- Trace the historical evolution of the policy agenda of the Supreme Court.
- Examine the ways in which American courts are both democratic and undemocratic institutions.

CHAPTER OVERVIEW

INTRODUCTION

Although the scope of the Supreme Court's decisions is broad, the actual number of cases tried in our legal system is tiny, compared to lower federal courts and state and local courts. This means that a great deal of judicial policymaking occurs in courts other than the Supreme Court. This chapter describes how the court systems are structured, how judges are selected, and the influence of the courts on the policy agenda in the United States.

THE NATURE OF THE JUDICIAL SYSTEM

The judicial system in the United States is an **adversarial** one in which the courts provide an arena for two parties to bring their conflict before an impartial arbiter (a judge). The system is based on the theory that justice will emerge out of the struggle between two contending points of view.

There are two basic kinds of cases, criminal and civil. In *criminal law,* an individual is charged with violating a specific law; criminal law provides punishment for crimes against society (or public order). *Civil law* does not involve a charge of criminality. Instead, it concerns a dispute between two parties and defines relationships between them. The vast majority of cases (both civil and criminal) involve state law and they are tried in state courts.

Every case is a dispute between a *plaintiff* and a *defendant*—the former bringing some charge against the latter. The task of the judge or judges is to apply the law to the case; in some cases, a **jury** is responsible for determining the outcome of a lawsuit. **Litigants** (the plaintiff and the defendant) must have **standing to sue,** which means they must have a serious interest in the case. **Class action suits** permit a small number of people to sue on behalf of all other people similarly situated. Because they recognize the courts' ability to shape policy, interest groups often seek out litigants whose cases seem particularly strong. At other times groups do not directly argue the case for litigants, but support them instead with ***amicus curiae*** ("friend of the court") **briefs** that attempt to influence the Court's decision, raise additional points of view, and present information not contained in the briefs of the attorneys for the official parties to the case.

There are a number of limitations on cases that federal courts will hear. Federal judges are restricted by the Constitution to deciding **"cases or controversies."** Two parties must bring a case to them (a case involving an actual dispute rather than a hypothetical question). Courts may decide only **justiciable disputes,** which means that conflicts must be capable of being settled *by legal methods.*

THE STRUCTURE OF THE FEDERAL JUDICIAL SYSTEM

The Constitution is vague about the federal court system. Aside from specifying that there will be a Supreme Court, the Constitution left it to Congress' discretion to establish lower federal courts of general jurisdiction. In the Judiciary Act of 1789, Congress created a system of *constitutional courts* on the basis of this constitutional provision.

The basic judicial structure has been modified several times. At the present time, there are 12 federal courts of appeal, 91 federal district courts, and thousands of state and local courts (in addition to the Supreme Court).

Congress has also established some *legislative courts* (such as the Court of Military Appeals, the Court of Claims, and the Tax Court) for specialized purposes, based on Article I of the Constitution. These **Article I courts** are staffed by judges who have fixed terms of office and who lack the protections of judges on constitutional courts against removal or salary reductions.

Courts of **original jurisdiction** are those where a case is first heard, usually in which trials are held. Courts with **appellate jurisdiction** hear cases brought to them on appeal from a lower court. Appellate courts do not review the factual record, only the legal issues involved.

The entry point for most litigation in the federal courts is one of the 91 district courts. The 680 district court judges usually preside over cases alone, but certain rare cases require that three judges constitute the court. Jurisdiction of the district courts extends to federal crimes; civil suits under federal law; diversity of citizenship cases where the amount exceeds $75,000; supervision of bankruptcy proceedings; review of the actions of some federal administrative agencies; admiralty and maritime law cases; and supervision of the naturalization of aliens.

However, approximately 98 percent of all criminal cases in the United States are heard in state and local court systems, not in federal courts. Even so, only a small percentage of the persons convicted in district courts actually have a trial. Most charged with federal crimes enter guilty pleas as part of a bargain to receive lighter punishment (*"plea bargaining"*). Most *civil suits* are also handled in *state and local* courts; the vast majority of suits are *settled out of court* without a trial.

U.S. courts of appeal are *appellate* courts empowered to review final decisions of district courts; they also have the authority to review and enforce orders of many federal regulatory agencies. The United States is divided into *12 judicial circuits*, including one for the District of Columbia. There is also a special appeals court called the **U.S. Court of Appeals for the Federal Circuit** (established in 1982), which hears appeals in *specialized cases*, such as those regarding patents, copyrights and trademarks, claims against the United States, and international trade.

About 70 percent of the more than 68,000 cases heard in the courts of appeal come from the district courts. Each court of appeals normally hears cases in panels consisting of

three judges, but each may sit *en banc* (with all judges present) in particularly important cases. Decisions are made by *majority vote* of the participating judges.

The U.S. **Supreme Court** is the only court specifically established within Article III of the Constitution. The size of the Court is not set in the Constitution, and it was altered many times between 1801 and 1869; the number has remained stable at nine justices since that time. All nine justices sit together to hear cases and make decisions.

The Supreme Court has *both original and appellate jurisdiction*. Very few cases arise under original jurisdiction, which is defined in *Article III* of the Constitution. Almost all the cases come from the appeals process; appellate jurisdiction of the Court is set by *statute*. Cases may be appealed from both federal and state courts. The great majority of cases come from the lower federal courts. Unlike other federal courts, it controls its own agenda.

THE POLITICS OF JUDICIAL SELECTION

Federal judges are constitutionally guaranteed the right to serve for life "during good behavior." Federal judges may be removed only by *impeachment*, which has occurred only seven times in two centuries. No Supreme Court justice has ever been removed from office, although Samuel Chase was tried (but not convicted by the Senate) in 1805.

Although the *president nominates* persons to fill judicial posts, the *Senate must confirm* each by majority vote. The customary manner in which the Senate disposes of state-level federal judicial nominations is through **senatorial courtesy**. Because of the strength of this informal practice, presidents usually check carefully with the relevant senator or senators ahead of time. The president usually has more influence in the selection of judges to the federal courts of appeal than to federal district courts. Individual senators are in a weaker position to determine who the nominee will be because the jurisdiction of an appeals court encompasses several states. Even here, however, senators of the president's party from the state in which the candidate resides may be able to veto a nomination.

Although on the average there has been an opening on the Supreme Court every two years, there is a substantial variance around this mean. Presidents have failed 20 percent of the time to get Senate confirmation of their nominees to the Supreme Court—a percentage much higher than that for any other federal position. When the **chief justice's** position is vacant, presidents usually nominate someone from outside the Court; but if they decide to elevate a sitting associate justice, he or she must go through a new confirmation hearing. Nominations are most likely to run into trouble under certain conditions. Presidents whose parties are in the minority in the Senate or who make a nomination at the end of their terms face a greatly increased probability of substantial opposition. Equally important, opponents of a nomination usually must be able to question a nominee's competence or ethics in order to defeat a nomination.

THE BACKGROUNDS OF JUDGES AND JUSTICES

Judges serving on federal district and circuit courts are not a representative sample of the American people. They are all lawyers, and they are overwhelmingly white males. Federal judges have typically held office as a judge or prosecutor, and often they have been involved in partisan politics.

Like their colleagues on the lower federal courts, Supreme Court justices share characteristics that qualify them as an elite group. All have been lawyers, and all but four have been white males. Typically, justices have held high administrative or judicial positions; most have had some experience as a judge, often at the appellate level; many have worked for the Department of Justice; and some have held elective office. A few have had *no* government service. The fact that many justices (including some of the most distinguished ones) *have not had any previous judicial experience* may seem surprising, but the unique work of the Supreme Court renders this background much less important than it might be for other appellate courts.

Partisanship is an important influence on the selection of judges and justices: only 13 of 110 members of the Supreme Court have been nominated by presidents of a different party. *Ideology* is as important as partisanship—presidents want to appoint to the federal bench people who share their views. Presidential aides survey candidates' decisions (if they have served on a lower court), speeches, political stands, writings, and other expressions of opinion. They also turn for information to people who know the candidates well. Presidents are typically pleased with the performance of their nominees to the Supreme Court and through them have slowed or reversed trends in the Court's decisions. Nevertheless, it is not always easy to predict the policy inclinations of candidates, and presidents have been disappointed in their nominees about one-fourth of the time.

THE COURTS AS POLICYMAKERS

The first decision the Supreme Court must make is *which cases to decide*: unlike other federal courts, the Supreme Court *controls its own agenda.* Approximately 8,000 cases are submitted annually to the U.S. Supreme Court (but only about one percent are accepted for review).

The nine justices meet in *conference* at least once each week. The first task in conference is for the justices to consider the chief justice's *discuss list* and decide which cases they want to hear. Most of the justices rely heavily on their *law clerks* to screen cases. If four justices agree to grant review of a case (the "rule of four"), it can be scheduled for oral argument or decided on the basis of the written record already on file with the Court. The most common way for the Court to put a case on its docket is by issuing a **writ of *certiorari*** to a lower federal or state court—a formal document that orders the lower court to send up a record of the case for review.

An important influence on the Supreme Court is the **solicitor general.** As a presidential appointee and the third-ranking official in the Department of Justice, the solicitor general is in charge of the appellate court litigation of the federal government. By

avoiding frivolous appeals and displaying a high degree of competence, they typically earn the confidence of the Court, which in turn grants review of a large percentage of the cases they submit.

The Supreme Court decides *very few cases.* In a typical year, the Court issues fewer than 100 (recently about 80) *formal written opinions* that could serve as precedent. In a few dozen additional cases, the Court reaches a *per curiam decision*—a decision without explanation (usually unsigned); such decisions involve only the immediate case and have no value as precedent because the Court does not offer reasoning that would guide lower courts in future decisions.

The second task of the weekly conferences is to *discuss cases* that have been accepted and argued before the Court. Beginning the first Monday in October and lasting until June, the Court hears **oral arguments** in two-week cycles. Unlike a trial court, justices are familiar with the case before they ever enter the courtroom. The Court will have received written **briefs** from each party. They may also have received briefs from parties who are interested in the outcome of the case but are not formal litigants (known as ***amicus curiae***—or "friend of the court"—briefs).

The chief justice presides in conference. The chief justice calls first on the senior associate justice for discussion and then the other justices in order of seniority. If the votes are not clear from the individual discussions, the chief justice may ask each justice to vote. Once a *tentative vote* has been reached (votes are not final until the opinion is released), an *opinion* may be written.

The written **opinion** is the legal reasoning behind the decision. The *content of an opinion may be as important as the decision itself.* Tradition requires that the chief justice—if he voted with the majority—assign the **majority opinion** to himself or another justice in the majority; otherwise, the opinion is assigned by the senior associate justice in the majority.

Concurring opinions are those written to support a majority decision but also to stress a different constitutional or legal basis for the judgment. ***Dissenting opinions*** are those written by justices opposed to all or part of the majority's decision. Justices are free to write their own opinions, to join in other opinions, or to associate themselves with part of one opinion and part of another.

The vast majority of cases are settled on the principle of ***stare decisis*** ("let the decision stand"), meaning that an earlier decision should hold for the case being considered. Lower courts are expected to follow the **precedents** of higher courts in their decision making. The Supreme Court may overrule its own precedents, as it did in ***Brown* v. *Board of Education*** (1954) when it overruled ***Plessy* v. *Ferguson*** (1896) and found that segregation in the public schools violated the Constitution.

Policy preferences do matter in judicial decision making, especially on the nation's highest court. When precedent is not clear, the law is less firmly established. In such cases, there is more leeway and judges become more purely political players with room for their values to influence their judgment.

The most contentious issue involving the courts is the role of *judicial discretion*; the Constitution itself does not specify any rules for interpretation. Some have argued for a jurisprudence of **original intent** (sometimes referred to as **strict constructionism**). This view, which is popular with conservatives, holds that judges and justices should determine the intent of the framers of the Constitution and decide cases in line with that intent. Advocates of strict constructionism view it as a means of constraining the exercise of judicial discretion, which they see as the *foundation of the liberal decisions* of the past four decades. Others assert that the Constitution is subject to multiple meanings; they maintain that what appears to be deference to the intentions of the framers is simply *a cover for making conservative decisions.*

Judicial implementation refers to how and whether court decisions are translated into actual policy, thereby affecting the behavior of others. The implementation of any Court decision involves many actors besides the justices, and the justices have no way of ensuring that their decisions and policies will be implemented.

THE COURTS AND THE POLICY AGENDA

The courts both *reflect* and *help to determine* the national *policy agenda.* Until the Civil War, the dominant questions before the Court regarded the strength and legitimacy of the federal government and slavery. From the Civil War until 1937, questions of the relationship between the federal government and the economy predominated; the courts traditionally favored corporations, especially when government tried to regulate them. From 1938 to the present, the paramount issues before the Court have concerned personal liberty and social and political equality. In this era, the Court has enlarged the scope of personal freedom and civil rights, and has removed many of the constitutional restraints on the regulation of the economy. Most recently, environmental groups have used the courts to achieve their policy goals.

John Marshall, chief justice from 1801 to 1835, established the Supreme Court's power of **judicial review** in the 1803 case of ***Marbury* v. *Madison*** (the so-called *"midnight judges"* case). In a shrewd solution to a political controversy, Marshall asserted for the courts *the power to determine what is and is not constitutional* and thereby established the power of judicial review. By in effect reducing its own power—the authority to hear cases such as Marbury's under its original jurisdiction—the Court was able to assert the right of judicial review in a fashion that the other branches could not easily rebuke.

Few eras of the Supreme Court have been as active in shaping public policy as that of the Warren Court. The Court's decisions on desegregation, criminal defendants' rights, and voting reapportionment reshaped public policy and also led to calls from right-wing groups for Chief Justice Earl Warren's impeachment. His critics argued that the unelected justices were making policy decisions that were the responsibility of elected officials.

The Burger Court—which followed the Warren Court—was more conservative than the liberal Warren Court, but did not overturn the due process protections of the Warren era. The Court narrowed defendants' rights, but did not overturn the fundamental contours of

the *Miranda* decision. It was also the Burger Court that wrote the abortion decision in ***Roe* v. *Wade*** (1973), required school busing in certain cases to eliminate historic segregation, and upheld affirmative action programs in the *Weber* case. When the Supreme Court was called upon to rule on whether President Nixon's White House (Watergate) tapes had to be turned over to the courts, it unanimously ordered him to do so (***United States* v. *Nixon***, 1974), and thus hastened his resignation.

The Rehnquist Court has not created a "revolution" in constitutional law. Instead, it has been slowly chipping away at liberal decisions such as those regarding defendants' rights, abortion, and affirmative action. The Court no longer sees itself as the special protector of individual liberties and civil rights for minorities; it has typically deferred to the will of the majority and the rules of the government.

UNDERSTANDING THE COURTS

Powerful courts are unusual; very few nations have them. The power of American judges raises questions about the compatibility of unelected courts with a democracy and about the appropriate role for the judiciary in policymaking.

In some ways, the courts are not a very democratic institution. Federal judges are not elected and are almost impossible to remove. Their social backgrounds probably make the courts the most elite-dominated policymaking institution. However, the courts are not entirely independent of popular preferences. Even when the Court seems out of step with other policymakers, it eventually swings around to join the policy consensus (as it did in the New Deal era).

There are strong disagreements concerning the appropriateness of allowing the courts to have a policymaking role. Many scholars and judges favor a policy of **judicial restraint** (sometimes called *judicial self-restraint*), in which judges play minimal policymaking roles, leaving policy decisions to the legislatures. Advocates of judicial restraint believe that decisions such as those on abortion and school prayer go well beyond the "referee" role they feel is appropriate for courts in a democracy. On the other side are proponents of **judicial activism,** in which judges make bolder policy decisions, even breaking new constitutional ground with a particular decision. Advocates of judicial activism emphasize that the courts may alleviate pressing needs, especially of those who are weak politically or economically.

Judicial activism or restraint should *not be confused* with *liberalism or conservatism.* In the early years of the New Deal, judicial activists were conservatives. During the tenure of Earl Warren, activists made liberal decisions. The tenure of the conservative Chief Justice Warren Burger and several conservative nominees of Republican presidents marked the most active use of judicial review in the nation's history. The problem remains of reconciling the American democratic heritage with an active policymaking role for the judiciary. The federal courts have developed a doctrine of **political questions** as a means to avoid deciding some cases, principally those that involve conflicts between the president and Congress.

One factor that increases the acceptability of activist courts is *the ability to overturn their decisions*. The president and the Senate determine who sits on the federal bench (a process that has sometimes been used to reshape the philosophy of the Court). Congress can begin the process of amending the Constitution to overcome a constitutional decision of the Supreme Court, and Congress could even alter the appellate jurisdiction of the Supreme Court to prevent it from hearing certain types of cases. If the issue is one of **statutory construction** (in which a court interprets an act of Congress), the legislature routinely passes legislation that *clarifies existing laws*—and, in effect, overturns the courts.

CHAPTER OUTLINE

I. THE NATURE OF THE JUDICIAL SYSTEM

A. The judicial system in the United States is an **adversarial** one in which the courts provide an arena for two parties to bring their conflict before an impartial arbiter (a judge).
   1. The system is based on the theory that justice will emerge out of the struggle between two contending points of view.
   2. In reality, most cases never reach trial because they are settled by agreements reached out of court.
   3. There are two basic kinds of cases, *criminal law* and *civil law*.
      a. In criminal law, an individual is charged with violating a specific law; criminal law provides punishment for crimes against society (or public order).
      b. Civil law does not involve a charge of criminality; instead, it concerns a dispute between two parties and defines relationships between them.
      c. The vast majority of cases (both civil and criminal) involve state law and are tried in state courts.

B. Participants in the judicial system.
   1. Federal judges are restricted by the Constitution to deciding *cases or controversies*.
   2. Courts may decide only **justiciable disputes**, which means that conflicts must be capable of being settled *by legal methods*.
   3. Every case is a dispute between a **plaintiff** and a **defendant**—the former bringing some charge against the latter.
   4. **Litigants** (the plaintiff and the defendant) must have **standing to sue**, which means they must have a serious interest in a case (typically determined by whether or not they have sustained or are in immediate danger of sustaining a direct and substantial injury from another party or from an action of government).
      a. In recent years, there has been some broadening of the concept of standing to sue.
      b. **Class action suits** permit a small number of people to sue on behalf of all other people similarly situated (for example, a suit on behalf of all credit card holders of an oil company).