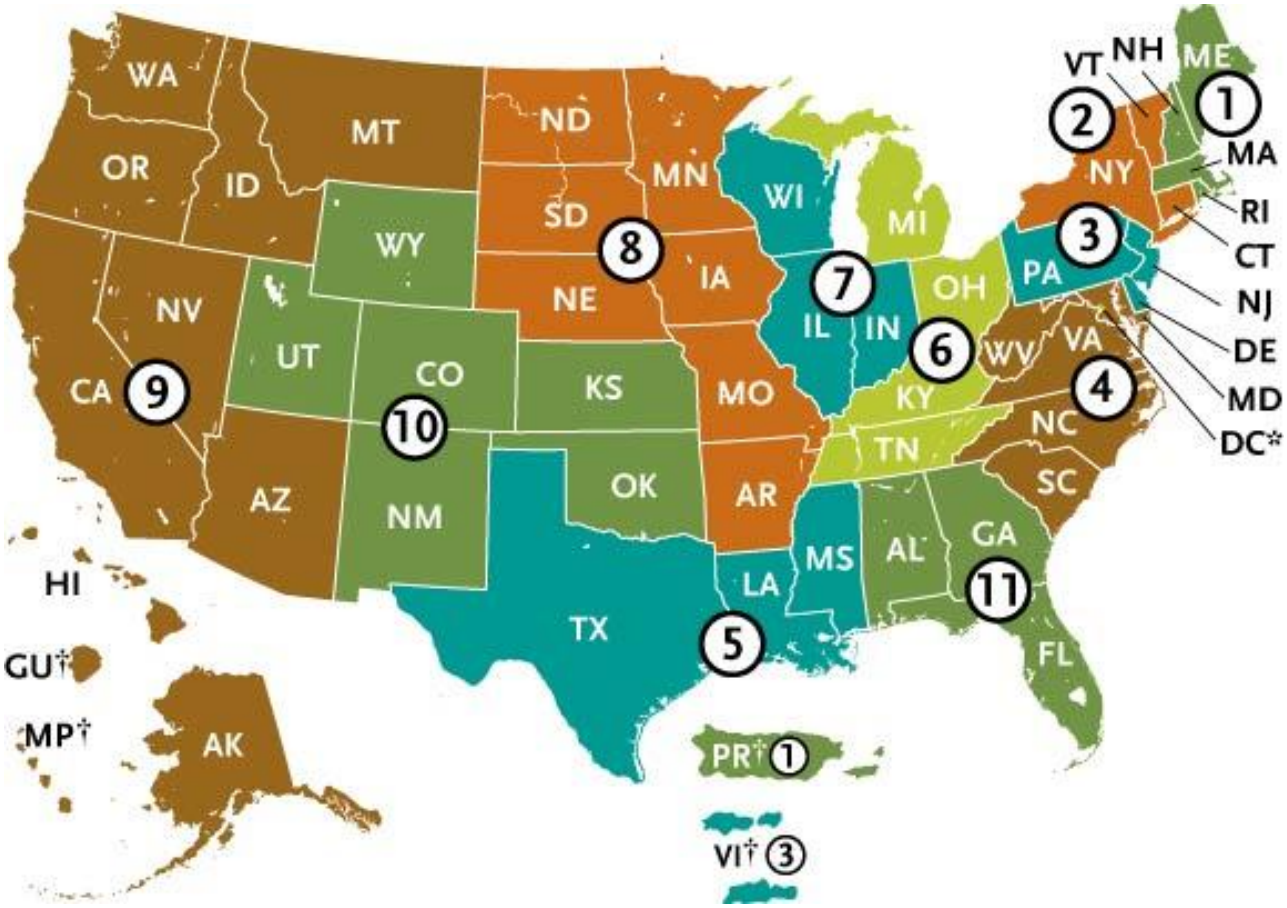


About 10 percent of cases in district court and federal agencies are accepted by higher courts for appeals.

There are courts of appeals divided into twelve (primarily geographical) judicial circuits.

Court of appeals decisions can be appealed to the Supreme Court, though they are otherwise final.

Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts



The Supreme Court

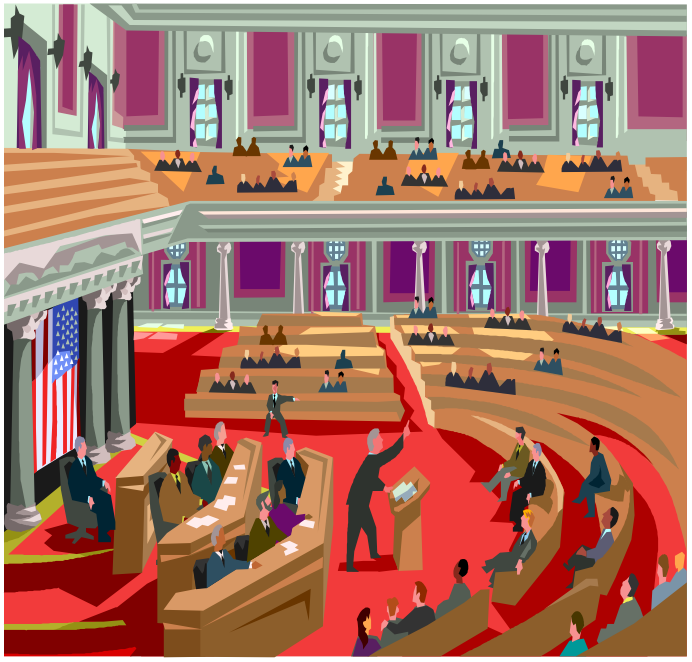
Although the Constitution does not stipulate as such, there are nine Supreme Courts justices; eight associate justices and the **chief justice**.

Supreme Court Justices, 2009

Name	Year of Birth	Prior Experience	President Who Made the Appointment	Year of Appointment
John G. Roberts, Jr., *Chief Justice*	1955	Federal judge	G. W. Bush	2005
John Paul Stevens	1920	Federal judge	Ford	1975
Antonin Scalia	1936	Federal judge	Reagan	1986
Anthony M. Kennedy	1936	Federal judge	Reagan	1988
Clarence Thomas	1948	Federal judge	G. H. W. Bush	1991
Ruth Bader Ginsburg	1933	Federal judge	Clinton	1993
Stephen G. Breyer	1938	Federal judge	Clinton	1994
Samuel A. Alito, Jr.	1950	Federal judge	G. W. Bush	2006
Sonia Sotomayor	1954	Federal judge	Obama	2009

According to the Constitution, federal justices and judges are nominated by the president and must be confirmed by the United States Senate.

Though politics dominates both the president's decision and that of the Senate, both have important constitutional roles to perform.



The Supreme Court in Action

Courts must establish and maintain standards of access to the judiciary.

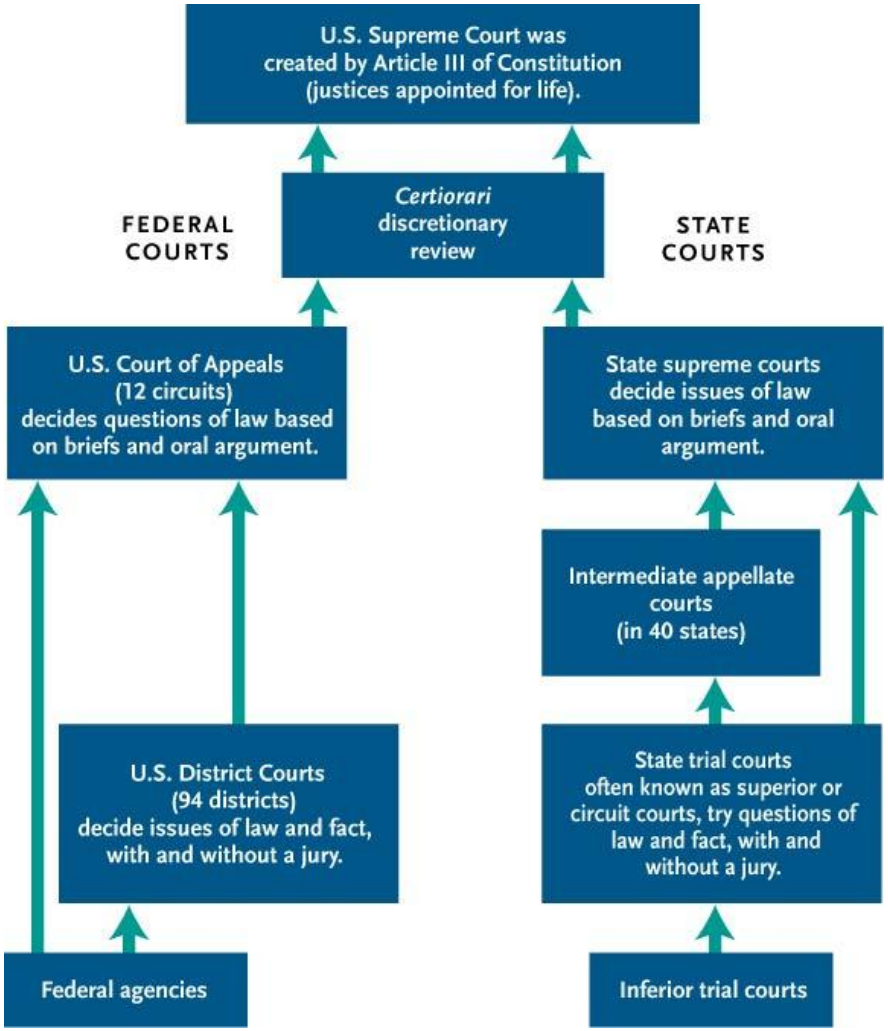
Parties must have **standing** to sue and cases must involve an actual and, more or less, current controversy; that is, cases cannot be **moot**.

Standing refers to the right of an individual or organization to initiate a court case on the basis of having a substantial stake in the outcome.

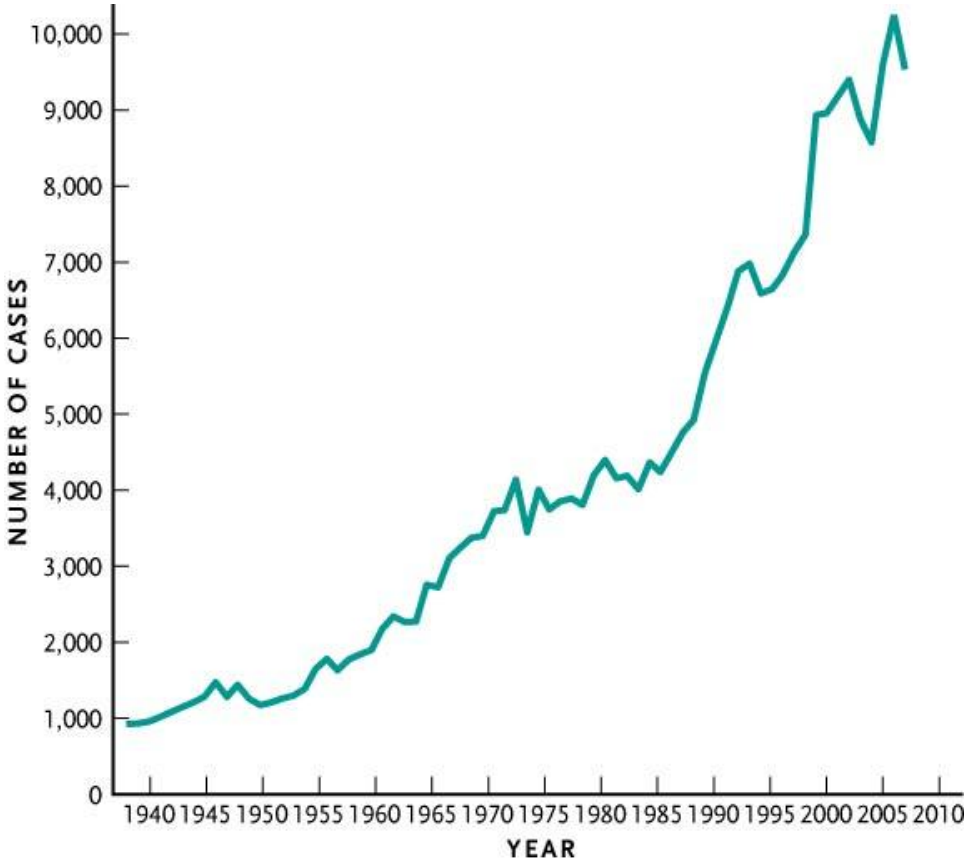
More informally, of the thousands of cases it might hear, the Supreme Court is likely to accept cases that present important questions of civil rights and liberties and cases involving the federal government.

The Supreme Court sets most of its agenda by issuing **writs of certiorari** when four of the nine justices vote to review a lower court's decision.

Reaching the Supreme Court Through Certiorari



Cases Filed in The U.S. Supreme Court



Once the Supreme Court decides to hear a case, there are several remaining stages of the process.

Litigants before the Court prepare written **briefs** and make **oral arguments** before the justices.

Also, outside groups may submit **amicus curiae** (“friend of the court”) briefs in an attempt to weigh in on the decision.

After presentation of briefs and arguments, justices meet in conference to discuss the case and vote.

Once they have voted, justices write **opinions** explaining their legal reasoning.

In most cases, the Supreme Court issues a **majority opinion** that is controlling.

Justices who disagree with the judgment of the majority often offer **dissenting opinions**.

In rarer instances, no majority may emerge and justices write a **plurality opinion**.

And those who agree with the ultimate conclusion but for different reasons might write a **concurring opinion**.

The Influence of the American Judiciary

Despite the traditional limitations on judicial power and the American judiciary's dependence on the other branches of government, the United States Supreme Court has become very influential in American politics and society.

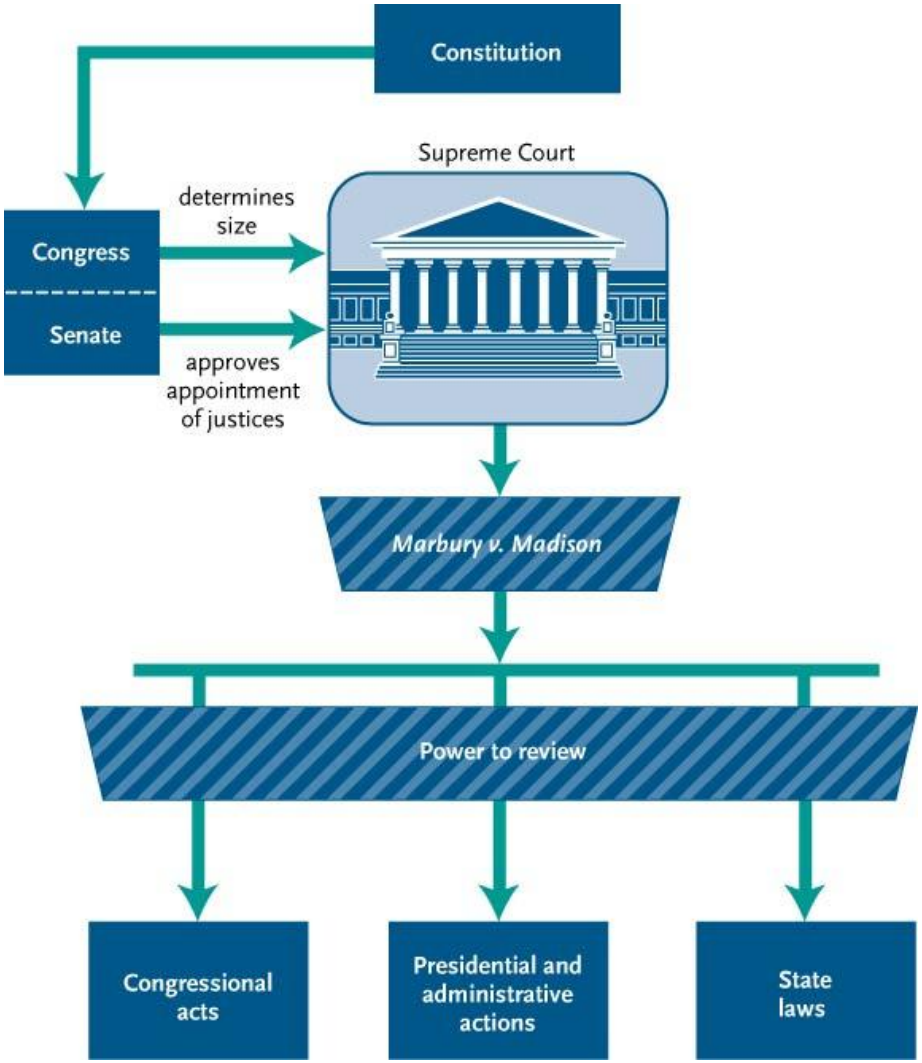
Whereas the Constitution bequeathed the Supreme Court "merely judgment," in *Marbury v. Madison* (1803) the Court interpreted for itself the power of **judicial review**.

Judicial review:

The Court's power to determine the constitutionality of laws passed by state legislatures and the Congress.

Although judicial review was used sparingly in the nineteenth century, the Supreme Court's ability to effectively "veto" acts of Congress and the states is the basis for Court power in the American separation of powers system.

Judicial Review



Moreover, structural changes in the judiciary (many approved by Congress) alleviated some of the traditional limitations on court power.

1. By liberalizing *standing*—the right to sue—the federal courts have expanded the range of potential cases that can be decided.

2. The Court achieved greater control over its agenda in 1925 when the "Judges Bill" passed by Congress gave justices more discretion about what cases they would and would not take.

3. The increased use of *class-action* lawsuits has allowed the judiciary to provide generalized relief to groups, enhancing, in some respects, its ties to key groups and constituencies.

4. Finally, justices and judges themselves have felt freer to pursue their own political agendas and, as such, they are less constrained by the prior belief that the Court should be apolitical.

The "Nonpolitical" Judiciary

The federal judiciary must balance its power and increased political role with the valuable perception that it is a nonpolitical branch of government.

Justices and judges seek to reinforce the perception that they are "above politics" by tying their decisions to the Constitution, previous court decisions, and precedents.

Following the principle of ***stare decisis*** (that is, following precedent), judges' and justices' goals are constrained to a degree by previous court rulings.

The interaction of the goals of these political actors and the concept of *stare decisis* is an important example of the *Policy Principle*, that *political outcomes are the products of individual preferences and institutional procedures*.

Justices must reconcile their short-term policy goals with constitutional principles, precedent, and the overall institutional reputation of the Court.

1. In some instances, justices will overturn precedent in order to fulfill their policy goals.
2. In other instances, justices might drop their short-term policy goals in an effort to uphold the doctrine of *stare decisis*.

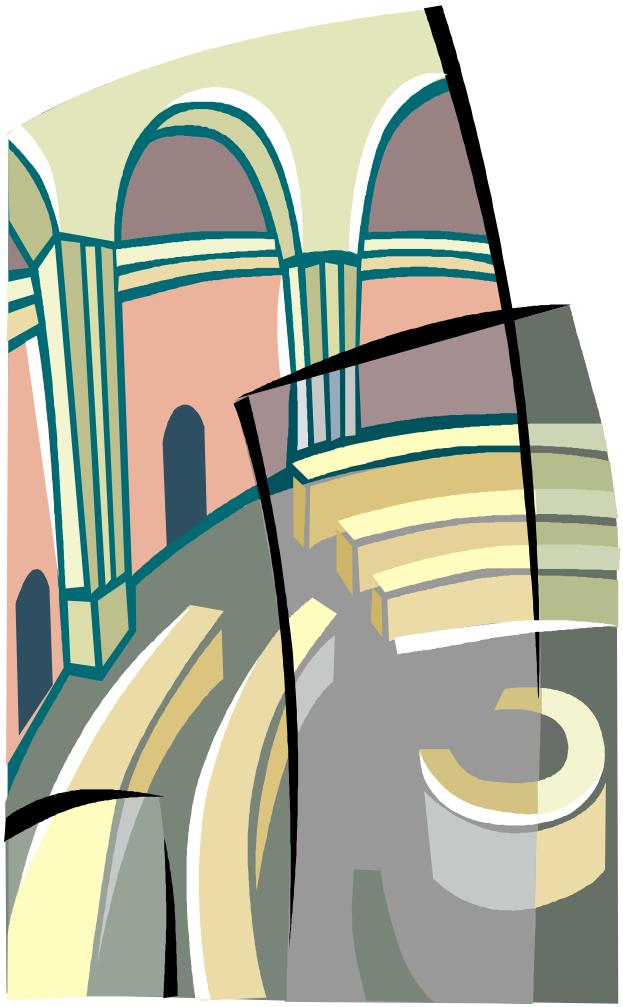
Former Chief Justice William Rehnquist's decision in *Dickerson v. United States* (2000) demonstrates the weight of precedent in judicial decision making.

Citing the Court's decision in *Miranda v. Arizona* (1966), Rehnquist said,

"Whether or not we would agree with Miranda's *reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of* stare decisis *weigh heavily against overruling it now."*

If Court power is tied in an important sense to the perception that it is nonpolitical, justices pursuing their short-term political goals risk their long-term influence and the long-term strength of the federal judiciary.

Rehnquist's actions exemplify this tension between individual justices' ideological goals and the maintenance of judicial power.



More recently, fear that judges might pursue their goals rather than the law and precedent have led to many confirmation battles in the recent past.

When testifying before the Senate Judiciary Committee prior to their confirmation to the Supreme Court, both **Chief Justice John Roberts** and Associate **Justice Samuel Alito** pledged “due” deference to precedents, claiming that they would be reluctant to overturn “settled law” even if they disagreed with the case as originally decided.

Opponents of **Justice Sonia Sotomayor**, Barack Obama's first nominee to the Supreme Court, challenged her confirmation in part because of comments she made about how "empathy" was a favorable quality for a judge.

Still, both Chief Justice Roberts's and Justice Alito's commitments to adhere to precedent where possible will be challenged, with several high-profile and controversial cases on the horizon.

Indeed, Justices Roberts, Alito, and Sotomayor are but the most recent additions to a Supreme Court that must constantly balance personal goals and philosophies, on the one hand, with precedents and institutional norms, on the other hand.

The “Least Dangerous Branch”?

Compared to Congress and the president, the Court is ill-equipped to compete in the separation of powers.

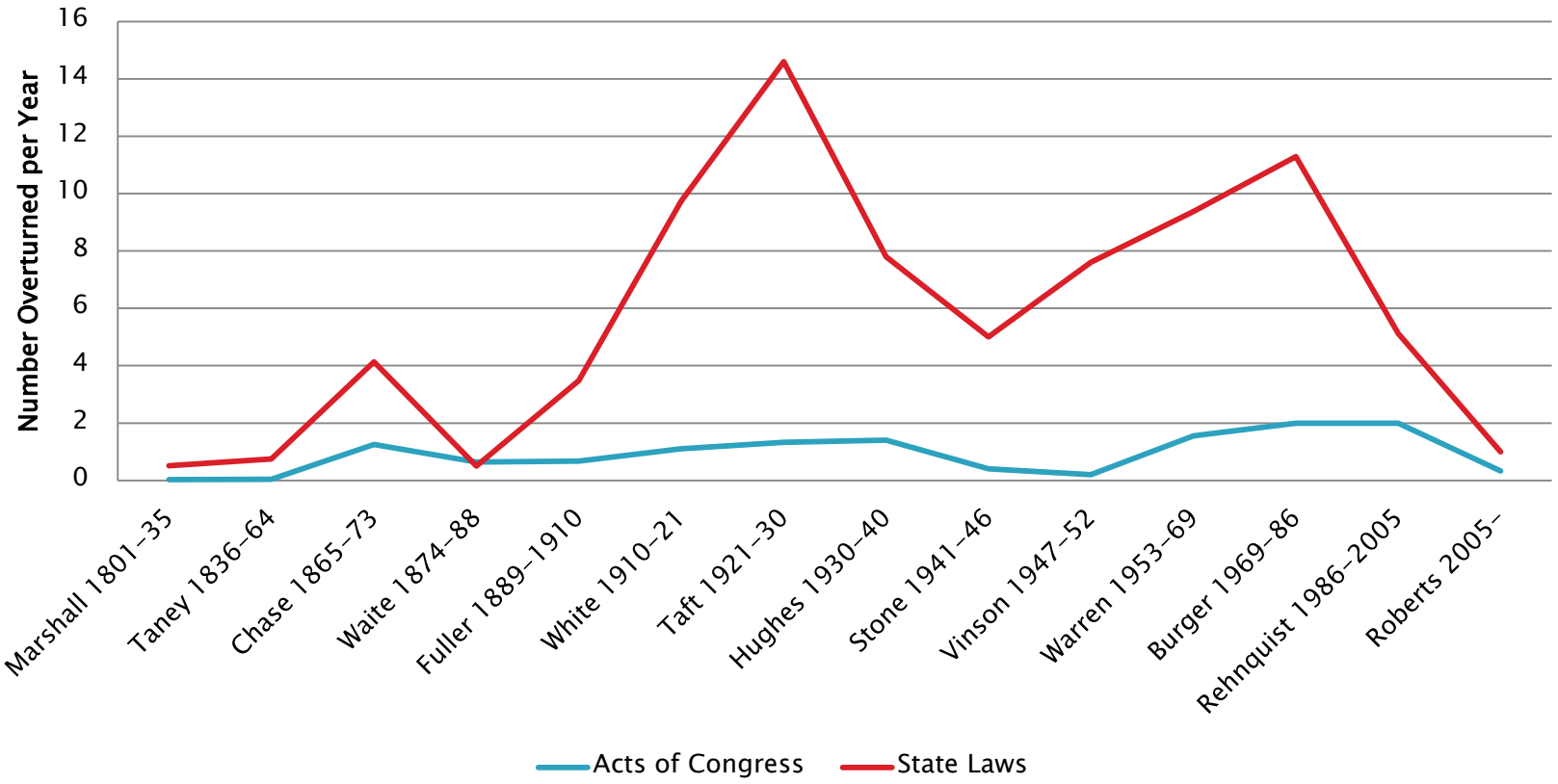
1. Presidential nomination and Senate confirmation of federal justices and judges allow the other branches key control over the composition of the judiciary.

2. Through “judiciary acts” Congress and the president can alter the structure and composition of the federal judiciary.

Still, changes in Court politics have allowed the judiciary greater leverage over the Congress and the president.

1. The use of judicial review increased greatly in the twentieth century.

Judicial Review over Time: Acts of Congress and State Laws Overturned, 1801–2007



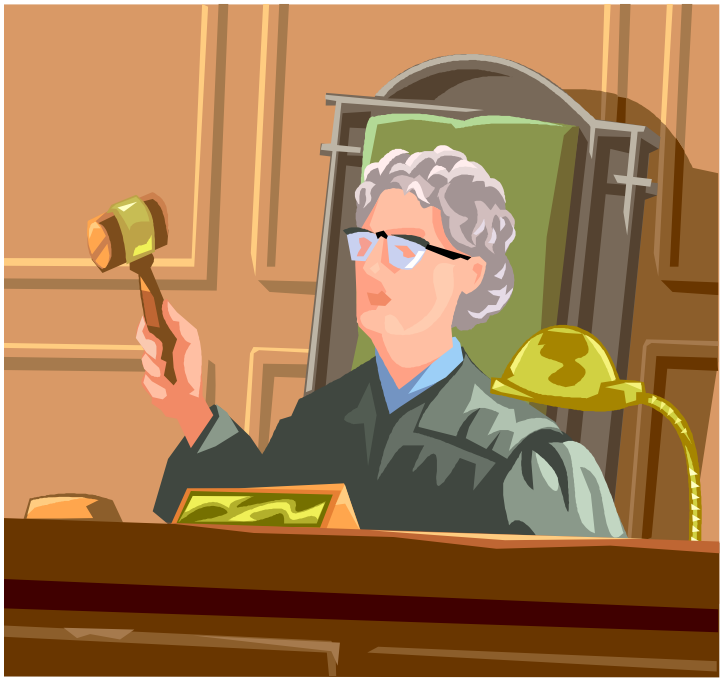
Source: David M. O'Brien, *Storm Center: The Supreme Court in American Politics,* 8th edition (New York: W.W. Norton, 2008), p. 31. Figures represent the number of congressional acts and state laws overturned divided by the number of years of each chief justice's tenure. Note that the figures for the Roberts Court only include data up to 2007.

2. The Court's increased willingness to hear cases on political questions—like reapportionment and election cases (e.g., *Bush v. Gore)*—has allowed the judiciary greater control over the politics of the other branches of government.

Still, the more the judiciary involves itself in political questions, the less it can claim to be nonpolitical. This presents a vexing problem for the Court.

As Justice John Paul Stevens wrote in his dissent in *Bush v. Gore*, "*It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law . . . .*

". . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."



A notable irony of Court power is that the more it is exercised and the more its exercise is consequential, the more the Court's ability to claim its traditional authority as a nonpolitical arbiter of disputes becomes reduced.

Additional Art for Chapter 8

Landmark Court Cases

Not all cases and decisions are equally important. "Landmark" cases are decisions that revolutionize an area of law and announce new legal standards or have far-reaching political consequences. Here are some of the more significant decisions made by the U.S. Supreme Court.

Marbury v. Madison (1804). The Court declared part of the Judiciary Act unconstitutional, establishing judicial review.

McCulloch v. Maryland (1819). The Supreme Court justified the "implied powers" of the government under the Constitution, enabling Congress and the president to assert their authority beyond those activities explicitly mentioned in the Constitution.

Gibbons v. Ogden (1824). This decision establishes the supremacy of the federal government over the states in the regulation of commerce so as to create uniform business law.

Dred Scott v. Sandford (1857). The Court declared that people of African origin brought to the United States as part of the slave trade were not given the rights of citizenship under the Constitution and could, therefore, claim none of the rights and privileges that the Constitution provides.

Plessy v. Ferguson (1896). The Court interpreted the post–Civil War amendments to the Constitution in such a way as to allow segregation, so long as facilities were "separate but equal."

Lochner v. New York (1905). The Court established a general right to enter freely into contracts as part of business, including the right to purchase and sell labor. The decision made it more difficult for unions to form.

Schenck v. United States (1919). The Court declared that the right to free speech does not extend to words that are "used in such circumstances and are of such a nature as to create a clear and present danger."

Korematsu v. United States (1944). The Court allowed the United States government to intern Japanese-Americans in concentration camps during World War II as a safeguard against insurrection or spying.

Brown v. Board of Education (1954). The Court ruled that separate educational facilities could not be equal, overturning *Plessy*, and ordering an end to segregation "with all deliberate speed."

Baker v. Carr (1962). The justices established that the Court had the authority to hear cases involving legislative districting, even though that is a "political matter," ultimately guaranteeing equal representation in the state legislatures and the U.S. House of Representatives.

Mapp v. Ohio (1961). The Court ruled that all evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a court of law.

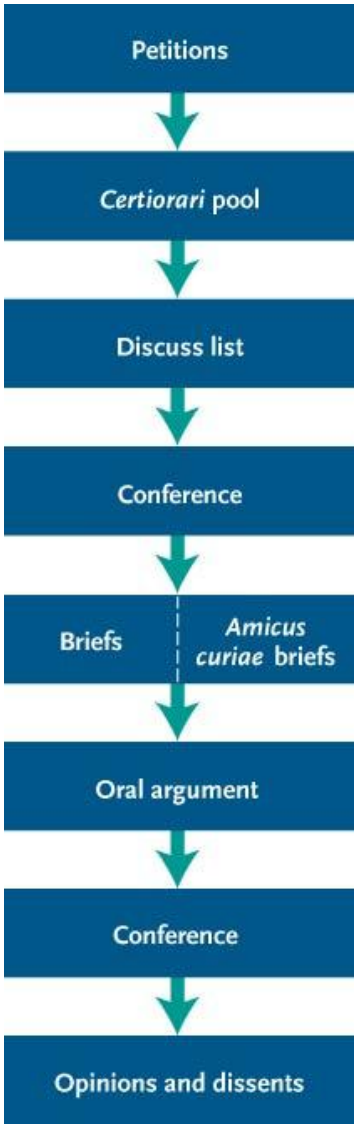
Griswold v. Connecticut (1965). The Court struck down a Connecticut law prohibiting counseling on the use of contraceptives, and declared that the Bill of Rights implied a right to privacy.

Roe v. Wade (1973). The Court held that a mother may abort her baby for any reason up to the point that the fetus becomes "viable," and that any law passed by a state or Congress inconsistent with this holding violated the right to privacy and the right to enter freely into contracts.

Kelo v. City of New London (2005). The Court upheld the power of local government to seize property for economic development.

Boumediene v. Bush (2008). The Court declared that foreign terrorism suspects have the constitutional right to challenge their detention (using the writ of *habeas corpus*) at the Guantánamo Bay naval base in U.S. courts, even though the detainees are not citizens.

The Supreme Court's Decision-making Process



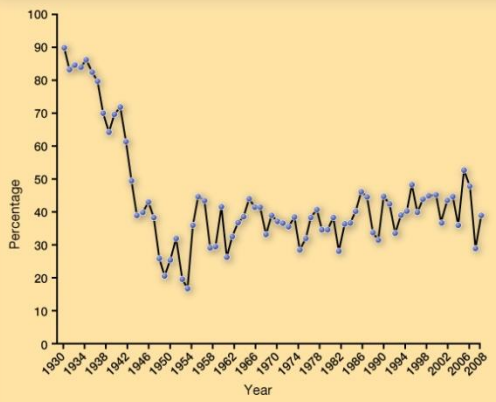
ANALYZING THE EVIDENCE

Consensus on the U.S. Supreme Court

For much of the nineteenth century and through the early part of the twentieth century, the Supreme Court publicly operated under what many considered to be a "norm of consensus." Justices believed that unanimity in decision making would serve to strengthen the authority of the Court and its rulings, even if disagreements persisted in private.[1] Over time, however, this behavioral norm appears to have declined among the justices serving on the Court.

The proportion of unanimous decisions handed down by the Court declined sharply between 1930 and 1950, dropping from 90 percent of the cases heard to less than 20 percent. While a number of changes occurred within the judiciary during this period, no definitive explanation exists to account for this trend. Since the 1950s, there has been a modest increase in the proportion of unanimous decisions, but not to anywhere near the level that was common prior to the 1930s.

UNANIMOUS SUPREME COURT DECISIONS

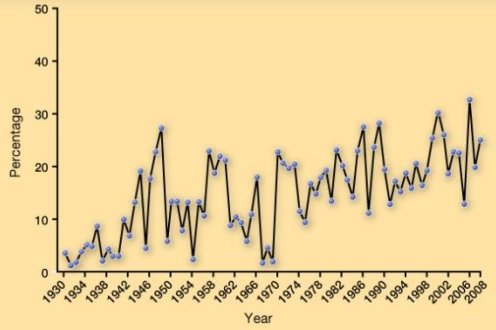


Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 3rd edition. (Washington, DC: CQ Press, 2003). Updated by author.

As Alexander Hamilton observed in *Federalist* 78, the federal judiciary was designed to be the weakest of the three branches of government. Given that the Supreme Court is reliant upon the other branches of government to enforce its decisions, it is much easier to defend a unanimous Court decision than one that reveals a sharp divide among the justices.

> *Federalist 78*
>
> The judiciary…has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[2]

CASES DECIDED BY A ONE-VOTE MARGIN



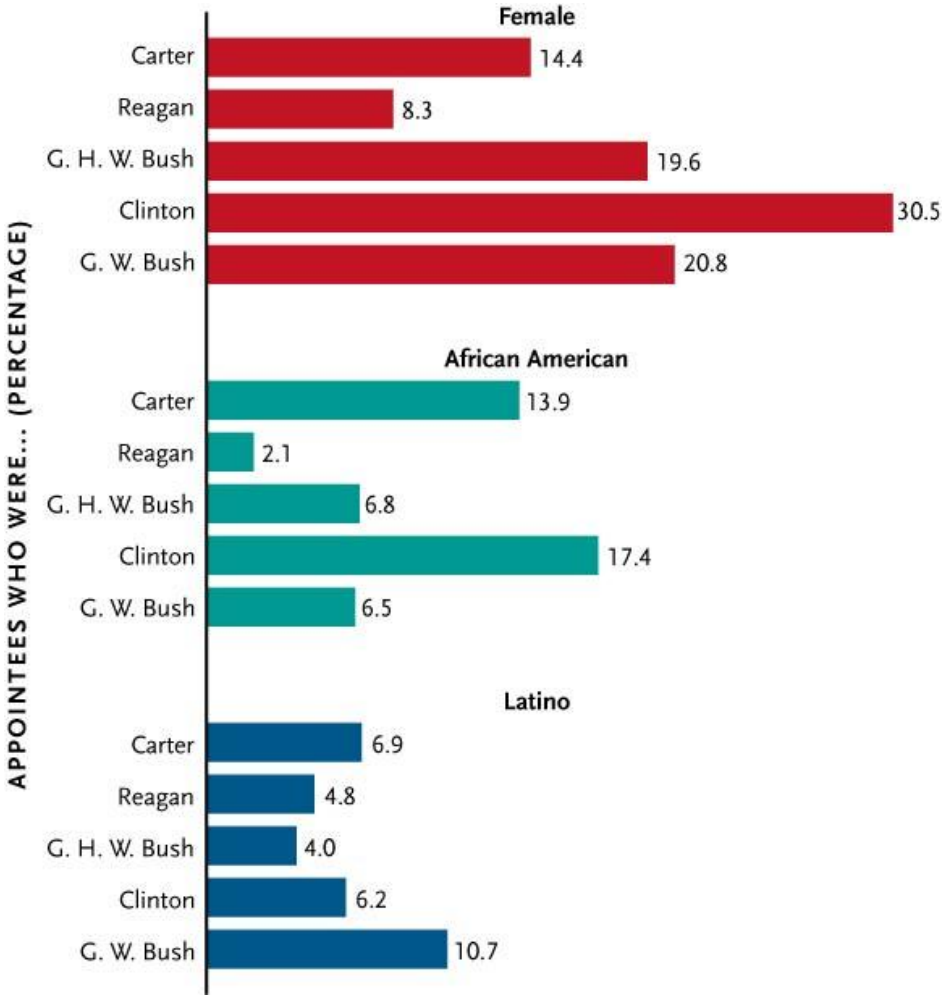
Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 3rd edition. (Washington, DC: CQ Press, 2003). Updated by author.

What are the implications of the precipitous decline in unanimous decisions after 1930? Unanimously decided cases are less likely to be interpreted differently by lower court judges who consider these decisions to be established precedents, whereas decisions supported by a bare majority of justices may not be followed as strictly. Indeed, the proportion of Supreme Court cases decided by a one-vote margin has been steadily increasing since 1930.

[1] On these points, see Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court," *American Journal of Political Science* 45 (April 2001): 362–77.

[2] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*, Clinton Rossiter, ed. (New York, Penguin: 1961).

Diversity of Federal District Court Appointees



This concludes the presentation slides for Chapter 8: The Federal Courts

For more, visit our online StudySpace at:

http://wwnorton.com/college/polisci/american-government11/full