

## Study Outline

### Chapter 14: The Judiciary

- I. Introduction
  - A. Only in the United States do judges play so large a role in policy-making.
    - 1. Judicial review: right to rule on laws and executive acts on basis of constitutionality; chief judicial weapon in system of checks and balances
    - 2. In Great Britain, Parliament is supreme
    - 3. In other countries, judicial review means little
      - Exceptions: Australia, Canada, West Germany, India, and a few others
  - B. Debate is over how the Constitution should be interpreted
    - 1. Strict constructionist (interpretivist) approach: judges are bound by the wording of the Constitution
    - 2. Activist (legislative) approach: judges should look to the underlying principles of the Constitution
    - 3. Not a matter of liberal versus conservative
      - a. A judge can be both conservative and activist, or vice versa
      - b. Today most activists tend to be liberal, most strict constructionists conservative
- II. The development of the federal courts
  - A. Founders' view
    - 1. Most Founders probably expected judicial review but not its large role in policy making
    - 2. Traditional view: judges find and apply existing law
    - 3. Activist judges would later respond that judges make law
    - 4. Traditional view made it easy for Founders to justify judicial review
    - 5. Hamilton: courts least dangerous branch
    - 6. But federal judiciary evolved toward judicial activism
  - B. National supremacy and slavery: 1789-1861
    - 1. *McCulloch v. Maryland*: federal law declared supreme over state law
    - 2. Interstate commerce clause is placed under the authority of federal law; conflicting state law void
    - 3. *Dred Scott v. Sandford*: Negroes were not and could not become free citizens of the United States; a direct cause of the Civil War
  - C. Government and the economy: Civil War to 1936
    - 1. Dominant issue of the period: whether the economy could be regulated by state and federal governments
    - 2. Private property held to be protected by the Fourteenth Amendment
    - 3. States seek to protect local businesses and employees from the predatory activities of national monopolies; judicial activism
    - 4. The Supreme Court determines what is "reasonable" regulation
    - 5. The Court interprets the Fourteenth and Fifteenth Amendments narrowly as applied to blacks
  - D. Government and political liberty: 1936 to the present
    - 1. Court establishes tradition of deferring to the legislature in economic cases
    - 2. Court shifts attention to personal liberties and becomes active in defining rights
  - E. The revival of state sovereignty
    - 1. Supreme Court rules that states have right to resist some forms of federal action
    - 2. Hint at some real limits to the supremacy of the federal government
- III. The structure of the federal courts
  - A. Two kinds of federal courts
    - 1. Constitutional courts
      - a. Created under Article III
      - b. Judges serve during good behavior
      - c. Salaries not reduced while in office
      - d. Examples: District Courts (ninety-four), Courts of Appeals (twelve)
    - 2. Legislative courts
      - a. Created by Congress for specialized purposes
      - b. Judges have fixed terms
      - c. No salary protection

- B. Selecting judges
  - 1. Party background some effect on judicial behavior but ideology does not determine behavior
  - 2. Senatorial courtesy: judges for U.S. district courts must be approved by that state's senators
  - 3. The litmus test
    - a. Presidential successes in selecting compatible judges
    - b. Concern this may downplay professional qualifications
    - c. Greatest effect on Supreme Court
- IV. The jurisdiction of the federal courts
  - A. Dual court system
    - 1. One state, one federal
    - 2. Federal cases listed in Article III and the Eleventh Amendment of the Constitution
      - a. Federal question cases: involving U.S. matters
      - b. Diversity cases: involving citizens of different states
      - c. All others are left to state courts
    - 3. Some cases can be tried in either court
      - a. Example: if both federal and state laws have been broken (dual sovereignty)
      - b. Justified: each government has right to enact laws, and neither can block prosecution out of sympathy for the accused
    - 4. State cases sometimes can be appealed to Supreme Court
    - 5. Exclusive federal jurisdiction over federal criminal laws, appeals from federal regulatory agencies, bankruptcy, and controversies between two states
  - B. Route to the Supreme Court
    - 1. Most federal cases begin in U.S. district courts, are straightforward, and do not lead to new public policy.
    - 2. The Supreme Court picks the cases it wants to hear on appeal
      - a. Uses writ of certiorari ("cert")
      - b. Requires agreement of four justices to hear case
      - c. Usually deals with significant federal or constitutional question
        - 1. Conflicting decisions by circuit courts
        - 2. State court decisions involving the Constitution
      - d. Only 3 to 4 percent of appeals are granted certiorari
      - e. Others are left to lower courts; this results in a diversity of constitutional interpretation
- V. Getting to court
  - A. Deterrents
    - 1. The Court rejects 95 percent of applications for certiorari
    - 2. Costs of appeal are high
      - a. But these can be lowered by
        - 1. In forma pauperis: plaintiff heard as pauper, with costs paid by the government
        - 2. Payment by interest groups who have something to gain (American Civil Liberties Union)
      - b. Each party must pay its own way except for cases in which it is decided
        - 1. That losing defendant will pay (fee shifting)
        - 2. Section 1983 suits
    - 3. Standing: guidelines
      - a. Must be controversy between adversaries
      - b. Personal harm must be demonstrated
      - c. Being taxpayer not entitlement for suit
      - d. Sovereign immunity
  - B. Class action suits
    - 1. Brought on behalf of all similarly situated
    - 2. Financial incentives to bring suit
    - 3. Need to notify all members of the class since 1974 to limit such suits
- VI. The Supreme Court in action
  - A. Oral arguments by lawyers after briefs submitted
    - 1. Questions by justices cut down to thirty minutes
    - 2. Role of solicitor general
    - 3. Amicus curiae briefs

- 4. Many sources of influence on justices, such as law journals
  - B. Conference procedures
    - 1. Role of chief justice: speaking first, voting last
    - 2. Selection of opinion writer: concurring and dissenting opinions
  - C. Strategic retirements from the U.S. Supreme Court
    - 1. There has been a sharp increase in the rate of retirements (contra deaths)
    - 2. Early duties were physically onerous, adverse to one's health
    - 3. More recently, retirements occur when justices and presidents share party identification
- VII. The power of the federal courts
  - A. The power to make policy
    - 1. By interpretation
    - 2. By extending reach of existing law
    - 3. By designing remedies
  - B. Measures of power
    - 1. Number of laws declared unconstitutional (more than 120)
    - 2. Number of prior cases overturned; not following stare decisis
    - 3. Deference to the legislative branch (political questions)
    - 4. Kinds of remedies imposed; judges go beyond what justice requires
    - 5. Basis for sweeping orders from either the Constitution or the interpretation of federal laws
  - C. Views of judicial activism
    - 1. Supporters
      - a. Courts should correct injustices
      - b. Courts are last resort
    - 2. Critics
      - a. Judges lack expertise
      - b. Courts not accountable; judges not elected
    - 3. Various reasons for activism
      - a. Too many lawyers; but real cause adversary culture
      - b. Easier to get standing in courts
  - D. Legislation and courts
    - 1. Laws and the Constitution are filled with vague language
      - a. Ambiguity gives courts opportunities to design remedies
      - b. Courts can interpret language in different ways
    - 2. Federal government is increasingly on the defensive in court cases; laws induce litigation
    - 3. The attitudes of federal judges affect their decisions
- VIII. Checks on judicial power
  - A. Judges are not immune to politics or public opinion
    - 1. Effects will vary from case to case
    - 2. Decisions can be ignored
      - a. Examples: school prayer, segregated schools
      - b. Usually if register is not highly visible
  - B. Congress and the courts
    - 1. Confirmation and impeachment proceedings alter the composition of the courts
    - 2. Changing the number of judges
    - 3. Revising legislation declared unconstitutional
    - 4. Altering jurisdiction of the courts and restricting remedies
    - 5. Constitutional amendment
  - C. Public opinion and the courts
    - 1. Defying public opinion, especially elite opinion, frontally is dangerous
    - 2. Opinion in realigning eras may energize court
    - 3. Public confidence in court since 1966 has varied
    - 4. Change caused by changes of personnel and what government is doing
  - D. Reasons for increased activism
    - 1. Growth of government
    - 2. Activist ethos of judges