5 The Courts

Published by

Holman, Mirya and Timothy O. Lenz.
Project MUSE.  muse.jhu.edu/book/66967.

► For additional information about this book
https://muse.jhu.edu/book/66967
The above image is a picture of the U.S. Supreme Court Building. What does the building remind you of? It is intended to remind you of a temple of justice. The design of the building and the black robes that the Justices wear are intended to instill reverence for the courts and the law. All countries have courts. Courts are considered an essential element of good government because they administer justice and uphold the rule of law.
But courts do not have the same role in all countries. Courts have a very limited role in some countries and a very broad role in others. Courts play a broad role in modern American government, politics, and society. They rule on everything from “A” (abortion and agriculture and airlines) to “Z” (zoning and zoos and zygotes). In fact, the broad role that courts play in the U.S. political system explains why courts are considered essential for good government and the administration of justice, but they are also frequent targets of strong criticism. This chapter explains the complicated thinking about courts by examining three main issues related to the role courts play in the U.S. system of government and politics:

- The Power Problem for the Federal Courts;
- The Increased Power of the Judiciary; and
- The Relationship between Law and Politics.

The power problem for the federal courts is legitimacy. In a democracy, there is a preference for policymaking by elected government officials. Federal judges are appointed to life terms. The tensions between democratic values and rule of law values are evident in court rulings. The increased power of the judiciary is a source of criticism because the courts have over time become much more powerful than originally intended. The judiciary was originally called the “least dangerous” branch of government. Today, court critics talk about an “imperial judiciary.” The charge that the courts have become imperial is based on claims that judges have assumed powers previously held by the political branches of government. The issue of courts as government institutions is ultimately about the relationship between law and politics, the legal system and the political system. The Constitution created a political system where three separate institutions share power, and the courts are not immune from political criticism any more than Congress and the president.

The Supreme Court’s decisions in cases about abortion, the death penalty, school prayer, obscenity and indecency, sexual behavior, and marriage have made the Court one of the primary targets in the culture wars. The term culture wars refers to political fights over values rather than valuables, but the fights are also legal conflicts. The chapter’s primary focus is the U.S. Supreme Court, but some attention is paid to organization and operation of the federal court system and the state court systems. The American legal system also provides a prominent role for juries, so some attention is paid to jury justice.

5.1 | The Power Problem For the Federal Courts

Previous chapters examined the power problem for Congress (effectiveness) and the presidency (accountability). The power problem for the federal courts is legitimacy. The problem is rooted in a basic democratic principle: the preference for policy making by elected government officials. Federal judges are appointed to life terms. This makes the federal judiciary an undemocratic or even counter-majoritarian government institution. The legitimacy problem arises when individual judges or the courts as an institution make decisions that affect or in effect make public policy.

The federal courts are not the only non-elected government institution with policymaking power. The Federal Reserve Board is not elected and it has substantial
power to make economic policy related to inflation and employment. The U.S. is not a pure democracy; it is a constitutional democracy. The Constitution actually places a number of very important limits on majority rule. In fact, the Constitution (particularly the Bill of Rights) is a counter-majoritarian document. The fact that courts interpret the Constitution means that courts sometime perform a counter-majoritarian role in the constitutional democracy. Much of the controversy surrounding the role of the courts in the U.S. system of government and politics is about the legitimacy of courts making policy. Judicial policymaking or legislating from the bench is considered inappropriate in a political system where the elected branches of government are expected to have the primary policymaking power. The power problem for the courts is about the boundaries between the political system and the legal system, the separation of politics and law. Keeping law and politics separate is complicated by the fact that the judiciary is expected to have some degree of independence from the political system so that courts can perform one of their most important roles: enforcing basic rule of law values in a constitutional democracy.

Think About It!
C-SPAN presents Constitutional Role of Judges in the American republic and democratic systems, and Legal Scholars Examine Role of Courts in Democracy:
https://www.c-span.org/video/?301909-1/constitutional-role-judges
https://www.c-span.org/video/?305745-1/role-courts-us-democracy

5.2 | Political History of the Supreme Court

Judicial power is also controversial because courts have historically taken sides in many of the most important and controversial issues facing the nation. The Supreme Court has had four distinct eras based on the kinds of issues the Court decided during the era: the Founding Era (1790–1865); the Development Era (1865–1937); the Liberal Nationalism Era (1937–1970); and the Conservative Counter-revolution (1970–). The specific issues that the Court decided during these four eras changed, but the Court consistently addressed many of the major political controversies and issues of the day. The Supreme Court Timeline marks some of these eras and issues.

5.21 | The Founding Era (1790–1865)

During the Founding Era the Court issued major rulings explaining how the new system of government worked. Its federalism rulings broadly interpreted the powers of the national government. The Marshall Court (1801-1835) established the power of judicial review in *Marbury v. Madison* (1803). It ruled that Congress had complete power over interstate commerce in *Gibbons v. Ogden* (1824). And it broadly interpreted Congress’s power under the Necessary and Proper Clause in *McCulloch v. Maryland* (1819).
Chief Justice Roger B. Taney replaced Marshall. The Taney Court (1836–1864) was less concerned about establishing the new powers of the national government, so it issued a number of rulings upholding the powers of the states using the doctrine of dual federalism. Dual federalism is the idea that both levels of government are supreme in their respective fields. The national government is supreme in matters of foreign affairs and interstate commerce. The states are supreme in intrastate policies such as commerce, education, the regulation of morality, and criminal justice. The Taney Court’s ruling in Dred Scott v. Sandford (1857) limited Congress’s power to limit the spread of slavery, thereby contributing to the inevitability of the Civil War. The Dred Scott ruling struck down the Missouri Compromise of 1820, a law passed by Congress to limit the spread of slavery in the territories.

5.22 | Development and Economic Regulation (1865-1937)

During this era, the Court decided cases challenging the government’s power to regulate the economy. Government regulation of the economy increased during the Progressive Era (roughly 1890 to WWI) and the New Deal Era (1930s) in order to ease some of the problems created by the Industrial Revolution. The government regulations included antitrust laws, child labor laws, minimum wage and maximum hour laws, and workplace safety regulations. However, the Court saw its role as protecting business from government regulation so it used its power of judicial review to strike down many of these laws. In 1934 and 1935 it declare unconstitutional many of the major provisions of the Roosevelt Administration’s New Deal. This exposed a major conflict between the political system and the legal system. The political system supported government regulation of business and social welfare policies that were intended to end the Great Depression and provide more income security. But the Court saw its role as protecting business from government regulation.

One reason for the New Deal era conflict between the political branches and the Court was an accident of history. President Franklin D. Roosevelt was unlucky in that he did not have the opportunity to appoint a member of the Supreme Court during his entire first term in office. Political change occurs regularly with the election calendar: every two years. But the Justices are appointed to life terms so vacancies occur irregularly with retirements or death. President Roosevelt and congressional Democrats saw the election of 1932 as a critical election that gave them a mandate to govern. They became increasingly frustrated with Supreme Court rulings where a conservative majority (often by 6–3 or 5–4 margins) struck down major New Deal programs in 1935 and 1936. Roosevelt eventually proposed legislation to add another member to the Court for every sitting justice over the age of seventy, up to a maximum of six more members—which would have increased the size of the Court from nine to 15 members. This proposal was very controversial because it was a presidential plan to “pack” the Court with new Justices who would support his New Deal policies. Although the Court’s rulings striking down New Deal policies were unpopular, President Roosevelt’s court packing plan was considered an inappropriate attempt to exert political control over the Court. The proposal died in Congress.

But in 1937 the Court seemed to get the political message. It abruptly changed its rulings on economic regulation and began to uphold New Deal legislation. The Court announced that it would no longer be interested in hearing cases challenging the
government’s power to regulate the economy. The Court indicated that it would henceforth consider questions about the government’s power to pass economic regulations matters for the political branches of government to decide. The Court also announced that in the future it was going to take a special interest in cases involving laws that affected the political liberties of individuals. In effect, the Court announced that it would use judicial restraint when laws affected economic liberties but judicial activism when laws affected political liberties. The Court further explained that it was especially interested in protecting the rights of “discrete and insular” minorities. This 1937 change is called the constitutional revolution of 1937 because it was such an abrupt, major change in the Court’s reading of the Constitution and its understanding of its role in the system of government and politics.

5.23 | The Era of Liberal Nationalism (1937-1970)

In the middle years of the 20th Century, the Court participated in debates about civil liberties and civil rights by assuming a new role: 1) protector of individual liberties; and 2) supporter of equality. The Court’s interest in civil liberties cases marks the beginning of the Court’s third era. It began protecting civil liberties in cases involving freedom of expression (including freedom of religion, speech, and press); the rights of suspects and criminals in the criminal justice system; racial and ethnic minorities to equal protection of the laws; and the right to privacy. The Warren Court (1953-1969) is remembered for its judicial activism on behalf of civil liberties. Chief Justice Earl Warren presided over the Court’s important civil liberties cases supporting individual freedom and equality in both civil law and criminal law. In the 1950s and 1960s, the Court’s civil liberties rulings ordering school desegregation put the Court in the middle of debates about racial equality.

The Warren Court’s civil law rulings included the landmark school desegregation case Brown v. Board of Education (1954), and landmark right to privacy cases such as Griswold v. Connecticut (1965). In Griswold v. Connecticut the Court held that the U.S. Constitution included an implied right to privacy that prohibited states from passing laws that made it a criminal offense to disseminate information about birth control devices—and by implication, the implied right to privacy limited government power to regulate other aspects of sexual behavior. The Warren Court also issued rulings that affected the freedom of religion. In Engel v. Vitale (1962), the Court ruled that it was unconstitutional for government officials to compose a prayer and require that it be recited in public schools. The prayer was “Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country.” In Abington School District v. Schempp (1963) the Court held that mandatory Bible reading in public schools was unconstitutional.

The Warren Court’s criminal law rulings were no less controversial than its civil law rulings. The Court broadened the rights of suspects and convicted offenders in the state criminal justice systems. Gideon v. Wainwright (1963) broadened the right to the assistance of counsel by holding that anyone charged with a felony had a right to be provided an attorney if he or she could not afford to pay for one. Mapp v. Ohio (1961) held that the Exclusionary Rule applied to state courts. The Exclusionary Rule prohibited the use of evidence seized in violation of the Constitution in order to obtain a conviction. Miranda v. Arizona (1966) may be the most famous of the Warren Court rulings on
criminal justice. It required police officers to notify suspect of their constitutional rights before questioning them. These rights include the right to remain silent, the right to have the assistance of counsel, and notified that anything said can be used in a court of law against them.

These Warren Court rulings, and the Burger Court’s ruling in *Roe v. Wade* (1973) that the right to privacy included the right to an abortion, put the Court in the middle of “the culture wars”—the political conflicts over value as opposed to economics. Judicial decisions about state laws defining marriage continue the tradition of judicial participation in the leading controversies of the day.

5.24 *The Conservative Counter-Revolution*

One indication that the era of liberal nationalism has ended is the fact that today’s Court has a different agenda than the Warren Court. The conservatives have had working majorities on the Burger, Rehnquist, and now the Roberts Courts. They are interested in different issues than the Warren Court. President Nixon’s election in 1968 marked the beginning of the rightward change in the country’s political direction. His appointment of four Justices marked the beginning of the rightward change in the Court’s legal direction. Crime became a national issue in the 1968 presidential campaigns. Richard Nixon portrayed judges as being soft on crime, and pledged to appoint judges who would get-tough-on-crime. President Nixon appointed four members of the Court, including Chief Justice Warren Burger. The Burger Court’s (1969–1986) conservatism was first evident in criminal law. Crime fighting is a core function of government. All levels of government participate in making and implementing crime policy.

The election of conservative Republican presidents (Nixon, Ford, Reagan, Bush 41 and Bush 43)—and even the election of Democratic Presidents Carter and Clinton who came from the conservative wing of the Democratic Party—solidified the Court’s rightward movement. Federal judges are appointed by political figures through a political process: the president nominates and the Senate confirms. So it is not surprising that political changes are reflected in the judiciary because the selection of federal judges is an obvious contact point between law and politic, between the legal system and the political system.

The Rehnquist Court (1986–2005) had a conservative working majority. It revived federalism to limit Congress’s Commerce Clause powers. In *U.S. v. Lopez* (1995) and it struck down the Gun Free School Zones Act of 1990. In *U.S. v. Morrison* (2004), the Court struck down provisions of the Violence Against Women Act of 2000. The Roberts Court (2005–present) has also generally been a conservative Court. Chief Justice Roberts and Justice Samuel Alito were nominated in part because their lower court rulings supported business interests. Business issues had been overshadowed by higher profile issues such as abortion, school prayer, affirmative action, and the death penalty. But the Roberts Court has issued a number of rulings that are favorable to business interests. A 2010 ruling struck down provisions of federal law regulating independent campaign contributions. The *Citizens United v. Federal Election Commission* ruling eased restrictions on corporate campaign contributions. The Roberts Court has also adopted the Accommodationist interpretation of the Establishment Clause of the First Amendment. It allows much more government support for, or accommodation of, religion than the Wall of Separation interpretation. And on matters of national security
and counterterrorism policy, the conservative working majority on the current Court supports broad interpretations of the president’s power as Commander-in-Chief.

5.3 | The Increased Power of the Courts: Going from Third to First?

The judiciary is called the third branch of government for two reasons. First, the judiciary is provided for in Article III of the Constitution. Second and more important, the legislative and executive branches were intended to be more powerful than the judiciary. The judiciary was intended to be the weakest of the three branches of government. In *Federalist No. 78*, Alexander Hamilton described the judiciary as the “least dangerous” branch of government because the courts had neither the power of the purse (Congress controlled the budget) nor the power of the sword (the executive branch enforced the laws). The following describes how:

But courts have always played an important role in American society. In *Democracy In America*, Alexis de Tocqueville (1835) famously said, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” Today, critics call the courts an imperial judiciary.

5.31 | The Early Years

In the early years of the republic the Court initially lacked power or prestige. Early presidents had a hard time finding people who were willing to serve on the Court because it was not considered an important or prestigious institution. And the Justices’ duties included travel to the circuit courts and a time when frontier travel was very difficult.

The Supreme Court first met in February 1790 at the Merchants Exchange Building in New York City, which then was the national capital. When Philadelphia became the capital city later in 1790 the Court followed Congress and the President there. After Washington, D.C., became the capital in 1800 the Court occupied various spaces in the U.S. Capitol building until 1935, when it moved into its own building.

The Court acquired prestigious during the Marshall Court Era. Chief Justice John Marshall’s ruling in *Marbury v. Madison* (1803) established the doctrine of judicial review. The Marshall Court also ended the practice of each judge issuing his or her own opinion in a case and began the tradition of having the Court announce a single decision for the Court. This change created the impression that there was one Court with one view of what the Constitution meant, rather than a Court that merely consisted of individuals with differing points of view. The Marshall Court enhanced the Court’s prestige as an authoritative body with special competence to interpret the Constitution when disputes arose over its meaning. But the main reason for the expansion of the power of the courts is the power of judicial review.
5.32 | Judicial Review

Judicial review is the power of courts to review the actions of government officials to determine whether they are constitutional. It is a power that all courts have, not just the Supreme Court, and it is a power to review the actions of any government official: laws passed by Congress; presidential actions or executive orders; regulations promulgated by administrative agencies; laws passed by state legislatures; actions of governors; county commission decisions; school board policies; city regulations; and the rulings of lower courts. The Constitution does not explicitly grant the courts the power of judicial review. Judicial review was established as an implied power of the courts in the landmark case *Marbury v. Madison* (1803), where the Court for the first time ruled that a law passed by Congress was unconstitutional. The case was a minor dispute. President John Adams signed a judicial appointment for William Marbury. His commission was signed but not delivered when a new President (Thomas Jefferson) took office. When the new administration did not give Marbury his appointment, Marbury used the Judiciary Act of 1789 to go to the Supreme Court asking for an order to deliver his commission as judge. Chief Justice John Marshall’s ruling in *Marbury v. Madison* used syllogistic reasoning to explain why it was logical to read the Constitution as implying that courts have the power to review laws and declare them unconstitutional if they conflicted with the Constitution. Syllogistic logic is a form of reasoning that allows inferring true conclusions (the “then” statements) from given premises (the givens or “if” statements). Marshall structured the logical argument for judicial review as follows:

\[
\text{[If] the Constitution is a law,} \\
\text{[and if] the courts interpret the laws,} \\
\text{[then] the courts interpret the Constitution.}
\]

Marshall further reasoned that courts have the power to declare a law unconstitutional:

\[
\text{[If the] Constitution is the supreme law of the land,} \\
\text{[and if] a law, in this case the Judiciary Act of 1789, conflicts with the Constitution,} \\
\text{[then] that law is unconstitutional.}
\]

Judicial review is the court’s power to review and declare unconstitutional laws passed by Congress, executive orders or other actions of the President, administrative
regulations enacted by bureaucracies, lower court judges, laws passed by state legislatures, or the actions of state governors, county commissioners, city officials, and school board policies. Judges have used judicial review to declare unconstitutional a federal income tax law, presidential regulations of the economy, state laws requiring that black children be educated separate from white children in public schools, school board policies requiring the recitation of organized prayer in public schools, and laws making flag burning a crime.

Some of the Founding Fathers, particularly Federalists such as Alexander Hamilton, accepted the notion of judicial review. In Federalist No. 78 Hamilton wrote: “A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute.” The Antifederalists (e.g., Brutus in Antifederalist #XV) feared the judicial power would be exalted above all other, subject to “no controul,” and superior even to Congress. Nevertheless, judicial review has become a well-established power of the courts.

5.33 Limits on Judicial Power

Does judicial review make the courts more powerful than the legislative and executive branches of government because the courts can rule presidential and congressional actions unconstitutional? The courts do have the power to strike down presidential and congressional actions. Does this make the judiciary the most powerful, not the least powerful, branch of government? There are limits on judicial power. The courts cannot directly enforce their rulings. Judges rely on individuals or other government officials to enforce their rulings. And judges cannot expect automatic compliance with their rulings. Opposition to desegregation of public schools after the 1954 Brown v. Board of Education was widespread. In 1957 the Florida Legislature passed an Interposition Resolution that asserted that the U.S. Supreme Court did not have the authority to order states to desegregate public schools therefore Florida government officials did not have to comply with the Brown ruling.

Interposition is a doctrine that asserts the power of a state to refuse to comply with a federal law or judicial decision that the state considers unconstitutional. Compliance with the Court's rulings outlawing organized prayer in public schools has also been mixed. And police officer compliance with Court rulings on search and seizure is not automatic. The courts depend on compliance by executive branch officials, such as school board members, teaching, and police officers.

5.34 Judicial Restraint and Judicial Activism

The legitimacy of judicial power is usually described in terms of two concepts of the appropriate rule for the judiciary: judicial restraint and judicial activism. Judicial restraint is defined as a belief that it is appropriate for courts to play a limited role in the government, that judges should be very hesitant to overturn decisions of the political branches of government, and that judges should wherever possible defer to legislative
Judicial activism is defined as a belief that it is appropriate for courts to play a broad role in the government—that judges should be willing to enforce their view of what the law means regardless of political opposition in the legislative or executive branches. There are three main elements of judicial restraint.

- **Deference** to the Political Branches of Government. Judicial deference to legislative and executive actions is a hallmark of judicial restraint. When judges are reluctant to overturn the decisions of the political branches of government they are exercising judicial restraint. Judges who bend over backwards to uphold government actions are exercising judicial restraint. Judicial activists are less deferential to the political branches of government. Activist judges are more willing to rule that the actions of government officials—whether the president, the Congress, lower court judges, the bureaucracy, or state government officials—are unconstitutional.

- **Uphold Precedent.** Precedent is a legal system where judges are expected to use past decisions as guides when deciding issues that are before the court. Precedent means that judges should decide a case the same way that they have decided similar cases that have previously come before the court. When judges decide cases based on established precedent, they are exercising judicial restraint. Judges who rely on “settled law” are using judicial restraint. Activists are not as committed to uphold precedent. They are more willing to overturn precedents or create new ones that reflect changes in contemporary societal attitudes or values. Activist judges are less bound by what has been called the “dead hand of the past.”

- **Only Legal Issues.** Courts are institutions that are designed to settle legal disputes. Advocates of judicial restraint believe that courts should only decide legal questions, that courts should not become involved with political, economic, social, or moral issues. One indicator of judicial restraint is when a court limits its cases and rulings to legal disputes. It is not always clear, however, whether an issue is a legal or a political issue. Cases that address campaigns, voting, and elections, for instance, involve both law and politics because voting is considered a right, rather than merely a political privilege. Judicial activists are less concerned about getting the courts involved with cases or issues that affect politics, economics, or social issues. They are willing to issue rulings that affect politics because they don’t necessarily see a bright dividing line between politics and law.

5.35 | Ideology and Roles

The above definitions of restraint and activism do not mention ideology even though restraint is commonly considered conservative and activism is commonly considered liberal. Judicial restraint and activism are not intrinsically conservative or liberal. For most of the Supreme Court’s history, its activism has been conservative. The Marshall Court was a conservative activist court. During the 1930s the Court was a conservative activist court. Today’s identification of liberalism as activism can be traced to the period
1937–1970 when the Court’s activism was generally liberal. Since then, the Court has once again become a primarily conservative activist Court. The Rehnquist Court used federalism and the separation of powers to strike down federal legislation such as the Violence Against Women Act, the Gun Free School Zones Act, and provisions of the Brady Handgun Control Act. The Rehnquist Court’s ruling in *Bush v. Gore* (2000) ensured that George W. Bush became President despite receiving fewer votes than Al Gore. The Roberts Court has continued the trend toward conservative activism by striking down campaign finance regulations. Its rulings have most notably ignored established precedent to overturn existing campaign finance laws and to create a new individual right to keep and bear arms.

### 5.4 | Courts as Government Institutions

A court can be defined as a government body designed for settling legal disputes according to law. In the U.S. courts have two primary functions: dispute resolution and law interpretation.

#### 5.41 | Dispute Resolution

The dispute resolution function of courts is to settle disputes according to law. This is a universal function associated with courts. Courts provide a place and a method for peaceably settling the kinds of disputes or conflicts that inevitably arise in a society. These disputes or conflicts could be settled in other ways, such as violence (vendettas, feuds, duels, fights, war, or vigilantism) or political power. One justice problem with these methods of dispute resolution is that the physically strong, or the more numerous, or the more politically powerful will generally prevail over the physically weaker, the less numerous, or the less politically powerful. These alternative methods of dispute resolution tend to work according to the old maxim that Might Makes Right. The modern preference for settling disputes peaceably according to law rather than violence or political power has made the dispute resolution function of courts a non-controversial function because they are associated with justice.

Dispute resolution is the primary function of trial courts. A trial is a fact-finding process for determining who did what to whom. In a civil trial, the court might determine whether one individual (the respondent) did violate the terms of a contract to provide another individual (the plaintiff) with specified goods or services, or whether a doctor’s treatment of a patient constituted medical malpractice, or whether a manufacturer violated product liability laws. In a criminal trial, the court might determine whether an individual (the defendant) did what the government (the prosecution) has accused him of doing.

The dispute resolution function of courts is familiar to most people as a courtroom trial where the lawyers who represent the two sides in a case try to convince a neutral third party (usually a jury) that they are right. In one sense, a trial is nothing more than a decision making process, a set of rules for making a decision. But a trial is a distinctive decision making process because it relies so heavily on very elaborate procedural rules. The rules of evidence (what physical or testimonial evidence can and cannot be introduced) are very complicated. The rules of evidence are important because
the decision (the trial verdict) is supposed to be based solely on the evidence introduced at trial. Trials have captured the political and cultural imagination so much so that famous trials are an important part of the political culture of many countries including the U.S.

5.42 | Law Interpretation

The second function of courts is law interpretation. Courts decide what the law means when there is a disagreement about the meaning of words or when two provisions of law conflict. Courts decide whether a police officer’s search of a person’s car constitutes a violation of the Fourth Amendment’s prohibition against “unreasonable search and seizure.” Courts decide whether imposing the death penalty on children or mentally handicapped persons with an I.Q. below 70 violates the Eighth Amendment prohibition against “cruel and unusual punishment.” Courts interpret the meaning of due process of law.

Law interpretation is primarily the function of appellate courts. Appeals courts do not conduct trials to determine facts; they decide the correct interpretation of the law when a party appeals the decision of a trial court. Law interpretation is a much more controversial function than dispute resolution because it involves judges making decisions about what the law means. The Supreme Court “makes” legal policy when it decides whether police practices related to search and seizure or questioning suspects are consistent with the Fourth Amendment warrant requirements or the Fifth Amendment due process of law. It makes legal policy when it decides whether the death penalty constitutes cruel or unusual punishment. It makes policy when it decides whether laws restricting abortion violate the right to privacy. It makes policy when it reads the Fourteenth Amendment Equal Protection Clause to require “one person, one vote.” It also makes policy when it decides whether the traditional definition of marriage as the union of one man and one woman deprives gays and lesbians of the Equal Protection of the laws. The law interpretation function is often political and often controversial because it gets the courts involved with making policy.

The dispute resolution function is not very controversial. There is broad public support for the idea of government creating courts to peaceably settle conflicts according to law. Law interpretation is the controversial function of courts because it gets courts involved with policy making.

5.43 | The U.S. Court Systems

The U.S. has a federal system of government that consists of one national government and fifty state governments. The U.S. has two court systems: the federal court system and the state court systems. But it can also be said that the U.S. has 51 courts systems and 51 systems of law because each state has substantial autonomy to create its own court system and its own system of criminal and civil laws.
5.44 The Organization of the Federal Court System

The main federal court system consists of one Supreme Court, 13 Courts of Appeals, and 94 District Courts. These are the Article III courts with general jurisdiction over all criminal and civil cases raising questions of federal law. But they are not the only federal courts. There also are special or legislative courts that Congress has created with jurisdiction over special kinds of cases: the U.S. Court of Federal Claims; the U.S. Court of Appeals for Veterans Claims; the Foreign Intelligence Surveillance Courts; and Immigration Courts.

5.45 The 50 State Court Systems

The U.S. system of federalism gives each state substantive power to establish its own court systems and its own system of civil and criminal laws. Therefore the U.S. does not have two court systems (one federal and one state). It has fifty-one systems: one federal and 50 separate state court systems.

The Florida Supreme Court administers or manages the entire state court system. This includes budgeting and allocation of judicial resources. It also hears appeals from death penalty sentences, cases in which a defendant receives capital punishment.

Find Out About It!
The National Center for State Courts provides a great deal of valuable information about courts in the 50 states. Check out the court system in your state.

5.46 The Supreme Court of the United States

The Supreme Court (SCOTUS) is the highest court in the United States. It is also the head of the judicial branch of the federal government and as such has administrative and legal responsibilities for managing the entire federal court system. The Supreme Court consists of nine Justices: the Chief Justice and eight Associate Justices. The Justices are nominated by the President and confirmed with the “advice and consent” of the Senate to serve terms that last a lifetime or during “good behavior.” Federal judges can be removed only by resignation, or by impeachment and subsequent conviction.
The Supreme Court is the only court established by the Constitution. All other federal courts are created by Congress. Article III of the Constitution provides that:

> 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

**5.47 | Supreme Court Jurisdiction**

The term *jurisdiction* refers to a court’s authority to hear a case. The Supreme Court’s jurisdiction is provided in the Constitution, statutes, and case law precedents.

**Constitutional.** Article III provides that judicial power “shall extend to all Cases…arising under this Constitution, the Laws of the United States, and Treaties….” The Court has both original and appellate jurisdiction, but the Court is primarily an appellate court. The Court’s original jurisdiction (that is its authority to sit as a body hearing a case for the first time, as a kind of trial court) is limited to cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party…” The Founders gave the Supreme Court original jurisdiction over cases where states are parties in order to remove the case from the geographic jurisdiction of a state. They believed it served the interests of justice to have a legal dispute between two states be decided by a federal court that was not physically located in a state. In all other cases, the Court has appellate jurisdiction; that is, it reviews the decisions of lower courts.

**Statutory.** Congress also has statutory authority to determine the jurisdiction of federal courts. The Federal Judicial Center lists “Landmark Judicial Legislation” related to the organization and jurisdiction of the federal courts from the Judiciary Act of 1789 to the creation of the federal circuit in 1982. Congress has attempted to prohibit the courts from hearing controversial issues by passing *court stripping* laws that prohibit federal courts from hearing cases involving flag burning or school prayer for instance. The Detainee Treatment Act limited the jurisdiction of courts to hear cases involving habeas corpus application of a Guantanamo Bay detainee.¹ The Constitution specifies that the Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, and in cases in which a state is a party. In all other cases, however, the Supreme Court has only appellate jurisdiction. The Supreme Court considers cases based on its original jurisdiction very rarely; almost all cases are brought to the Supreme Court on appeal. In practice, the only original jurisdiction cases heard by the Court are disputes between two or more states.

The *Judiciary Act of 1789* gave the Supreme Court jurisdiction over appeals from state courts. Article III of the U.S. Constitution gives federal courts jurisdiction over all “cases” or “controversies” arising under federal law. This means that federal courts do not have jurisdiction to hear hypothetical disputes or to give advisory opinions about whether a proposed law would be constitutional.
Case Law Precedents. The Supreme Court also has authority to determine the jurisdiction of the federal courts. Its case law rulings and its administrative rules describe the kinds of cases or issues that federal courts hear. The Court’s Rule 10 provides that a petition for certiorari should be granted only for “compelling reasons.” One such reason is to resolve lower court conflicts. A lower court conflict occurs when different courts interpret the same law differently. An example of lower court conflict is the rulings upholding and striking down the Affordable Care Act. Other compelling reasons to accept an appeal are to correct a clear departure from judicial procedures or to address an important question of law. A writ of certiorari is a request to a higher court to review the decision of a lower court. The Court receives around 7,000 petitions each year, but issues only 75 or so decisions each year, so the Court has an elaborate screening process for determining which writs will be accepted. After the Court grants the writ of certiorari, the parties file written briefs and the case is scheduled for oral argument. If the parties consent and the Court approves, interested individuals or organizations may file amicus curiae or friend of the court briefs which provide the Court with additional information about the issues presented in a case.

5.48 | The Supreme Court Term

The Supreme Court meets in the United States Supreme Court building in Washington D.C. Its annual term starts on the first Monday in October and finishes sometime during the following June or July. Each term consists of alternating two-week intervals. During the first interval, the court is in session, or “sitting,” and hears cases. During the second interval, the court is recessed to consider and write opinions on cases it has heard. The Court holds two-week oral argument sessions each month from October through April. Each side has half an hour to present its argument—but the Justices often interrupt them as you can tell when listening to the Oyez audio recordings.

After oral argument, the Justices schedule conferences to deliberate and then take a preliminary vote. Cases are decided by majority vote of the Justices. The most senior Justice in the majority assigns the initial draft of the Court’s opinion to a Justice voting with the majority. Drafts of the Court’s opinion, as well as any concurring or dissenting opinions, circulate among the Justices until the Court is prepared to announce the ruling.

5.5 | The Selection of Federal Judges

Article II grants the president power to nominate federal judges, whose appointments must be confirmed by the Senate. The individual Justices and the Court as an institution are political, but judicial politics is different than the politics of members of Congress or the president. The politics is less overt; partisan politics is less apparent. But individual Justices and the Court are described in political terms primarily as conservative, moderate, or liberal rather than as members of a political party. Media accounts of the Court refer to the right wing, the left wing, and the swing or moderate Justices. Presidents nominate individuals who share their ideology and usually their party identification. Senators also consider party and ideology when considering whether to ratify a nominee. Presidents generally get Justices who vote the way they were expected
to vote but there are some prominent exceptions to the rule that presidents get what they expected from their nominees:

- Oliver Wendell Holmes disappointed President Theodore Roosevelt;
- Chief Justice Earl Warren disappointed President Eisenhower who expected Warren to be a traditional conservative but he presided over the most liberal Court in the Court's history;
- Justice Harry Blackmun became more liberal than President Nixon expected him to be; and
- Justice David Souter’s voting record was more liberal than President George H. W. Bush expected.

The Constitution does not provide any qualifications for federal judges. A Supreme Court Justice does not even have to be a lawyer. The President may nominate anyone to serve and the Senate can reject a nominee for any reason. But most members of the Court have been graduates of prestigious law schools, and in recent years presidents have nominated individuals with prior judicial experience.

### 5.51 | Demographics

In addition to political factors such as party and ideology, and legal factors such as legal training, legal scholars examine demographic factors such as race, ethnicity, age, gender, and religion. The Supreme Court is not a representative institution. For the first 180 years, the Court’s membership almost exclusively white male Protestant. In 1967 Thurgood Marshall became the first black member of the Court. In 1981, Sandra Day O’Connor became the first female member of the Court. It is interesting that the first black Justice was a liberal who was replaced by a conservative black Justice (Clarence Thomas) and the first female Justice was a conservative who was succeeded by a liberal (Ruth Bader Ginsburg). Justice Brandeis became the first Jewish Justice in 1916. In 2006 Samuel Alito became the fifth sitting Catholic Justice, which gave the Court a Catholic majority. This is significant because the conservative majorities on the Burger, Rehnquist, and Roberts Courts have changed First Amendment freedom of religion law by relying less on the *Wall of Separation* doctrine when deciding church and state cases, and relying more on the *Accommodation* doctrine, which allows much more government accommodation of and support for religion.

### 5.52 | Senate Hearings

As the courts have played a broader role in our system of government and politics, the confirmation process has attracted more attention from interest groups, the media, political parties, and the general public. The nomination of Supreme Court Justices is now an opportunity to participate in the political process. The Senate Judiciary Committee conducts hearings where nominees are questioned to determine their suitability. At the close of confirmation hearings, the Committee votes on whether the nomination should go to the full Senate with a positive, negative or neutral report.

The practice of a judicial nominee being questioned by the Senate Judiciary Committee began in the 1920s as efforts by the nominees to respond to critics or to answer specific concerns. The modern Senate practice of questioning nominees on their
judicial views began in the 1950s, after the Supreme Court had become a controversial institution after the *Brown v. Board of Education* decision and other controversial rulings. After the Senate Judiciary Committee hearings and vote, the whole Senate considers the nominee. A simple majority vote is required to confirm or to reject a nominee. Although the Senate can reject a nominee for any reason, even reasons not related to professional qualifications, it is by tradition that a vote against a nominee is for cause. It is assumed that the President’s nominee will be confirmed unless there are good reasons for voting against the nominee. And so rejections are relatively rare. The most recent rejection of a nominee by vote of the full Senate came in 1987, when the Senate refused to confirm Robert Bork. A President who thinks that his nominee has little chance of being confirmed is likely to withdraw the nomination.

### 5.53 Vacancies

The Constitution provides that Justices “shall hold their Offices during good Behavior.” A Justice may be removed by impeachment and conviction by congressional vote. In 1805, Justice Samuel Chase became the only Justice to have been impeached by the House—he was acquitted by the Senate. His impeachment was part of the era’s intense partisan political struggles between the Federalists and Jeffersonian-Republicans. As a result, impeachment gained a bad reputation as a partisan measure to inappropriately control the Court rather than as a legitimate way to hold judges accountable as public officials. Court vacancies do not occur regularly. There are times when retirement, death, or resignations produce vacancies in fairly quick succession. In the early 1970s, for example, Hugo Black and John Marshall Harlan II retired within a week of each other because of health problems. There have been other lengthy periods when there have been no Court vacancies. Eleven years passed between Stephen Breyer’s appointment in 1994 and Justice O’Connor’s retirement in 2005. Only four presidents have been unable to appoint a Justice: William H. Harrison, Zachary Taylor, Andrew Johnson, and Jimmy Carter.

The Chief Justice can give retired Supreme Court Justices temporary assignments to sit with U.S. Courts of Appeals. These assignments are similar to the senior status, the semi-retired status of other federal court judges. Justices typically plan their retirements so that a president who shares their ideological and partisan ties will appoint their successor.

### 5.54 Republicans Playing Hardball

Justice Antonin Scalia died on February 13, 2016. Shortly after his death, Senate Majority Leader Mitch McConnell (R-Kentucky) issued the following statement: “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.” On March 16, President Obama nominated Merrick Garland, the Chief Judge of the U.S. Court of Appeals for the District of Columbia, to fill the vacancy. The Republican majority in the Senate refused to even consider the Garland nomination. The Republican strategy was to stonewall the nomination. Majority Leader McConnell also “slow-walked” the confirmation of other judicial nominees to “run out the clock” so that the Obama nomination game would over with the 2016 elections. The refusal to act on the
Supreme Court nomination and the slowing of the confirmation process were a political gamble that a Republican would win the presidency. The gamble paid off.

During the campaign, Donald Trump consulted with two very prominent conservative organizations, The Federalist Society and the Heritage Foundation, to create a list of people from whom he promised to select judicial nominees if elected. The campaign strategy worked: it became one of the reasons for conservatives and republicans to vote for Trump because the names on the list were supporters of gun rights and critics of the constitutional right to abortion. President Trump nominated and the Senate confirmed Neil Gorsuch to the Supreme Court. President Trump described Gorsuch as a judge in the Scalia model: a legal conservative who believed that Originalism is the appropriate method of deciding cases. The strategy to run out the clock greatly reduced the number of Obama appointees to the federal courts. Compare the judicial appointments for the following presidents who faced a Senate controlled by the other party during their last two years in office:

Table 5.541: Number of Judges Appointed During Last Two Years of Term with Opposition Party Controlling Senate

<table>
<thead>
<tr>
<th>President</th>
<th>Number of Judges Appointed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reagan</td>
<td>83</td>
</tr>
<tr>
<td>Clinton</td>
<td>72</td>
</tr>
<tr>
<td>George W. Bush</td>
<td>68</td>
</tr>
<tr>
<td>Obama</td>
<td>20</td>
</tr>
</tbody>
</table>

The Republican slow-walk strategy resulted in more than 120 judicial vacancies when President Trump took office, which was a great opportunity for President Trump to have a significant, long-term impact on legal policy. President Obama appointed a total of 329 Article III judges. Article II judges are those that are nominated by the president and confirmed by the Senate.

Table 5.542: Total Number of Obama Judicial Appointments to Article III Courts

<table>
<thead>
<tr>
<th>Obama Appointments</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court Justices</td>
<td>2</td>
</tr>
<tr>
<td>Court of Appeals Judges</td>
<td>55</td>
</tr>
<tr>
<td>District Court Judges</td>
<td>268</td>
</tr>
<tr>
<td>U.S. Court of International Trade Judges</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>329</td>
</tr>
</tbody>
</table>

In addition to these Article III courts, President Obama appointed judges to Article I (or legislative courts): Tax Court; Court of Appeals for Veterans Claims; Court of Military Commission Review; Court of Federal Claims; and Court of Appeals for the Armed Forces. He also appointed Immigration Court Judges.
The Constitution does not specify the size of the Supreme Court. Congress determines the number of Justices. The Judiciary Act of 1789 set the number of Justices at six. President Washington appointed six Justices—but the first session of the Supreme Court in January 1790 was adjourned because of a lack of a quorum. The size of the Court was expanded to seven members in 1807, nine in 1837, and ten in 1863. In Judicial Circuits Act of 1866 provided that the next three Court vacancies would not be filled. The Act was passed to deny President Johnson the opportunity to appoint Justices. The Circuit Judges Act of 1869 set the number at nine again where it has remained ever since. In February of 1937 President Franklin D. Roosevelt proposed the Judiciary Reorganization Bill to expand the Court by allowing an additional Justice for every sitting Justice who reached the age of seventy but did not retire (up to a maximum Court size of fifteen). The Bill failed because members of Congress saw it as a court packing plan. Roosevelt was in office so long that was able to appoint eight Justices and promote one Associate Justice to Chief Justice.

The New Supreme Court (2017)

Deciding Cases: Is it Law or Politics?

One of the most frequently asked questions about the courts is whether judges decide cases based on law or politics. This question goes to the heart of the legitimacy problem. To answer the question let’s look first at the Supreme Court as an institution. The Supreme Court has almost complete control over the cases that it hears. The Supreme Court controls its docket. It decides only 80-90 of the approximately 10,000 cases it is
asked to decide each year. This means that the Court decides which issues to decide and which issues not to decide. This is, in a sense, political power.

The role of law and politics in an individual Justice’s decision making is of more direct interest. Legal scholars identify a variety of influences or factors that explain judicial decisions. But there are two general models of judicial decision making: a legal model and a political (or extra-legal) model. The legal model of deciding cases explains judicial decisions as based on legal factors (the law and the facts of the case). The political model explains decisions as based on behavioral factors (demographics such as race, gender, religion, ethnicity, age), attitudinal factors (political, ideological, or partisan), or public opinion. The legal methods include the plain meaning of the words, the intentions of the framers, and precedent. The most political method is interpretation, where judges decide cases based on their own beliefs about what the law is or should be, or contemporary societal expectations of justice.

5.61 | The Methods of Deciding Cases

The U.S. is a system of government based on the rule of law. Judges are expected to decide cases based on the written law: the Constitution, statutes, and administrative law. The following is the logical order in which judges decide cases, beginning with the most legal method (the plain meaning of the words) and ending with the most political method (interpretation).

<table>
<thead>
<tr>
<th>Most Legal</th>
<th>Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Plain Meaning of Words (What the law says)</td>
<td></td>
</tr>
<tr>
<td>2. Intentions of Framers (What the words mean)</td>
<td></td>
</tr>
<tr>
<td>3. Precedent (Stare decisis)</td>
<td></td>
</tr>
<tr>
<td>4. Interpretation</td>
<td></td>
</tr>
</tbody>
</table>

5.62 | Plain Meaning of the Words

A judge reads the law to determine whether the case can be decided by the plain meaning of the words. Sometimes the meaning of the law is plain. The Constitution requires that a President be 35 years old and a native born citizen. But some provisions of the Constitution are ambiguous. The Fifth Amendment provides that “No person shall be... deprived of life, liberty, or property, without due process of law…” The Eighth Amendment prohibits “cruel and unusual punishments.” It is impossible to read the phrases “due process” or “cruel and unusual punishment” and arrive at a plain meaning of the words. Judges must use other methods to determine the meaning of these general provisions of the Constitution.
Statutes can present a similar problem. The Communication Decency Act of 1996, for instance, made it a felony to “knowingly” transmit “obscene or indecent” messages to a person under age 18. It is easy to determine whether a person who was sent a message was under age 18; it is virtually impossible to define with any precision the meaning of “indecent.” Therefore judges use the second method: they try to determine what the people who wrote the law intended the words to mean.

5.63 | Intentions of the Framers

Judges have several ways to determine the intention of the framers of the law. In order to determine what a provision of the Constitution was intended to mean, judges examine the Records of the Constitutional Convention, the writings or letters of the delegates to the Constitutional Convention of 1787, the Federalist Papers (a series of essays by James Madison, Alexander Hamilton, and John Jay supporting the adoption of the new Constitution), or the writings of the Anti-federalists (authors who opposed the ratification of the new constitution). In order to determine the meaning of the words in a constitutional amendment, judge examine the Congressional Record for evidence of the intentions of the framers. The congressional debates surrounding the adoption of the 13th, 14th, and 15th Amendments, for example, can help understand what these three post-Civil War Amendments were intended to mean.

5.64 | Precedent

The U.S. legal system is based on precedent or stare decisis. Stare decisis is Latin for “let the previous decision stand.” The system of precedent means a judge is expected to decide a current issue the way a previous issue was decided. Although precedent may seem like a legalistic way to decide cases, it is actually based on a common sense expectation of justice: an expectation that an individual will be treated the way other similarly situated individuals were treated. In this sense, precedent is a basic element of fairness.

Precedent is a system where the past guides the present. But courts cannot always decide a case by looking backward at how other courts decided a question or legal issue. Sometimes a judge may think it is inappropriate to decide a current question the same way it was decided in the past. Attitudes toward equality and the treatment of women for example may have changed. Or attitudes toward corporal punishment may have changed. Rigidly adhering to precedent does not readily allow for legal change. And sometimes courts are presented with new issues for which there is no clearly established precedent. Advances in science and technology, for instance, presented the courts with new issues such as patenting new life forms created in the laboratory or the property rights to discoveries from the Human Genome Project. When the plain meaning of the words, the intentions of the framers, and precedent do not determine the outcome of a case, then judges sometimes turn to another method: interpretation.

5.65 | Interpretation

Interpretation is defined as a judge deciding a case based on 1) her or his own understanding of what the law should mean; or 2) modern societal expectations of what
the law should mean. Determining the meaning of the Eighth Amendment prohibition against “cruel and unusual punishment” illustrates how judges use interpretation. Should it mean what people considered cruel and unusual punishment in the 18th Century? Or should judges refer to the standards of modern or civilized society when determining what punishments the Eighth Amendment prohibits? Interpretation is controversial because it gives judges power to decide what the law means. This is why interpretation is called political decision-making, legislating from the bench, or judicial activism. Judicial restraint usually means judicial deference to the other branches of government, upholding precedent, and deciding only legal (not economic, social, or political) issues. Interpretation raises the power problem with the courts. In a democracy, the legitimacy of judicial interpretation of the laws is controversial.

5.66 | Two Models of Decision Making

The following flow charts depict two models of legal decision making: the Classical or Legal Model and the Legal Realist (or Political) Model. Which do you think describes how judges and jurors decide cases? Which do you think describes how judges and jurors should decide cases?

**The Classical or Legal Model**

![Flow Chart of The Classical or Legal Model]

**The Legal Realist (or Political) Model**

![Flow Chart of The Legal Realist (or Political) Model]
5.67 | Three Models of Legal Systems

The methods that judges use to decide cases, and the role that juries play in the administration of justice, reflect different beliefs about the relationship between the political system and the legal system. A **Responsive Legal System** is one where the legal system is almost completely responsive to politics so that law and politics are basically the same thing. At the other end of the spectrum, an **Autonomous Legal System** is one where law and politics are almost completely separate: politics does not affect law. The Politico-Legal System is one where legal institutions are separate from political institutions but isolated from political institutions—for example, politicians select judges but they have lifetime tenure and cannot be removed except for cause. Politics often involves debates about the merits of an issue AND debates about whether the issue should be decided by politics or by law, by the legal system (courts) or by the political system.

---

5.68 | The Crime Control Model of Justice and The Due Process Model of Justice

One useful way to understand liberal and conservative thinking about crime policy is the two models of justice described by Herbert Packer *The Limits of the Criminal Sanction* (1968). The models describe two ways of thinking about how best to achieve or administer justice. The two models represent the **ends of a spectrum or a range of views**, not two categories. Liberals and conservatives tend to locate themselves toward one or the other value in the following five sets of paired values related to thinking about justice.

Four of the pairs are familiar. The **Individual Rights v. Government Power** pair is the familiar civil liberties conflict between individual freedom and government power.
Rehabilitation v. Punishment reflects the preference for criminal sentencing policy that emphasizes rehabilitation or punishment. Sentencing law looks very different depending on which value is emphasized. The Justice with Law v. Justice without Law pair reflects describes the difference between thinking that law (e.g., elaborate rules of evidence and procedure) is the best way to achieve justice and thinking that justice is best achieved without law (e.g., executive discretion rather). Legal Autonomy v. Responsive Law describes legal systems that are relatively separate from the political system or fairly responsive to it. In responsive legal systems, sheriffs, prosecutors, and judges are elected officials who are held politically accountable rather than legally accountable.

The fifth pair of values—Law and Order—are less familiar because “law and order” are often described as a single value.

Due Process (Liberal) Model    Crime Control (Conservative) Model

<table>
<thead>
<tr>
<th>Law</th>
<th>Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual Rights</td>
<td>Government Powers</td>
</tr>
<tr>
<td>Justice with Law</td>
<td>Justice without Law</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>Punishment</td>
</tr>
<tr>
<td>Legal Autonomy:</td>
<td>Responsive Law:</td>
</tr>
</tbody>
</table>

5.69 | Popular Legal Culture

Most Americans have fairly strong opinions about crime. Where does the general public get information about the legal system? Some people have direct personal experience: they are arrested and tried for a felony, for example, or they have sued someone or they have been sued. Some people have served on juries. People also get indirect information from family, friends, and colleagues. The media are also an important source of public thinking about crime. The media effect applies to the news media and legal fiction. Trials certainly have captured the public’s imagination. The nation’s history is marked by famous “trials of the century.” Fictional TV judges are familiar figures in the public imagination: The People’s Court; Judge Judy; Judge Joe Brown; Judge Mathis; Judge Alex; and even Judge Wapner’s Animal Court. Police procedurals are staples of television programming. The media frame crime stories in terms of the crime control and due process models of justice.

5.7 | Jury Justice

The relationship between law and politics is complicated in the U.S. because of political culture (democratic theory); legal culture (the strong commitment to popular justice as the will of the people); and constitutionalism (limits on popular justice).
The founders intended juries to function as a political institution. The jury was intended to be part of the elaborate system of institutional checks and balances. Juries were composed of lay people who could check government power. The Trial of John Peter Zenger (1735) established the tradition of jurors refusing to convict a defendant despite the judge’s directive to do so. The Declaration of Independence consists of a list of charges accusing the King of violating the rights of colonists—including the right to trial by jury. Article III, Section 2 of the Constitution, the Sixth Amendment, and the Seventh Amendment provide for the right to trial by jury in criminal and civil cases. In Democracy in America (1835), Alexis de Tocqueville wrote: “The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.” He also described the jury system as a “public school, ever open” to teach people about the culture of rights and responsibilities.

Individual jurors are also political in the sense that their attitudes and values influence decision-making. This is why so much attention is paid to the demographics of a jury—its racial, ethnic, gender, age, income, religion, and other demographic composition. Juror selection is an extremely important stage of the legal process because empirical evidence of decision making indicates that demographic and attitudinal factors influence decisions. This is why jury consulting has become a profession. It is also one of the reasons why the Black Lives Matter movement put police accountability for the use of force on the agendas of the national government and local government.

Trials as Fact-finding processes

A trial is a fact-finding process with elaborate procedural rules governing the kinds of evidence that can be considered. The U.S. uses the adversarial system of justice. Each side—the two adversaries—presents its side of the story to a neutral third party decision-maker—judge or jury. The adversarial system is based on the belief that the best way to discover the truth of “what happened” is to have each side tell its story to a neutral third party which then determines which set of facts is most believable. The burden of proof in a criminal trial is proving “beyond a reasonable doubt” that the accused did what they were accused of. There is a lower burden of proof in a civil trial: “the greater weight of the evidence.”

Determining the facts can be hard. In Courts on Trial: Myth and Reality in American Justice, Judge Jerome Frank explains that fact-finding is hard because “facts are guesses.” This seems an astonishing statement because it means that the question whether a defendant is guilty of murder is a guess. The fact is that a person was killed; the guess is whether the killing was murder. Why is it so hard for jurors to determine what happened after a lengthy trial where both sides have presented evidence and made arguments? Why is it so hard to determine who did what to whom, or why they did it? There are several reasons.

- Hard cases. Easy cases are settled; they don’t actually go to trial. More than 90% of criminal cases are settled by plea bargains.
• The adversarial process. The adversarial process itself may contribute to the difficulty of determining who is telling the truth. Each side in a trial has an incentive to exaggerate its version of what happened rather than to tell the truth, each attorney has an incentive to portray their client as a regular Mother Theresa and the opponent as a regular Ted Bundy. The prosecution and the defense may hire expert witnesses who are paid to testify in support of their side. After listening to conflicting/competing expert witnesses, a jury is left to decide what happened. Is the adversarial system the best way to design a fact-finding process? Many other countries do not use the adversarial system. Most European countries, for example, use the inquisitorial system: judges play an active role in investigating, questioning, and determining what happened rather than just presiding over a trial where the two lawyers tell their sides of the story.

• Eyewitness testimony. Even one of the most compelling types of testimony—eyewitness testimony—is notoriously faulty. And research indicates that police line-ups have structural flaws that produce false positive identifications that result in wrongful convictions.

• Human psychology. The study of how people make decisions indicates that fact-finding is intertwined with value judgments. Jurors tend to accept as fact evidence that supports their beliefs. This is confirmation bias. In criminal trials, jurors believe or give credibility to witnesses that support their predisposition to support the police or the accused. That is, jurors use the crime control or due process model of justice to frame the question of guilt or innocence. In civil cases, confirmation bias means that jurors who think that people need to assume more personal responsibility for their injuries, and jurors who think that people need to be compensated for their injuries, will accept evidence that supports their predisposition and discount evidence that challenges their predisposition. The concept of cognitive dissonance helps explain juror decisions. Cognitive dissonance occurs when a person faces ideas or information or evidence that conflict with their strongly held beliefs. The conflict/contradiction creates discomfort and is unsettling. Logically, one might expect that a rational person would adjust their beliefs to fit the facts/evidence. But the evidence indicates that this is not always what happens. When faced with cognitive dissonance, people often contort the facts, interpret the facts, or construct the facts to fit into (confirm or conform to) their belief system. This means that jurors affirm their own group identity (including ideology) when confronted with a different identity. This “us” versus “them” dynamic produces bias in the administration of justice.

What do these aspects of human psychology mean for “judging” the evidence presented at trial? How does a juror weigh the testimony of a defendant, a character witness, a child who testifies, an eyewitness, or an expert? These psychological questions are central to the story lines and theme of legal fiction, including the classic film 12 Angry Men (1957) and many television police procedurals.
5.73 | Demographics: You think who you are?

The belief that juries are political institutions and the belief that legal facts are guesses means that the composition of the jury is central to the administration of justice! What you think about the facts of a case involving the use of deadly force, for example, depends to a great extent on who you are. This is why scientific or social scientific jury selection (jury consulting) has grown as a profession.

5.74 | Race

In the early decades of the 20th Century, the U.S. Supreme Court began to intervene in state and local criminal justice to remedy racial discrimination in the administration of justice. This included the problem all-white juries.

The Scottsboro Boys (1931-1937). The story of the Scottsboro Boys case is also told in the PBS article. Click on the link for defense counsel Samuel Liebowitz to get a sense of the difference between the world of a northern, Jewish New York lawyer and the southern political culture of the day. Why did the U.S. Supreme Court intervene in the local political/legal culture? The book and film To Kill a Mockingbird, which are legal fiction based loosely on the Scottsboro Boys case, expose the problem of racial discrimination in the administration of local jury justice.

Smith v. Texas, 311 U.S. 128, 130 (1940). The Court mentioned the need to make the jury “truly representative of the community,” but did not declare that a defendant had a right to a representative jury.

The Men Accused of Murdering Emmett Till (1955). The white sheriffs did not seem worried about being accused of a crime because they believed the local political-legal system would not convict them.

Representation, pluralism, and diversity have become important factors in determining whether political decisions are legitimate. They have also become important factors determining the legitimacy of legal decisions. At one time, laws stole prohibited women from serving on juries. Today, it is unconstitutional to exclude women from jury duty. The representative ideal does not mean that juries must have the same number of women and men; it simply means that the jury pool must not systematically exclude or be biased against women. The jury pool must include a “fair cross-section” of the community.

The original ideal of trial by a jury of peers did not mean trial by an impartial jury. In fact, it meant trial by a partial jury. A jury of peers was partial in the sense that the jurors would be familiar with the community, its values, and maybe even the defendant and the victim. The jury of peers was intended to achieve “local justice.” Professionals run the criminal justice system: the police; the prosecutors; the judges; and the lawyers. Jurors provide the lay perspective on the administration of justice. Juries do have a different perspective than judges: jurors do justice while judges do law.
Think About It!
What should be the goal of jury selection? The **voir dire** is used to exclude “biased” or “prejudiced” jurors. Is the composition of the jury relevant in cases where white police officers fatally shoot black men? What about cases where civilians claim that they are immune from prosecution under a state’s Stand Your Ground Law?

5.75 | **Trials as Morality Plays**

Trials are not just fact-finding processes. Trials are also morality plays. In a morality play, the characters represent values that are in dramatic conflict: good versus evil; heroes versus villains; freedom versus order; law versus violence; and even law versus justice. These are the themes of the dramatic conflicts in the famous trials of Socrates, Jesus, Peter Zenger, John Brown, Timothy McVeigh, and O.J. Simpson or any of the other more contemporary **Famous Trials**. These dramatic conflicts explain why some trials become media spectacles that attract national attention as the trial of the century, decade, or year. Fictional trials also serve as morality plays that teach us about law and justice. Legal fiction is such a universally popular form of fiction that it can be considered a form of world literature.

5.8 | **Summary**

All countries have courts. In the U.S. courts decide legal disputes and interpret the laws. Interpretation is often controversial because it means that judges are deciding what the law means in ways that are often considered judicial policymaking or legislating from the bench. The legitimacy of judicial policymaking is questionable in a democracy where laws are supposed to be made by the elected representatives of the people. As judicial power has expanded over time, the legitimacy of judicial power has become even more contentious. The controversy is at root a controversy about the appropriate relationship between politics and law, between the political system and the legal system. The chapter focused on the role of the courts in the administration of justice, but it also described some aspects of jury justice because the jury is an important institution in the administration of justice.

5.9 | **Additional Resources**

5.91 | **Internet Resources**

Information about the Supreme Court is available at [http://www.supremecourt.gov/](http://www.supremecourt.gov/). Information about the federal court system is available at [http://www.uscourts.gov/Home.aspx](http://www.uscourts.gov/Home.aspx) and the [Federal Judicial Center](http://www.uscourts.gov/). Information about the organization and functions of the federal court system, including a court locator to find the federal courts in your area or information about serving as a juror, is available at [http://www.uscourts.gov/](http://www.uscourts.gov/)
The full text and summaries of Supreme Court opinions, as well as audio recordings of the oral arguments before the U.S. Supreme Court are available at the Oyez Project: http://www.oyez.org/

Landmark Supreme Court cases are available at www.landmarkcases.org

A gallery of famous trials (e.g., Socrates, Galileo, the Salem Witch Trials, John Peter Zenger, and the Oklahoma City Bomber) are available at http://www.law.umkc.edu/faculty/projects/fltrials/fltrials.htm

Videos of the Justices explaining their views on how they see their individual job as Justices and the Court’s role as an institution in their own words are available at the C-SPAN Web site: http://supremecourt.c-span.org/Video/TVPrograms.aspx

Information about the 50 state court systems is available at The National Center for State Courts: http://www.ncsconline.org/

For Information about Florida’s death row, a virtual tour of a prison cell, or other information about convicted offenders on the death row roster is available at the My Florida Web site (click Government, Executive Branch, Department of Corrections): www.myflorida.gov The link to death row fact sheets is http://www.dc.state.fl.us/oth/deathrow/

Additional information about the Supreme Court is available at http://www.pbs.org/wnet/supremecourt/educators/lp4b.html and http://www.pbs.org/wnet/supremecourt/educators/lp4c.html

Demographic information about the Supreme Court Justices is available at http://www.fas.org/sgp/crs/misc/R40802.pdf

5.82 | In the Library


Discussion Questions

1. Discuss the importance of the Marshall Court.

2. Explain stare decisis and the role it plays in the American judicial system. What did William Rehnquist mean when he called \textit{stare decisis} “a cornerstone of our legal system” but said that “it has less power in constitutional cases?” Do you agree with him?

3. Describe the racial, ethnic, and gender makeup of the federal courts. Does it matter that some groups are underrepresented and other groups are overrepresented? Why?

4. Discuss the criteria for nominating Supreme Court justices and the process by which the nominees are confirmed. How has the process changed in recent years?

5. Discuss the advantages and disadvantages of judicial activism and judicial restraint.

6. Compare and contrast the attitudinal, behavioral, and strategic models of judicial decision making. Explain which of these models most accurately captures how judges make their decisions.

7. What factors affect the implementation of court rulings? Should courts be given additional power to implement decisions?

---


2. The Court’s annual case schedule and docket are available at [http://www.supremecourtus.gov/](http://www.supremecourtus.gov/)

---

5.84 | Discussion Questions

5.83 | Terms

Legitimacy
Judicial restraint
Judicial activism
Judicial review
Dispute resolution
Law interpretation
Precedent
Jury Justice
Jury of Peers