Key Objective Outline

How are American court systems organized?
- Court Structure and Processes (page xxx)

What makes American judges more powerful than those in other countries?
- The Power of American Judges (page xxx)

What political processes determine the selection of judges?
- Judicial Selection (page xxx)

What do we know about how Supreme Court justices really make decisions?
- Judges’ Decision-Making (page xxx)
When Lindsay Earls first heard the announcement from her high school choir teacher, she thought it was a joke. The local school board in Tecumseh, Oklahoma, had adopted a new policy requiring students to submit to random drug tests in order to participate in after-school clubs. Sixteen-year-old Lindsay, a high-achieving honor student who later attended an Ivy League university, was bothered by the thought of being escorted to a restroom and required to urinate in a cup while a teacher listened. She believed that it was wrong to force students to submit to such an embarrassing act when they had done nothing to raise suspicions about drug use. How would this make you feel?1

With help from the American Civil Liberties Union (ACLU), an interest group that uses the courts to protect constitutional rights, Lindsay filed a lawsuit. Despite harsh criticism from many in her small town who believed random tests were necessary to stop drug abuse, Lindsay and her ACLU attorney carried the case through each level of the federal court system until it was heard by the U.S. Supreme Court. Lindsay felt strongly that her school’s drug test policy violated her Fourth Amendment right against “unreasonable searches.”

The Supreme Court announced its decision in Board of Education v. Earls on June 27, 2002. By a narrow 5–4 vote, the justices approved the school’s drug testing policy. Lindsay lost the case. But the justices left open the question of whether a school could impose drug testing on all students.2 Similar questions also remain open with respect to college students: Could a college require drug testing as a condition for living in a dorm? Could it require drug testing as a condition for admission and continued enrollment? If such policies emerge, they may be challenged in court by other students who, like Lindsay Earls, feel strongly enough about a matter of constitutional principle to pursue a lengthy lawsuit despite facing public criticism. See related Policy-Shaping Litigation figure 4.4 on page xxx.
Court Structure and Processes (pages XXX–XXX)

How are American court systems organized?

The judicial branch is made up of courts that have different responsibilities. As you consider the elements of the judicial branch, remember that there are two types of courts—trial and appellate—and that both types of courts operate in two parallel court systems—state and federal. If you watch television shows such as Boston Legal and Law & Order, you can become familiar with trial court processes. Such shows emphasize American courts’ use of the adversarial system, in which opposing attorneys zealously represent the interest of their clients. By contrast, many other countries use the inquisitorial system, in which judges take an active role in investigating cases and questioning witnesses. However, dramatic depictions in television and movies typically show only one type of proceeding (trials) in one type of court (trial courts). They do not adequately convey the idea that most cases in trial courts end in plea bargains or negotiated settlements rather than in trials. Television portrayals also won’t educate you about the U.S. Supreme Court and other appellate courts that consider whether errors occurred when a case was decided by a judge or jury in a trial court.

Why are there two court systems?

—Student Question

Trial Courts

The United States has a dual court system. In other words, two court systems, state and federal, exist and operate at the same time in the same geographic areas (see Table 4.1 on page 000). Sometimes a state court and a federal court are right next door to each other in a downtown district. In small cities and towns, a courthouse may be run by a single judge. In larger cities, a dozen or more judges may hear cases separately in their own courtrooms within a single courthouse. Both court systems handle criminal prosecutions, which involve accusations that one or more individuals violated criminal statutes and therefore should be punished. In addition, in both systems, civil lawsuits are presented, in which people or corporations seek compensation from those whom they accuse of violating contracts or causing personal injuries or property damage. Civil lawsuits can also seek orders from judges requiring the government, corporations, or individuals to take specific actions or refrain from behavior that violates the law.

The existence of two court systems within each state reflects American federalism, under which state governments and the federal government both exercise authority over law and public policy. States are free to design their own court systems and to name the different courts within the state. Thus, in some states, trial courts are called “superior courts,” while in others, they are known as “district courts,” “circuit courts,” or “courts of common pleas.”

Federal trial courts are called “U.S. district courts.” The country is divided into 94 districts. Each state has at least one district court, and larger states have multiple districts. Within each district, there may be multiple judges and courthouses. For example, Wisconsin is divided into the Eastern District of Wisconsin, with courthouses at Milwaukee and Green Bay, and the Western District of Wisconsin, with its courthouse located in Madison. These courts handle cases concerning federal law, such as those based on the U.S. Constitution and statutes enacted by Congress, as well as certain lawsuits between citizens of different states.

Trial courts use specific rules and processes to reach decisions. These courts fit the image of courts portrayed on television, with lawyers presenting arguments to a group of citizen jurors in a jury trial. In a such trial, the judge acts as a “referee,” who makes sure proper rules are followed and the jurors understand the rules of law that will guide their decision. Some cases use bench trials, in which a single judge rather than a jury is the decision maker. Trial courts are courts of original jurisdiction, meaning they receive cases first, consider the available evidence, and make the initial decision. By contrast, appellate courts have appellate jurisdiction, meaning they review specific errors that allegedly occurred in trial court processes or in decisions of appellate courts beneath them in the judicial hierarchy. The U.S. Supreme Court is an unusual appellate court in that it also has original jurisdiction in limited categories of cases defined in Article III of the U.S. Constitution, usually lawsuits between the governments of two states.

Although the trial is the final possible stage for these lower-level courts, most cases do not get that far. Trial courts actually process most cases through negotiated resolutions, called settlements in civil cases and plea bargains in criminal cases. Negotiated resolutions in civil
The trial of Saddam Hussein in Iraq for crimes committed against the people of his country included many features that are familiar in American trials, including arguments by attorneys and rulings by a judge. There were also differences in the Iraqi trial, such as the absence of a jury. —Why is so much time and money spent on a lengthy trial when everyone agrees that an individual has committed horrible acts?

Appellate Courts
Most states, as well as the federal court system, have intermediate appellate courts. These courts, which are typically called “courts of appeals,” hear appeals from judicial decisions and jury verdicts in the trial courts. In the federal system, the U.S. courts of appeals are divided into 11 numbered circuits, and there is also the District of Columbia circuit and a specialized federal circuit for patent and trade cases. The numbered circuits each handle the appeals from districts in specific states (see Figure 4.1 on page 000). For example, the U.S. Court of Appeals for the Fifth Circuit handles appeals from U.S. district courts in Texas, Louisiana, and Mississippi.3

The highest appellate courts in the state and federal systems are courts of last resort. In the federal system, the U.S. Supreme Court is the court of last resort. It can also be the court of last resort when issues of federal law, such as questions about civil liberties under the Bill of Rights, arise in cases decided by state supreme
### TABLE 4.1a | Structure of American Court System

<table>
<thead>
<tr>
<th>FEDERAL COURT SYSTEM</th>
<th>APPELLATE JURISDICTION</th>
<th>STATE COURT SYSTEM</th>
</tr>
</thead>
<tbody>
<tr>
<td>ORIGINAL JURISDICTION</td>
<td>courts of last resort</td>
<td>52 State Supreme Courts*</td>
</tr>
<tr>
<td>U.S. Supreme Court</td>
<td>(no federal limited jurisdiction trial court)</td>
<td>40 State Courts of Appeals*</td>
</tr>
<tr>
<td>Limited categories of cases that rarely arise.</td>
<td>Cases previously decided in U.S. courts of appeals or state supreme courts or Court of Military Appeals</td>
<td>Two states—Texas and Oklahoma—have separate highest courts for civil and criminal cases</td>
</tr>
<tr>
<td>Lawsuits involving:</td>
<td>intermediate appellate courts</td>
<td>10 states do not have intermediate appellate courts</td>
</tr>
<tr>
<td>Two or more states</td>
<td>trial courts of general jurisdiction</td>
<td>State Trial Courts (50 states)</td>
</tr>
<tr>
<td>The United States and a state Ambassadors and diplomats</td>
<td>trial court of limited jurisdiction</td>
<td>Lower-level State Trial Courts</td>
</tr>
<tr>
<td>A state against a citizen of another state</td>
<td></td>
<td>Minor criminal and civil cases</td>
</tr>
<tr>
<td>13 U.S. Courts of Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No original jurisdiction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>94 U.S. District Courts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases involve: Federal criminal and civil law Federal government</td>
<td>No appellate jurisdiction</td>
<td>Usually called superior courts, district courts, circuit courts, or courts of common pleas</td>
</tr>
<tr>
<td>Lawsuits between citizens of different states for amounts over $75,000 Bankruptcy Admiralty (shipping at sea)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### TABLE 4.1b | Paths to the U.S. Supreme Court for Criminal and Civil Cases in State and Federal Court Systems

<table>
<thead>
<tr>
<th>FEDERAL CRIMINAL CASE</th>
<th>FEDERAL CIVIL CASE</th>
<th>STATE CRIMINAL CASE</th>
<th>STATE CIVIL CASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision: 6th Amendment violation when defendant not allowed to hire attorney of his choice (defendant wins)</td>
<td>Decision: Job reassignment can be improper retaliation under federal employment law (claimant wins)</td>
<td>Decision: Use of drug-sniffing dog was not an unreasonable search and seizure (defendant loses)</td>
<td>Decision: No constitutional violation when city used its power to force homeowners to sell home so that a private developer could use the property (claimant loses)</td>
</tr>
<tr>
<td>U.S. Court of Appeals</td>
<td>U.S. Court of Appeals</td>
<td>Illinois Supreme Court</td>
<td>Connecticut Supreme Court</td>
</tr>
<tr>
<td>Defendant wins</td>
<td>Claimant wins</td>
<td>Defendant wins</td>
<td>Claimant loses</td>
</tr>
<tr>
<td>U.S. District Court</td>
<td>U.S. District Court</td>
<td>Illinois Appellate Court</td>
<td>Connecticut Superior Court</td>
</tr>
<tr>
<td>Defendant loses</td>
<td>Claimant wins</td>
<td>Defendant loses</td>
<td>Claimant wins</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Illinois Circuit Court</td>
<td></td>
</tr>
</tbody>
</table>

*A few states use different names for their courts of last resort (e.g., Court of Appeals [NY, MD], Supreme Judicial Court [ME, MA].*
courts. State supreme courts are courts of last resort for disputes about the meaning of laws created by a state legislature or about provisions of a state constitution.

Appeal courts use different processes than trial courts do. Appeals are heard in multijudge courts. Typically, three judges hear cases in a state or federal intermediate appellate court. State supreme courts generally have five or seven members, while the U.S. Supreme Court is made up of nine justices. There are never juries in appellate courts. These courts do not make decisions about criminal guilt or issue verdicts in civil cases. Instead, they consider narrow issues concerning alleged errors in the investigation and trial process that were not corrected by the trial judge. Instead of listening to witnesses or examining other evidence, appellate courts consider only elaborate written arguments, called appellate briefs, submitted by each side’s attorneys, as well as oral arguments.

Appellate judges issue detailed written opinions to explain their decisions. The outcome of the case and any announcement of a legal rule are expressed in the majority opinion. This opinion represents the views of the majority of judges who heard the case. Concurring opinions are written by judges who agree with the outcome favored by the majority but wish to present their own reasons for agreeing with the decision. Appellate decisions are not always unanimous, so judges who disagree with the outcome may write dissenting opinions to express their points of disagreement with the views expressed in the majority opinion. Sometimes concurring and dissenting opinions develop ideas that will take hold in later generations and help shape law after new judges are selected for service on appellate courts.

The U.S. Supreme Court

At the top of the American judicial system stands the U.S. Supreme Court. The U.S. Supreme Court has authority over all federal court cases and any decision by a state court (including those of a state supreme court) that concerns the U.S. Constitution or federal law. In particular, the U.S. Supreme Court is regularly called on to decide whether state statutes violate the U.S. Constitution or whether decisions and actions by state and local officials collide with federal constitutional principles. The U.S. Supreme Court’s decisions shape law and public policy for the entire country. Policy advocates often seek favorable decisions from the Court when they have been unsuccessful in persuading other branches of government to advance their goals. Table 4.2 on pages XXX–XXX gives the names and backgrounds of the current justices of the Court.

Each case goes through several specific stages in the Supreme Court’s decision-making process:

- The justices choose 70 to 80 cases to hear from among more than 8,000 petitions submitted annually.
- Attorneys in the chosen cases submit detailed written arguments, called appellate briefs, for the justices to study before the case is argued.
- At oral arguments, each side’s attorney can speak for only 30 minutes, and the justices often ask many questions.
- After oral arguments, the nine justices meet privately to discuss and vote on each case. The side that gains the support of five or more justices wins.
- The justices prepare and announce the majority opinion that decides the case as well as additional viewpoints expressed in concurring and dissenting opinions.

Nearly all cases are presented to the Court through a petition for a writ of certiorari, a traditional legal order that commands a lower court to send a case forward. Cases are selected for hearing through the Court’s “rule of four,” meaning that four justices must vote to hear a specific case in order for it to be scheduled for oral arguments.

Thousands of people and corporations ask the Court to hear their cases each year, but very few are accepted for hearing. During the Court’s 2006–2007 term, if received 8,857 petitions but granted oral arguments for only 78 of these. However, because some of these cases were later combined or sent back to the lower courts, it produced only 67 full opinions.

The attorneys must be good at thinking quickly on their feet in order to respond, because the justices interrupt and ask questions. The justices also sometimes exchange argumentative comments with each other during oral arguments.

After oral arguments, the justices meet in their weekly conference to present their views on the case to each other. When all the justices have stated a position, the chief justice announces the preliminary vote based on the viewpoints expressed. If the chief justice is in the majority, he designates which justice will write the majority opinion for the Court. If the chief justice is in the minority, then the senior justice in the majority assigns the opinion for the Court. Other justices can decide for themselves whether to write a concurring or dissenting opinion. With the assistance of their law clerks, justices draft preliminary opinions as well as comments on other justices’ draft opinions. These draft opinions and comments
TABLE 4.2
Supreme Court Justices

<table>
<thead>
<tr>
<th>Name</th>
<th>Support for Constitutional Rights Claims, 2006–2007</th>
<th>Nominated By</th>
<th>Date Confirmed</th>
<th>Confirmation Vote Numbers</th>
<th>Previous Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Paul Stevens</td>
<td>65%</td>
<td>Gerald Ford</td>
<td>December 19, 1975</td>
<td>98–0</td>
<td>Federal Judge, Private Attorney</td>
</tr>
<tr>
<td>Ruth Bader Ginsburg</td>
<td>65%</td>
<td>Bill Clinton</td>
<td>August 10, 1993</td>
<td>96–3</td>
<td>Federal Judge, Law Professor</td>
</tr>
<tr>
<td>David Hackett Souter</td>
<td>57%</td>
<td>George H. W. Bush</td>
<td>October 9, 1990</td>
<td>90–9</td>
<td>Federal Judge, State Judge</td>
</tr>
<tr>
<td>Stephen G. Breyer</td>
<td>52%</td>
<td>Bill Clinton</td>
<td>August 3, 1994</td>
<td>87–9</td>
<td>Federal Judge, Law Professor</td>
</tr>
</tbody>
</table>

are circulated to all the justices. They help shape the ultimate reasoning of the final opinions issued in the case and can sometimes persuade wavering justices to change sides.

When the decision of the Court is publicly announced and the opinions for that case are published, the decision becomes final. The legal rule announced in the decision, however, is not necessarily permanent, because the justices can later change their views. If at least five justices agree that the prior decision was wrongly decided, they can use the new case to overrule the Court’s earlier opinion and establish a new rule of law on the subject in question. Presidents often focus on this goal when they select new appointees for the Supreme Court, with the hope that the new justices will vote to overrule decisions with which the president disagrees.

PATHWAYS | profile
Ruth Bader Ginsburg

Ruth Bader Ginsburg, the second woman to serve on the U.S. Supreme Court (Sandra Day O’Connor was the first), was born in 1933, graduated from Columbia University’s law school, and went on to become a law professor at Rutgers University and Columbia University. Throughout the 1970s, she directed the Women’s Rights Project at the American Civil Liberties Union (ACLU). In that capacity, she presented arguments before the Supreme Court in the gender discrimination cases that first successfully turned the high Court’s attention to such issues. These cases were not just about discrimination against women. She also presented arguments on behalf of men, such as a case challenging Oklahoma’s authority to set a higher minimum drinking age for men than for women (Craig v. Boren, 1976). In 1980, Ginsburg was appointed by President Jimmy Carter to serve on the U.S. Court of Appeals for the District of Columbia Circuit. President Bill Clinton appointed her to serve as an associate justice on the U.S. Supreme Court in 1993.

During her years as a lawyer, Ginsburg earned a reputation as a strong advocate for equal rights. As a judge, however, she claimed that her job was very different. Rather than advocate for a particular vision of law and policy, she saw herself as carefully interpreting and applying the Constitution and federal statutes. Because her performance on the U.S. Court of Appeals showed her to be a thoughtful judge, the Senate easily confirmed her appointment by a 96–3 vote. As a Supreme Court justice, Ginsburg has supported individuals’ claims concerning violations of constitutional rights more frequently than most of her colleagues.
1. Legal processes in which the government seeks to prove that an individual is guilty of a crime and deserving of punishment are called
   a. civil lawsuits.          b. appellate arguments.
   c. criminal prosecutions. d. plea bargains.

2. How are most cases in lower-level courts resolved?
   a. jury or bench trial
   b. settlement or plea bargain
   c. criminal prosecution
   d. referral to a higher court

3. The final outcome and explanation for the decision in an appellate court case is expressed by the judges in a written rationale known as
   a. a majority opinion.      b. a concurring opinion.
   c. a dissenting opinion.   d. a per curiam.

4. Appellate courts do not examine evidence or hear testimony from witnesses. They determine the outcome based solely on written appellate briefs and lawyers’ oral arguments.
   a. true          b. false

Answers: 1-c, 2-b, 3-a, 4-a.

Discussion Questions:
1. Does the adversarial system lead courts to discover the truth, or does the system simply produce victory for whichever side has the best attorney?
2. Does a court system really need appellate courts? Why not just treat the original decision in each case as the final decision?

What YOU can do!
Observe a trial or hearing in process at your local courthouse. Also check to see if your community uses specialized courts, such as drug courts or DUI courts, to deal specially with recidivism and substance abuse. Note how what you observe differs from “television court,” such as Law & Order or Judge Judy.
Case precedent: A legal rule established by a judicial decision that guides subsequent decisions. The use of case precedent is drawn from the common law system brought from Great Britain to the United States.

EXAMPLE: In Lindsay Earls’s case, the majority opinion relied on the case precedent established in a prior decision, Vernonia School District v. Acton (1995), in which a narrow majority of justices approved random drug tests for students who played on school sports teams.

The Power of American Judges
(pages xxx–xxx)

What makes American judges more powerful than those in other countries?

The eighteenth-century authors of the U.S. Constitution did not expect the judicial branch to be as powerful as the executive and legislative branches. Although some of the framers wanted to permit judges to evaluate the constitutionality of statutes, they did not generally believe that the courts would be influential policymaking institutions. In Federalist No. 78, Alexander Hamilton called the judiciary the “least dangerous” branch of government, because it lacked the power of “purse or sword” that the other branches could use to shape policy and spur people to follow their decisions. Congress could use its “power of the purse” to levy taxes or provide government funds in order to encourage or induce people to comply with government policies. The president, as the nation’s commander in chief, could use the “sword” of military action to force people to obey laws. But judges produced only words written on paper and thus appeared to lack the power to enforce their decisions.

Hamilton was not wrong to highlight the inherent weakness of the judiciary’s structure and authority. He merely failed to foresee how the Supreme Court and other courts would assert their power and gain acceptance as legitimate policymaking institutions.

To maintain the public’s confidence in their fairness, courts portray themselves as the “nonpolitical” institutions of American government. Judges wear black robes and sit on benches elevated above other seats in the courtroom. People are required to rise when judges enter the courtroom and remain standing until given permission to sit down. Such requirements reinforce the status of judges and convey a message that other citizens are subordinate to judicial officers. Many courts operate in majestic buildings with marble columns, purple velvet curtains, fancy woodwork, and other physical embellishments designed to elicit respect for the importance and seriousness of these institutions.

The physical imagery of courts, as well as the dress and language associated with judges, helps convey the impression that they merely follow the law as established by prior judicial decisions and do not rely on their own values. Judges’ efforts to portray a nonpolitical image do not, in fact, mean that politics has no role in judicial decision-making. To begin with, political battles determine who will be selected to serve as judges, and judges’ personal political values and beliefs can affect their decisions. In addition, the process of interpreting the Constitution and statutes gives judges the opportunities to steer many decisions toward their own policy preferences.

There are structural elements and traditions in the American judicial system that make judges in the United States more powerful than their counterparts in many other countries. Let’s examine several of these factors. In particular, we will see the importance, first, of judges’ authority over constitutional and statutory interpretation;
Constitutional and Statutory Interpretation

In the United States, although participants in constitutional conventions write constitutions and elected legislators draft statutes, these forms of law still require judges to interpret them. Inevitably, the wording of constitutions and statutes contains ambiguities. Whenever there are disputes about the meaning of the words and phrases in constitutions and statutes, those disputes come to courts in the form of lawsuits, and judges are asked to provide interpretations that will settle those disputes. Therefore judges can provide meaning for law produced by other governmental institutions as well as for case law developed by judges.

For example, the Eighth Amendment to the U.S. Constitution forbids the government to impose “cruel and unusual punishments.” Clearly, the provision intends to limit the nature of punishments applied to people who violate criminal laws. The words themselves, however, provide no specific guidance about what kinds of punishments are not allowed. Thus judges have been asked to decide which punishments are “cruel and unusual.” Are these words violated when prison officials decline to provide medical care to prisoners? How about when a principal paddles a misbehaving student at a public high school? These are the kinds of cases that confront judges.

Statutes provide similar opportunities for judges to shape the law. Statutes are laws written by elected representatives in legislatures. Statutes for the entire country are produced by Congress, the national legislature. Each state has its own legislature to write laws that apply only within its borders. Judges, when they interpret statutes, are supposed to advance the underlying purposes of the legislature that made the statutes—but those purposes are not always clear. For example, if workers’ compensation statutes provide for payments to workers injured “in the course of employment,” does that include coverage for a disability resulting from slipping on an icy sidewalk by the employer’s business? Inevitably, judges must answer such questions, because legislatures cannot anticipate every possible situation in which issues about a statute’s meaning might arise.

As you will see in the later discussion of methods for selecting judges, political battles in state judicial election campaigns and in the nomination processes for federal judges largely arise from the interpretive authority that American judges possess. Political parties, interest groups, and politicians seek to secure judgeships for people who share their values and who, they hope, will apply those values in judicial decision-making.

Judicial Review

One of the most significant powers of American judges is that of judicial review. Judicial review permits judges to invalidate actions by other governmental actors, including striking down statutes enacted by Congress, by declaring that those actions violate the Constitution. Judges can also invalidate actions by the president or other executive branch officials by declaring that those actions violate the Constitution (see Table 4.3). Very few countries permit their judges to wield such awesome power over other branches of government. A leading constitutional law expert describes judicial review as “certainly the most controversial and at the same time the most fascinating role of the courts of the United States.”6

Article III of the Constitution (reprinted in the Appendix) defines the authority of the judiciary, yet there is no mention of the judiciary’s power of judicial review. The Constitution declares that there will be “one supreme Court” in Article III, Section 3, but leaves it to Congress to design and establish the other courts of the federal court system. The tenure of federal judges is described as service “during good Behaviour.” To protect judges against political pressure, Article III, Section 1 declares that their salaries “shall not be diminished” during their service on the bench. Article III, Section 2 describes the kinds of cases that fall under the authority of federal courts, including cases concerning federal law, disputes between states, and matters involving foreign countries. Article III, Section 3 defines the crime of “treason” and specifies the evidence necessary for conviction. As indicated by this brief description, nothing in Article III directly addresses the power of judicial review.

The framers of the Constitution were aware of the concept of judicial review, yet they made no mention of it in the founding document. Did this mean that the idea had been considered and rejected by the framers? Apparently not—at least not in the eyes of everyone debating the drafting and ratification of the Constitution. In Federalist No. 78, Hamilton argued in favor of judicial review, asserting not only that legislative acts violating the Constitution must be invalid but also that federal judges must be the ones who decide whether statutes are unconstitutional. According to Hamilton, limitations on congressional actions “can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.” Other founders, however worried...
that it would elevate the power of the judiciary above that of other governmental branches.

At the beginning of the nineteenth century, the Supreme Court did not rely on any specific provision of the Constitution to justify its exercise of the power of judicial review. Instead, it simply asserted its authority to review the actions of other governmental branches in the case of Marbury v. Madison (1803). William Marbury was one of many officials in the administration of Federalist President John Adams who received a last-minute judicial appointment as Adams was leaving office. The appointment of these “midnight judges” was an effort by Adams to place his supporters in positions of judicial influence to counteract the changes in government that would inevitably occur under the administration of the incoming president, Thomas Jefferson. However, in the rush of final activities, the outgoing secretary of state in the Adams administration, John Marshall, never managed to seal and deliver to Marbury his commission as a justice of the peace for the District of Columbia.

When Jefferson took office, the incoming secretary of state, James Madison, refused to deliver these commissions to Marbury and several other judicial appointees. Marbury sought his commission by filing a legal action. He followed the requirements of the Judiciary Act of 1789 by declaring that a portion of the Judiciary Act of 1789 was unconstitutional because Congress improperly expanded the kinds of cases that could be filed in the Court.

### TABLE 4.3 | Judicial Review Cases

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>DATE</th>
<th>VOTE</th>
<th>AFFECTED INSTITUTION</th>
<th>OVERVIEW OF CASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granholm, Governor of Michigan v. Heald</td>
<td>May 16, 2005</td>
<td>5-4</td>
<td>State legislatures in Michigan and New York</td>
<td>State laws in Michigan and New York prohibited direct sales of wine to consumers by out-of-state wineries—thus preventing Internet sales and other orders. The U.S. Supreme Court struck down these state laws as violating the Commerce Clause of the U.S. Constitution.</td>
</tr>
<tr>
<td>United States v. Booker</td>
<td>January 12, 2005</td>
<td>5-4</td>
<td>Congress</td>
<td>Portion of the Sentencing Reform Act of 1984 that makes Federal Sentencing Guidelines mandatory in federal criminal cases found to be unconstitutional as a violation of the Sixth Amendment right to jury trial, because it permits judges to make factual determinations that should be the responsibility of the jury.</td>
</tr>
<tr>
<td>Hamdi v. Rumsfeld</td>
<td>June 28, 2004</td>
<td>8-1 on the issue in question</td>
<td>President</td>
<td>American citizens detained as terrorism suspects are entitled to appear in court and contest the basis for their detention. The U.S. Supreme Court rejected arguments about the president’s power to hold suspects indefinitely without any rights, any contact with attorneys, or any access to the courts.</td>
</tr>
<tr>
<td>Ashcroft v. Free Speech Coalition</td>
<td>April 16, 2002</td>
<td>6-3</td>
<td>Congress</td>
<td>U.S. Supreme Court invalidated portions of the Child Pornography Prevention Act of 1996 as overly broad and in violation of the First Amendment. Congress cannot ban movies and pictures in which adults portray teenagers engaged in sexual activity.</td>
</tr>
</tbody>
</table>
Chief Justice John Marshall's opinion in *Marbury v. Madison* helped to establish the concept of judicial review, an important power for American judges. This power was not specifically granted to judges by the U.S. Constitution. "Do you think it was implied in that document, or did Marshall act improperly in announcing his opinion?"


In a unanimous decision written by Chief Justice Marshall, the Court declared that Marbury was indeed entitled to his commission and that the Court possessed the authority to order President Jefferson to have the commission delivered to him. However, the Court declined to issue such an order to the president because—so it declared—a portion of the Judiciary Act of 1789 was unconstitutional. Therefore, it ruled, Marbury had relied on an unconstitutional statute in seeking a writ of mandamus directly from the Supreme Court without first proceeding through the lower courts. According to the Court, statutes, such as the Judiciary Act, cannot define the kinds of cases that may be filed directly in the U.S. Supreme Court without being heard first in the lower courts. Article III of the Constitution specifically lists the kinds of cases in which the Supreme Court has original jurisdiction. Any effort by Congress to expand that list amounts to an improper effort to alter the Constitution by statute rather than by constitutional amendment. In general, the Supreme Court has appellate jurisdiction over cases decided in lower courts that are later brought to the highest court through appeals and other posttrial processes. The Constitution specifies that the Supreme Court will make the first or original decision only in cases concerning states and those involving high officials, such as ambassadors. Marbury's action seeking a writ of mandamus did not fit within these narrow categories of cases specified by the Constitution.

The decision in *Marbury v. Madison*—one of the most important Supreme Court decisions in American history—asserted the authority and importance of the Supreme Court without actually testing the Court's power in a confrontation with the president. The Court simply asserted the power of judicial review in striking down a portion of the Judiciary Act without providing any elaborate discussion in its opinion that would raise questions about whether such a power even existed under the Constitution.

The Court did not immediately begin to pass judgment on the propriety of executive and legislative actions. Instead, it waited more than 50 years before again asserting its power of judicial review. In 1857, in its highly controversial decision in *Dred Scott v. Sandford*, the Court invalidated the Missouri Compromise—a series of decisions by Congress in 1820 and 1821 that had put limits on the spread of slavery into western territories. By 1900, the power of judicial review came to be used more frequently, and it was used often throughout the twentieth century. Eventually, federal courts struck down hundreds of state statutes and more than 100 acts of Congress. Today judicial review is well entrenched in American governing processes and provides a primary source of judicial power.
Federal Judges’ Protected Tenure

As described earlier, Article III of the Constitution specifies that federal judges will serve “during good Behaviour.” Effectively, that means lifetime tenure, since these judges typically are removed through impeachment by Congress only if they commit a crime. The tenure granted to federal judges underscores the emphasis that the Constitution places on ensuring the independence of judicial decision makers. If judges are not afraid of losing their jobs by making unpopular decisions, then presumably they will possess enough protection against political attacks to enable them to do the right thing (see Figure 4.2, page xxx). This protection may be especially important when judges make decisions that protect the rights of minorities whom large segments of society view unfavorably. For example, many controversial judicial decisions in the mid-twentieth century advancing the equality of African Americans were vigorously criticized, because racial prejudice was widespread among whites. At other times, unpopular court decisions have protected the interests of corporations and the wealthy. For example, in 2005, the U.S. Supreme Court outraged critics by ruling that local governments can force individuals to sell their homes in order to turn the property over to developers who want to advance local economic progress by building office buildings and hotels (Kelo v. City of New London, 2005).

Because federal judges are exempted from democracy’s traditional accountability mechanism—the need to face periodic elections, which often keeps other public officials from making unpopular decisions—judges are better positioned to make decisions that go against society’s dominant values and policy preferences (see Figure 4.2). This lack of accountability also creates the possibility that judges’ decisions will go “too far” in shaping law and policy. **EXAMPLE:** Congress impeached Judge Harry Claiborne and removed him from office in 1986 after he was convicted of tax evasion and served 17 months in prison.

“Should we let judges serve for life?”

—Student Question
policy in ways that are unpopular and detrimental to society as well as risk a backlash against the entire court system.

A famous example of backlash against the Supreme Court arose in the late 1930s. In 1937, President Franklin D. Roosevelt was frustrated that the life-tenured justices on the Supreme Court were using their power of judicial review to invalidate New Deal legislation that he believed to be necessary to fight the Great Depression. As a result, he proposed restructuring the Supreme Court to permit the president to appoint an additional justice for each serving justice who reached the age of 70. His “court-packing plan,” as the press and congressional opponents immediately branded it, would have enabled him to select six new justices immediately and thereby alter the Court’s dynamics. Political and public opposition blocked Roosevelt’s plan, and he set it aside when elderly justices began to retire, thus permitting him to name replacements who supported his New Deal legislation. Roosevelt’s actions demonstrated that decisions by life-tenured judges can stir controversy, especially when those decisions clash with policies preferred by the public and their elected representatives in government. The reaction against packing the Court also demonstrated how much the American public had come to value the judiciary’s independence.

The Power of American Judges

Practice Quiz

1. As originally conceived by the framers of the Constitution, the judicial branch of the government was supposed to be
   a. as powerful as the other two branches.
   b. more powerful than the legislative branch but less powerful than the executive branch.
   c. more powerful than the executive branch but less powerful than the legislative branch.
   d. less powerful than the other two branches.

2. The power of judicial review is defined in Article III of the U.S. Constitution.
   a. true
   b. false

3. Why do judges need to interpret constitutions and statutes?
   a. because the legislators who draft these documents are not trained to do this interpretation themselves
   b. because all judges seize every opportunity to expand their own power
   c. because constitutions and statutes frequently contain ambiguities that need to be resolved.
   d. because constitutions and statutes are not considered laws unless judges interpret them

4. Why does judicial review make U.S. judges enormously powerful?
   a. because it grants them the authority to invalidate as unconstitutional statutes enacted by Congress and actions taken by the president
   b. because it comes with the trappings of authority: the black robe, the seat on high, the requirement that all in the court must rise when the judge enters
   c. because it means they are appointed for life
   d. because it means they can intervene in any case, ask witnesses and litigants their own questions, and reach verdicts entirely on their own

Discussion Questions

1. Does the power of judicial review improperly make the judicial branch more powerful than the executive (President) and legislative (Congress) branches of the federal government?
2. Some commentators suggest that federal judges serve only limited terms in office. What impact, if any, would limited terms have on the judicial branch and its role in the governing system?

What YOU can do!

Judicial Selection

What political processes determine the selection of judges?

Political parties and interest groups regard the judicial selection process as an important means to influence the court pathway. By securing judgeships for individuals who share their political values, these groups can enhance their prospects for success when they subsequently use litigation to shape public policy.

In the American political system, judges are, ideally, placed on the bench for their qualifications of thoughtfulness, knowledge, and experience. In reality, American lawyers do not become judges because they are the wisest, most experienced, or fairest members of the legal profession. Instead, they are selected through political processes that emphasize their affiliations with political parties, their personal relationships with high-ranking officials, and often their ability to raise money for political campaigns. The fact that judges are selected through political processes does not necessarily mean that they are unqualified or incapable of making fair decisions. Individuals who are deeply involved in partisan politics may, upon appointment, prove quite capable of fulfilling a judge’s duty to be neutral and open minded. Other judges, however, appear to make decisions that are driven by their preexisting values and policy preferences.

Judicial Selection in the Federal System

The Constitution specifies that federal judges, like ambassadors and cabinet secretaries, must be appointed by the president and confirmed by a majority vote of the U.S. Senate. Thus both the White House and one chamber of Congress are intimately involved in judicial selection.

“What is senatorial courtesy?”

Because there are nearly 850 judgeships in the federal district courts and courts of appeals, the president is never personally knowledgeable about all the pending vacancies. The president does, however, become personally involved in the selection of appointees for the U.S. Supreme Court, because that body is so important and influential in shaping national law and policy. For lower federal court judgeships, the president relies heavily on advice from White House aides, senators, and other officials from his own political party.

Traditionally, senators from the president’s political party have effectively controlled the selection of appointees for district court judgeships in their own states. Through a practice known as senatorial courtesy, senators from the president’s party have virtual veto power over potential nominees for their home state’s district courts. They are also consulted on nominations for the federal court of appeals that covers their state. Because senators are so influential in the selection of federal district court judges, the judges who ultimately get selected are usually acquainted personally with the senators, active in the political campaigns of the senators and other party members, or accomplished in raising campaign funds for the party.

The process begins with the submission of an appointee’s name to the Senate Judiciary Committee. The committee typically receives letters of support from individuals and interest groups that endorse the nomination, as well as similar communications from people and groups opposed to giving the appointee a life-tenured, federal judgeship. A few nominees encounter organized opposition and negative publicity campaigns, but this typically happens primarily with nominations to the Supreme Court or the federal courts of appeals. The committee holds hearings on each nomination, including testimony from supporters and opponents.

“What happens if the Senate objects to the president’s nominee?”

After the Judiciary Committee completes its hearings, its members vote on a recommendation to the full Senate. Typically, when a nomination reaches the full Senate, that body votes quickly, based on the Judiciary Committee’s report and vote. But in controversial cases or when asked to confirm appointments to the Supreme Court, the Senate may spend time debating the nomination. A majority of senators must vote for a candidate in order for that person to be sworn in as a federal judge. However, members of the minority political party in the Senate may block a vote through a filibuster (see Chapter 7, page xxx), keeping discussion going indefinitely unless three-fifths of the Senate’s members—60 senators—vote to end it. Democrats used a filibuster to block several judicial nominations during the first term of President George W. Bush. Eventually, however, senators from both parties negotiated a resolution that permitted Bush’s nominees to gain approval.

As in state systems, judicial selection at the federal level is a political process. Presidents seek to please favored constituencies and to advance their policy preferences in choosing appointees. Interest groups find avenues through which they seek to influence
the president’s choices as well as the confirmation votes of senators. Judicial selection processes are a primary reason that American courts are political institutions despite their efforts to appear “nonpolitical.”

Let’s illustrate the politics of judicial selection using the recent, highly publicized maneuvering after Justice Sandra Day O’Connor announced her retirement from the U.S. Supreme Court in 2005. Her retirement was to take effect as soon as a nominee was confirmed by the U.S. Senate to replace her. Justice O’Connor, the first woman ever appointed to the Supreme Court (by President Ronald Reagan in 1981), was a decisive “swing” vote between the Court’s liberal and conservative wings on several key issues. President Bush and his political supporters saw O’Connor’s retirement as an opportunity to turn the Court in a new direction on issues that closely divided the justices, especially abortion and affirmative action. Liberal and conservative interest groups mobilized their members and prepared significant advertising and lobbying campaigns for the battle over her successor. If she were to be replaced by a more conservative appointee, new decisions by the Supreme Court could potentially rewrite several aspects of constitutional law.

Unexpectedly, President Bush first nominated his long-time personal lawyer, Harriet Miers. Because he was personally acquainted with her, Bush may have felt confident that Miers would make decisions in a manner that would advance his preferred policies. However, she aroused intense public opposition from conservative journalists and interest group leaders as well as some Republican senators, who perceived her as neither professionally distinguished nor sufficiently conservative. Under heavy political pressure, Miers withdrew her name, and President Bush nominated Judge Samuel Alito in her place. No one questioned Alito’s outstanding educational credentials and professional experience as an attorney and a judge. But it was widely—and accurately—anticipated that Alito would be more consistently conservative than O’Connor and that his votes could move the Court to the right. A group of Democratic senators attempted to block Alito’s confirmation by raising concerns about his judicial decisions involving constitutional rights and questions about his attitudes regarding gender discrimination and other issues. However, he was confirmed in January of 2006 following a largely party-line vote of 58–42, with only one Republican voting against him and only four Democrats supporting him. In his first two terms on the Supreme Court, Justice Alito decided cases in a more consistently conservative manner than Justice O’Connor. Thus President Bush appeared to succeed in his objective of turning the Supreme Court in a more conservative direction.

Judicial Selection in the States

Compare the federal judicial selection process with the various processes used to select judges for state court systems. In general, there are four primary methods that states use for judicial selection: partisan elections, nonpartisan elections, merit selection, and gubernatorial or legislative appointment. Table 4.4 shows how judges are selected in each state. Although each of these methods seeks to emphasize different values, they are all closely linked to political processes.

Partisan elections emphasize the importance of popular accountability in a democratic governing system. When judges are elected and must subsequently run for reelection, the voters can hold them accountable if they make decisions that are inconsistent with community values. In selecting candidates to run for judgeships, political parties typically seek individuals with name recognition and the ability to raise campaign funds rather than the lawyer with the most experience. Voters frequently know very little about judicial candidates, so the party label next to the person’s name on the ballot can provide important information that distinguishes the candidates in the eyes of the voter. Partisan elections are used to select judges for at least some levels of courts in nine states.

In an effort to reduce the impact of partisan politics, several states began to use nonpartisan elections in the first decades of the twentieth century. In such elections, a judicial candidate’s campaign literature does not specify political party affiliation, nor is such affiliation indicated on the ballot. Ideally, voters will simply choose the best judge rather than be influenced by political party labels. In reality, however, political parties remain deeply involved in “nonpartisan” elections. Although technically nonpartisan, in these elections political parties often choose the candidates and provide organizational and financial support for their campaigns. Incumbency can also be a powerful influence in such elections, because the incumbent is the only one whose name sounds familiar to voters.

More than 20 states have sought to reduce the influence of politics and give greater attention to candidates’ qualifications when selecting judges. These states have adopted various forms of merit selection systems. The first merit selection process for choosing judges was developed in Missouri in 1949, and many states have used Missouri as a model for developing similar processes. Under the “Missouri plan,” the governor appoints a committee to review potential candidates for judgeships. It is presumed that the committee will focus on the individuals’ personal qualities and professional qualifications rather than on political party affiliations. The committee
### TABLE 4.4 | Methods of Judicial Selection for State Judges

<table>
<thead>
<tr>
<th>PARTISAN ELECTION</th>
<th>NONPARTISAN ELECTION</th>
<th>MERIT SELECTION</th>
<th>LEGISLATIVE (L) OR GUBERNATORIAL (G) APPOINTMENT</th>
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<td>Alaska</td>
<td>California (appellate)</td>
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<td>Illinois</td>
<td>Arizona (trial)</td>
<td>Arizona (appellate)</td>
<td>Maine G</td>
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<td>Indiana (trial)</td>
<td>California (trial)</td>
<td>Colorado</td>
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<td>Louisiana</td>
<td>Florida (trial)</td>
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**FIGURE 4.3 | Diversity within the Federal Courts**

Although the percentage of women and minority judges increased in the federal courts over the past three decades, their numbers still do not reflect their composition of American society. How could the credibility or image of the court system be harmed if important decision-making positions remain dominated by white males in an increasingly diverse society?

SOURCE: www.albany.edu
provides the governor with a short list of recommended candidates. From this list, the governor chooses one candidate and appoints that individual to be the judge. After that, the judge must periodically face the voters in retention elections. In a retention election, the judge’s name is on the ballot, and voters simply decide whether to give the judge an additional term in office. They don’t have a choice of judicial candidates.

One concern voiced by critics about all judicial selection process is the risk that political connections limit opportunities for women and members of minority groups to be considered for judgeships. Many people believe that a diverse judiciary is necessary to maintain the courts’ legitimacy as well as to have decision makers who are knowledgeable about and sensitive to issues that affect all segments of society. If virtually all judges were white and male, would it affect your views about the court system? As indicated by Figure 4.3, relatively few women and members of minority groups were appointed to federal judgeships prior to the Carter administration in the 1970s (1977–1981). Since the 1970s, presidents have shown different levels of commitment to the goal of diversifying the federal courts.

### Judicial Selection

#### Practice Quiz

1. As dictated by the Constitution, federal judges are appointed by the president and are confirmed by
   a. a majority vote in Congress.
   b. a two-thirds vote in the House of Representatives.
   c. a majority vote in the Senate.
   d. a two-thirds vote in the Senate.

2. Why are the characters and political philosophies of nominees for the federal bench scrutinized so carefully?
   a. When judges interpret constitutions and statutes, they inevitably rely on their own values—and their decisions can significantly affect the lives of millions of Americans.
   b. Federal judges are celebrities, and the American public is deeply interested in their private lives.
   c. The Judiciary Act of 1789 requires such scrutiny.
   d. Article II of the Constitution requires such scrutiny, without which judges are subject to impeachment.

3. Senators play a key role in the selection and confirmation of federal judges.
   a. true  b. false

4. What role do political parties play in the selection of state court judges?
   a. Political parties are only allowed to be involved in partisan judicial elections.
   b. Political parties are often involved in both partisan and nonpartisan judicial elections.
   c. Political parties always determine who will be nominated in the merit selection process.
   d. Political parties have no role in the selection of state judges.

**Answers:** 1-c, 2-a, 3-a, 4-b.

#### Discussion Questions

1. What is the best way to select judges?
2. How could you design a merit selection system that would truly select the most qualified individuals for judgeships?

#### What YOU can do!

Visit the American Judicature Society’s Web page on judicial selection in the states at [http://www.judicialselection.us/](http://www.judicialselection.us/). Read the voter guides for judicial elections to get a sense about the kinds of issues and positions that appear in these elections as compared to elections of legislative or executive officials. Also at this Web site, look at “History of Reform Efforts” to see both successful and unsuccessful reform efforts in your state as well as opinion polls and surveys on aspects of judicial reform. Which method of judicial selection do you think is the best for states to use? Why?
Judges’ Decision-Making (pages xxx–xxx)

What do we know about how Supreme Court justices really make decisions?

The political battles over Supreme Court nominations, as well as over judges at other levels of state and federal court systems, reflect the widespread recognition that judges do not merely “follow the law” in making their decisions. When judges interpret the U.S. Constitution, state constitutions, and statutes, they rely on their own values and judgments. These values and judgments ultimately have a significant effect on public policy affecting many aspects of American life. Hence, in appointing federal judges, the president seeks to name men and women with a politically compatible outlook. Similarly, the involvement of political parties and interest groups in supporting or opposing judicial candidates reflects their interests in securing judgeships for those whom they believe will make decisions that advance their policy preferences. Research by social scientists reinforces this assessment of judges. Studies show, for example, that decisions favoring individuals’ claims of rights are more frequently associated with Democratic judges and that decisions favoring business and the prosecution in criminal cases are more frequently associated with Republican judges.

Although judges can apply their values in making many kinds of decisions, they do not enjoy complete freedom to decide cases as they wish. Lower-court judges in particular must be concerned that their decisions will be overturned on appeal to higher courts if they make decisions that conflict with the judgments of justices on courts of last resort. What guides judges to reach conclusions that are not likely to be overturned? They rely on case precedent. Case precedent is the body of prior judicial opinions, especially those from the U.S. Supreme Court and state supreme courts, that establishes the judge-made law that develops from interpretations of the U.S. Constitution, state constitutions, and statutes. When lower-court judges face a particular issue in a case, they do research to determine whether similar issues have already been decided by higher courts. Typically, they will follow the legal principles established by prior cases, no matter what their personal views on the issue. However, if they believe that the precise issue in their case is distinguishable from the issues in prior cases, or if they have new ideas about how such issues should be handled, they can issue an opinion that clashes with established case precedent. Judges make such decisions in the hope that the reasons explained in their opinions will persuade the judges above them to change the prevailing precedent. The law changes through the development of new perspectives and ideas by lawyers and judges that ultimately persuade courts of last resort to move the law in new directions.

For example, when the U.S. Supreme Court decided in 2005 (in Roper v. Simmons) that the cruel and unusual punishments clause...
in the Eighth Amendment prohibits the execution of murderers who committed their crimes before the age of 18, it established a new precedent, overturning its previously established precedent permitting execution for murders committed at the ages of 16 and 17 (Stanford v. Kentucky, 1989). In reaching its conclusion, the nation’s highest court upheld a decision by the Missouri Supreme Court that advocated a new interpretation of the Eighth Amendment (State ex. rel. Simmons v. Roper, 2003).

The U.S. Supreme Court often seeks to follow and preserve its precedents in order to maintain stability in the law. However, it is not bound by its own precedents, and no higher court can overturn the Supreme Court’s interpretations of the U.S. Constitution. Thus the justices enjoy significant freedom to shape the law by advancing their own theories of constitutional interpretation and by applying their own attitudes and values concerning appropriate policy outcomes from judicial decisions. State supreme courts enjoy similar freedom when interpreting the constitutions and statutes of their own states. Lower-court judges can also apply their own approaches to constitutional and statutory interpretation, especially when facing issues that have not yet been addressed by any court. Their new approaches may be overturned on appeal, but they may also help establish new law if higher courts agree.

Judicial selection battles in the federal courts, especially those over the nomination of Supreme Court justices, often focus on the nominee’s approach to constitutional interpretation. Among the members of the Supreme Court, Justices Clarence Thomas and Antonin Scalia are known for advocating an original intent approach to constitutional interpretation. These justices and their admirers argue that the Constitution must be interpreted in strict accordance with the original meanings intended by the people who wrote and ratified the document. According to Thomas and Scalia, constitutional interpretation must follow original intent in order to avoid “judicial activism,” in which judges allegedly exceed their proper sphere of authority by injecting their own viewpoints into constitutional interpretation. That is why the followers of the original intent approach are also known as advocates of “judicial restraint,” in which judges defer to the policy judgments of elected officials in the legislative and executive branches of government. Despite their use of “judicial restraint,” judges who follow original intent still affect public policy with their decisions. They merely disagree with others about which policies should be influenced by judges.

Critics of original intent argue that there is no way to know exactly what the Constitution’s authors intended with respect to each individual word and phrase, or even whether one specific meaning was intended by all of the authors and ratifiers. Moreover, these critics typically argue that the ambiguous nature of many constitutional phrases, such as “cruel and unusual punishments” and “unreasonable searches and seizures,” represents one of the document’s strengths, because it permits judges to interpret and reinterpret the document in light of the nation’s changing social circumstances and technological advances. What would James Madison and the other eighteenth-century founders of the nation have thought about whether the use of wiretaps and other forms of electronic surveillance violates the Fourth Amendment prohibition on “unreasonable searches”? Critics of original intent argue that contemporary judges must give meaning to those words in light of current values and policy problems. Hence the critics of original intent typically want a flexible interpretation that enables judges to draw from the Constitution’s underlying principles in addressing contemporary legal issues. Nearly all the Supreme Court justices in the past 50 years have used flexible interpretation, including, among the justices serving in 2007, John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer.
Ginsburg, and Anthony Kennedy. However, the justices who use flexible interpretation frequently disagree with one another about how much flexibility should apply to various provisions in the Constitution.

As you can see, debates about the proper approach to interpreting the Constitution can be central elements in the political battles over the selection of judges. The successful confirmations of Bush appointees John Roberts and Samuel Alito may indicate that Justices Thomas and Scalia have gained new allies in their advocacy of judicial restraint and interpretation by original intent. In their first two terms on the Court, Chief Justice Roberts and Justice Alito were closely aligned with Thomas and Scalia in making decisions on a wide range of issues.

President George W. Bush clearly hoped that his appointees would decide cases in the manner of Justices Thomas and Scalia, but presidents are sometimes disappointed. Presidents cannot accurately predict how a nominee will decide every kind of case, especially because new and unexpected issues emerge each year. Moreover, some Supreme Court justices, as well as judges on lower courts, do change their views over the course of their careers. The views that led the president to select the nominee are not always the views held by nominees at the end of their careers. Justice Harry Blackmun, for example, an appointee of Republican President Richard Nixon, served on the Supreme Court from 1970 to 1994 and became increasingly protective of individuals' rights over the course of his career. Despite the fact that Nixon had envisioned him as a conservative decision maker, he was regarded as one of the Court's most liberal justices at the time of his retirement.

**Political Science and Judicial Decision Making**

Supreme Court justices present themselves as using particular approaches to constitutional interpretation in making their decisions, and they may honestly believe that these interpretive approaches guide their decisions. Political scientists, however, question whether the justices' decisions can be explained in this way. Through systematic examination of case decisions and close analysis of justices' opinions, researchers have identified patterns and inconsistencies. These examinations of Supreme Court decisions have led to alternative explanations for the primary factors that shape the justices' decisions.

The idea that justices follow specific theories of constitutional interpretation and carefully consider precedents in making decisions is often labeled the legal model. Critics argue, however, that the justices regularly ignore, mischaracterize, or change precedents when those case decisions seem to impede the desire of the majority of justices to have a case come out a certain way. As you will see in the discussion of freedom of religion in Chapter 5, the justices seem to decide cases on the separation of church and state according to a specific test of whether government actions advance a particular religion. In specific cases, however, they ignore the test if it leads to a result that they do not desire. For example, the justices permitted the Nebraska state senate to hire a minister to lead prayers at the start of each legislative session (Marsh v. Chambers, 1984). If they had applied the usual test, however, they would presumably have been required to prohibit the entanglement of church and state through the use of a Christian minister to deliver prayers in this context.

An alternative theory of judicial decision-making, known as the attitudinal model, states that Supreme Court justices' opinions are driven by their attitudes and values. Advocates of this model see the justices' discussion of interpretive theories and precedents as merely a means to obscure the actual basis for decisions and to persuade the public that the decisions are, in fact, based on law. Researchers who endorse the attitudinal model do systematic analyses of judicial decisions to identify patterns that indicate the attitudes and values possessed and advanced by individual justices. Put more simply, the attitudinal theorists argue that some justices decide cases as they do because they are conservative and that others decide cases differently because they are liberal.

Other political scientists see judicial decision making as influenced by a rational choice model. According to this theory, Supreme Court justices vote strategically in order to advance their preferred goals, even if it means voting contrary to their actual attitudes and values in some cases. For example, a justice may be keenly interested in a specific issue raised by a case presented to the Court. Yet that justice could vote against hearing the case if he or she fears there ultimately would not be enough support among the justices to advance a preferred outcome. By declining to hear the case, the justice helps avoid setting an adverse precedent and can wait for a similar issue to arise again after the Court's composition has changed in a favorable direction. Justices may also vote strategically in order to build relationships with allies in less important cases, with the hope that these relationships will increase the likelihood of...
persuading those allies to support specific decisions in other cases. These are just two examples of a variety of ways that rational choice strategies may influence Supreme Court decisions.9

In recent years, some political scientists have broadened their studies of courts, including judicial decision-making, through an approach commonly labeled new institutionalism. New institutionalism emphasizes understanding courts as institutions and seeing the role of courts in the larger political system.10 The adherents of new institutionalism do not necessarily agree with one another about the causes and implications of judicial action. They do, however, seek to move beyond analyzing judicial decisions solely by looking at the choices of individual Supreme Court justices. Instead, they may focus on the Supreme Court’s processes, its reactions to statutes enacted to undercut particular judicial decisions, or its decisions that minimize direct confrontations with other branches of government. Alternatively, the focus could be on judicial inaction, as when the Supreme Court refused to consider lawsuits against President Richard Nixon in the early 1970s for conducting an allegedly “illegal war” in Cambodia during the Vietnam War. In this example, the Supreme Court avoided involvement in issues of presidential war powers that would generate conflicts among the country’s governing institutions.

Political scientists continue to debate which model provides the best explanation for judicial decisions. New models are likely to be developed in the future. For students of American government, these models serve as a reminder that you should not automatically accept government officials’ explanations for their decisions and behavior. Systematic examination and close analysis of decisions may reveal influences that the government decision makers themselves do not fully recognize.

### Judges’ Decision-Making

#### Practice Quiz

1. The “legal model” of judicial decision-making presumes that
   a. judges’ decisions are based on their attitudes and values.
   b. judges’ decisions are based on their rational strategies.
   c. judges’ decisions are based on case precedents.
   d. judges’ decisions depend on them persuading each other.

2. Critics who oppose the efforts of Justices Thomas and Scalia to have the Constitution interpreted according to “original intent”
   a. claim that there is no way to know what the authors of the Constitution intended as the meaning of all the document’s ambiguous phrases.
   b. claim that the use of original intent always violates the principle of judicial restraint.
   c. do not believe that Supreme Court justices should interpret the Constitution.

3. Usually, the decisions of lower-court judges rely on case precedent, even if their personal views on the issue suggest a different decision.
   a. true
   b. false

4. In Roper v. Simmons (2005), the Supreme Court reinterpreted the Eighth Amendment, concluding that
   a. same-sex marriage was protected under the “right to privacy.”
   b. executing murderers who committed their crimes before the age of 18 constituted “cruel and unusual punishment.”
   c. installing a 6-foot crucifix in a government building violated the separation of church and state.
   d. Internet filters on public library computers constituted a violation of free speech.

**Answers:** 1-c, 2-a, 3-a, 4-b.

#### Discussion Questions

1. Should judges be required to follow case precedent, or would it be better for them to make decisions based entirely on their best judgment?

2. Is there any way to prevent judges from using their own values and attitudes in making decisions?

#### What YOU can do!

Think about the Eighth Amendment phrase that prohibits “cruel and unusual punishments.” What might the phrase mean under an “original intent” interpretation? Is that meaning different than what your own interpretation would be using a flexible approach? If your definition defined law and policy for the United States, how would that affect sentences imposed on criminal offenders and the treatment of offenders in prisons?
What litigation strategies are employed in the court pathway?

In theory, any individual can make use of the resources of the judicial branch merely by filing a legal action. Such actions may be directed at small issues, such as suing a landlord to recover a security deposit. They may also be directed at significant national issues, including actions aimed at Congress or the president in battles over major public policy issues.

In reality, filing a lawsuit at any level above small-claims courts (where landlord-tenant cases are typically argued) is expensive and requires professional legal assistance. As a result, the courts are not easily accessible to the average American. Typically, this policy-shaping process is used by legal professionals who have technical expertise and financial resources. Nor will courts accept every kind of claim: Claims must be presented in the form of legal cases that embody disputes about rights and obligations under the law. Thus organized interests and wealthy individuals are often best positioned to make effective use of court processes.

For an illustration of the court pathway in the Lindsay Earls case, see Figure 4.4.

PATHWAYS | profile

John G. Roberts, Jr.

John Roberts was educated at Harvard College and Harvard Law School. After graduation from law school, he served as a law clerk for a judge on the U.S. Court of Appeals in New York City and then spent a year as a law clerk for U.S. Supreme Court Justice (and future Chief Justice) William Rehnquist. Later, during the presidency of Ronald Reagan, Roberts served as an assistant to the U.S. attorney general and later to the White House counsel. He then entered private practice with a Washington, D.C., law firm. During the presidency of George H.W. Bush (1989–1993), Roberts served as the deputy solicitor general and argued cases in front of the U.S. Supreme Court on behalf of the federal government. Roberts returned to his law firm during Bill Clinton’s presidency (1993–2001).

During the first term of President George W. Bush, Roberts was appointed to a seat on the U.S. Court of Appeals for the District of Columbia. Later, upon the death of Chief Justice William Rehnquist in 2005, President Bush nominated Roberts to become chief justice of the United States.

Despite being a newcomer to the Court, as well as its youngest member, Roberts assumed leadership duties as chief justice. This means leading the discussion of cases and designating the specific justices who write opinions on behalf of the Court in cases when the chief justice has voted with the majority. In major cases, the chief justice often assigns the majority opinion to himself.

President Bush selected Roberts for the Supreme Court in the apparent belief that Roberts would move the high court in a conservative direction on such issues as expanded presidential power during the war on terrorism, abortion, and affirmative action.

Interest Group Litigation

The court pathway is often attractive to small interest groups, because it is possible to succeed with fewer resources than are required for lobbying or mass mobilization. Larger or resource-rich groups also use litigation, but it tends to be just one among several pathways that they use. To be effective in legislatures, for example, groups need lots of money and large numbers of aroused and vocal members. Lobbyists need to spend money by donating to politicians’ campaign funds, winning and dining public officials, and mounting public relations campaigns to sway public opinion. Groups also need to mobilize their membership to flood legislators’ offices with phone calls and e-mail messages. By contrast, a small group may be successful using the courts if it has an effective attorney and enough resources to sustain a case through the
litigation process. The most important resources for effective litigation are expertise and resources for litigation expenses.\textsuperscript{11}

**EXPERTISE** For effective advocacy in litigation, expertise is essential. This includes thorough knowledge in the areas of law relevant to the case as well as experience in trial preparation or appellate advocacy, depending on which level of the court system is involved in a particular case. Attorneys who have previously dealt with specific issues know the intricate details of relevant prior court decisions and are better able to formulate effective arguments that use those precedents. In addition, attorneys affiliated with large, resource-rich law firms or interest groups have at their disposal teams of attorneys who can handle research and other aspects of investigation and preparation.

**LITIGATION RESOURCES** Interest groups and individuals who use the court process must have the resources to handle various expenses in addition to the attorneys’ fees, which are generally very high unless the lawyers have volunteered to work for little or nothing on a pro bono basis. (Pro bono publico is a Latin phrase that translates as “for the public good.” It means that attorneys and other professionals are waiving their usual fees to work for a cause in which they believe. Some interest groups rely heavily on securing pro bono professional support.)

**PATHWAYS** of action

**The NAACP and Racial Segregation**

Beginning in the 1930s, the National Association for the Advancement of Colored People (NAACP), an important civil rights interest group founded in 1910, filed lawsuits to challenge state laws that segregated African Americans into separate, inferior educational institutions. These lawsuits tested the 1896 U.S. Supreme Court decision (\textit{Plessy v. Ferguson}) that had ruled no constitutional violation exists when government gives people

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**FIGURE 4.4** Policy-Shaping litigation

Litigation is a long and difficult process. The end result depends on the persistence, resources, and strategy of the competing sides as well as the values and interactions of the judges. —Do you have enough knowledge and resources to pursue policy-shaping litigation?
from different races “separate but equal” facilities and treatment. Unfortunately, many states used that court decision to justify their existing practice of providing separate and grossly inferior schools and services to African Americans. Rigid racial segregation was imposed, especially in the South, after the end of the post–Civil War Reconstruction period, and it was vigorously enforced for decades afterward.

Led by Thurgood Marshall, an attorney who later became the first African American to serve on the U.S. Supreme Court (1967–1991), the NAACP argued that the separate facilities sanctioned by Plessy were not equal and therefore violated the equal protection clause of the Constitution’s Fourteenth Amendment. As we will examine in greater detail in Chapter 6, page xxx, from the 1930s to the 1950s, the NAACP sued such states as Maryland, Missouri, Texas, and Oklahoma for excluding African-American students from state universities’ law schools and graduate programs. By 1950, the U.S. Supreme Court had issued several decisions rejecting states’ false claims that they provided “separate but equal” facilities for African Americans in colleges and universities. It was at that point that litigation began, backed by the NAACP, that would lead to public school racial segregation being declared unconstitutional.

After Earl Warren, the governor of California, was appointed chief justice in 1953, the nine justices unanimously declared that school segregation laws are unconstitutional because they violate the equal protection clause. That decision, Brown v. Board of Education of Topeka (1954), was based on a lawsuit filed by the NAACP on behalf of African-American parents and schoolchildren in Topeka, Kansas. The Brown decision established the foundation for subsequent NAACP lawsuits in the 1960s and 1970s seeking to desegregate public school systems throughout the United States.

Elements of Strategy

All litigants engage in certain types of strategies—for example, presenting evidence and formulating arguments. Interest groups may benefit from additional opportunities to use specific strategies by choosing which case to pursue or by choosing the court in which a case may be filed.

**SELECTION OF CASES** Interest groups seek to find an appropriate test case that will serve as the vehicle to persuade judges to change law and policy. Sometimes they can recruit plaintiffs and then provide legal representation and litigation expenses to carry the case through the court system. In challenging laws that restrict choices about abortion, an interest group would rather bring the case on behalf of a teenage rape victim than pursue the case for a married woman who became pregnant after being insufficiently careful with birth control. The interest group is likely to believe that the rape victim’s case will provide more compelling arguments that can generate sympathy from many judges, because this case concerns a young crime victim who became pregnant through no fault of her own.

Interest groups cannot always choose precisely which case would best serve their interests. They may pursue any relevant case available at a given moment, because they cannot afford to watch passively if other cases then working their way through the system may lead to adverse judicial decisions.

**CHOICE OF JURISDICTION** One important factor in litigation strategies is the choice of courts in which to pursue a legal action. Because of the country’s dual court system, there is often a choice to be made about whether state or federal courts are more likely to produce outcomes favorable to a group’s interests. In addition to considering whether state or federal law may be more likely to produce a favorable result, litigators may consider whether a specific federal or state judge would be sympathetic to their values and policy preferences.

**FRAMING THE ARGUMENTS** Litigants must make strategic decisions about how to frame the legal issues and arguments that they present in court. In some cases, they must decide which legal issues to raise. Lawyers must assess the judges before whom the case will be presented and make strategic decisions about which arguments will appeal to the particular decision makers who will consider the case.

When an interest group is not itself involved in a case, it may still seek permission to present written arguments as *amicus curiae* (Latin for “a friend of the court”). For example, it is very common for multiple interest groups to submit amicus briefs—detailed written arguments that seek to persuade the U.S. Supreme Court to endorse a specific outcome or to adopt reasoning that is favorable to the groups’ policy preferences. Amicus briefs can be influential, because justices’ opinions sometimes draw from these briefs rather than from the arguments presented by the two parties in the case. Participants in a Supreme Court case typically welcome the submission of amicus briefs on behalf of their side. Indeed, one strategy is to gain the endorsement of as many interest groups as possible to impress the Supreme Court with the broad support that exists for a particular position. Over the course of Supreme Court history, individuals and interest groups have increasingly sought to influence the Court’s decisions through amicus briefs. From 1946 through 1955, amicus briefs were filed in only 23 percent of Supreme Court cases, but between 1986 and 1995, they were filed in 85 percent of the cases considered.12
PUBLIC RELATIONS AND THE POLITICAL ENVIRONMENT  
Interest groups have a strong incentive to gain sympathetic coverage from the news media about cases that they are pursuing through the court pathway. Attorneys often develop relationships with reporters in hopes that sympathetic stories will be written about policy-oriented legal cases. Such stories help educate the public and perhaps shape public opinion about an issue. They may also influence judges, because just like other people, they read the newspapers or watch television every day.

STUDENT PROFILE
What would you do if you believed that your rights were being violated by one of your college’s policies? Would you have the courage to speak out? Would you have the persistence and determination to find a lawyer to help take your case through the court system? This is not easy to do.

In 2002, Tyler Deveny, a high school senior in Kanawha County, West Virginia, filed a lawsuit to challenge the school district’s policy of permitting prayers to be led at public school graduations. He claimed that such prayers are a form of government-sponsored religious activity in violation of the First Amendment’s prohibition on an “establishment” of religion by government. In many towns, when school-sponsored prayers are supported by a majority of citizens, individuals who oppose those practices may be subject to criticism and harassment. However, Tyler stood up for his interpretation of the First Amendment. After the lawsuit was filed with the assistance of the ACLU and another interest group, school officials settled the case by agreeing to change the policy.

Action in the Court Pathway

Practice Quiz

1. One advantage in using the court pathway to shape public policy is that
d. a case that will be easy to resolve through a negotiated settlement.
   
2. When interest groups submit amicus briefs in appellate case, they are
d. announcing that they will monitor the actions of the legislature and executive.

3. When interest groups look for a test case that will help them with their litigation strategy, they seek
c. a case involving someone rich, who can pay them a great deal of money.

Discussion Questions

1. Why did the NAACP use a litigation strategy instead of lobbying Congress and mobilizing voters to pressure the president to take action against racial segregation?

2. If you wanted to challenge a mandatory drug testing policy imposed by your college, what strategies would you need to use to succeed in the litigation process?

What YOU can do!

Pick a controversial issue in the current political arena (for example, immigration, enemy combatants, global warming, abortion, or same-sex marriage), and look at the portfolio of a variety of interest groups on the topic. Possible groups might include the Cato Institute, the American Enterprise Institute, the Family Research Council, the ACLU, or the Center for Constitutional Rights. What strategies, arguments, or approaches are being used by these groups to seek change through the court pathway?
Implementation and Impact (pages xxx–xxx)

What is the image of the courts in the United States?

Court decisions are not automatically implemented or obeyed. Judges have the authority to issue important pronouncements that dictate law and policy, but they have limited ability to ensure that their orders are carried out. To see their declarations of law translated into actual public policy, judges must typically rely on public obedience and on enforcement by the executive branch of government. As you saw earlier in this chapter, this is a primary reason why judges are concerned about preserving the courts’ nonpolitical image. If the public came to believe that the courts were no different from branches of government in which partisanship dictates operations and outcomes, the public might be less likely to obey court decisions.

“Does the executive branch ever refuse to enforce the courts’ decisions?”

—Student Question

During the Watergate scandal of the 1970s, in which President Richard Nixon conspired to cover up information about a burglary at Democratic Party offices committed by people working for his reelection campaign, the Supreme Court handed down a decision ordering Nixon to provide a special prosecutor with recordings of secretly taped White House conversations. Years later, Supreme Court Justice Lewis Powell observed that had Nixon refused to comply with the Court’s order, “there was no way that we could have enforced it. We had [only] 50 police officers [at the Supreme Court], but Nixon had the [U.S. military at his disposal].” But Nixon handed over the tapes, however, and shortly thereafter resigned from office, presumably realizing that public support for his impeachment, already strong, would lead to his conviction by the Senate if he disobeyed a unanimous Court decision that citizens and members of Congress viewed as legitimate.

The weakness of courts has been revealed in a number of cases over the course of American history. In the 1830s, the Cherokee Nation successfully litigated a case against laws that ordered the removal of Cherokees from their lands. The state of Georgia supported removal on behalf of whites who invaded Cherokee lands to search for gold. The U.S. Supreme Court, still led by the aged Chief Justice John Marshall, supported the Cherokees’ property rights, but President Andrew Jackson and other officials declined to use their power to enforce the ruling (“John Marshall has made his decision,” Jackson is supposed to have said, “now let him enforce it.”) Thus, despite using the court pathway in an appropriate manner to protect their property rights, the Cherokees were eventually forced off their land. A few years later, they were marched at gunpoint all the way to an Oklahoma reservation, with an estimated 4,000 dying along the way. The Cherokees’ infamous Trail of Tears forced march and loss of land demonstrated that courts cannot automatically ensure that their decisions are enforced and obeyed. Unlike the situation in the 1970s, in which President Nixon felt strong public pressure to obey the Supreme Court or face impeachment, the Cherokees and the Supreme Court of the 1830s did not benefit from public acceptance and political support.

In modern times, analysts have questioned the effectiveness of courts in advancing school desegregation. Although the Supreme Court has earned praise for courageously standing up for equal protection by declaring racial segregation in public schools unconstitutional in Brown, the 1954 decision did not desegregate schools. Racial separation continued in public schools throughout the country for years after the Court’s decision. In two highly publicized incidents, military force was necessary to enroll African-American students in all-white institutions. In 1957, President Dwight D. Eisenhower sent troops to force Little Rock Central High School to admit a half-dozen black students, and in 1962, President John F. Kennedy dispatched the U.S. Army to the University of Mississippi so that one African-American student could enroll. In both situations, there had been violent resistance to court orders, but the presidents effectively backed up the judicial decisions with a show of force. In other cities, desegregation was achieved piecemeal, over the course of two decades, as individual lawsuits in separate courthouses enforced the Brown mandate.

According to Professor Gerald Rosenberg, the actual desegregation of public schools came only after the president and Congress acted in the 1960s to push policy change, using financial incentives and the threat of enforcement actions to overcome segregation. In Rosenberg’s view, courts receive too much credit for policy changes that actually only occur when other actors become involved. Courts receive this credit, in part, because of the symbolism attached to their publicized pronouncements.14 Similar arguments can be made about other policy issues. For example, the Supreme Court’s decision recognizing a woman’s right to make choices about abortion (Roe v. Wade, 1973) does not ensure that doctors and medical facilities will perform such procedures in all locations or that people have the resources to make use of this right.

Other analysts see the courts differently—as important and effective policymaking institutions. They argue that Brown and other
judicial decisions about segregation were essential elements of social change. Without these judicial decisions initiating, guiding, and providing legitimacy for change, the changes might not have occurred. For example, until the mid-1960s, southern members of Congress who supported segregation were able to block corrective legislation, because the seniority system gave them disproportionate power on congressional committees. In the Senate, they also used the filibuster to prevent consideration of civil rights legislation. Thus they could make sure that proposed bills either died in committee or never came to a vote. In addition, elected officials at all levels of government and in all parts of the country were often too afraid of a backlash from white voters to take strong stands in support of equal protection for African Americans. Analysts point to other court decisions, such as those requiring police officers to inform suspects of their Miranda rights in 1966 and recognizing abortion rights in 1973, to argue that the court pathway has been an important source of policy change. Unelected judges were arguably the only actors positioned to push the country into change.

**Implementation and Impact**

**Practice Quiz**

1. A court decision is a declaration of law; once it is formulated by a court, it automatically operates as effective public policy.
   - a. true
   - b. false

2. It’s fair to say that the desegregation of public schools in this country resulted from
   - a. the Supreme Court’s decision in Plessy v. Ferguson.
   - b. a series of legislative decisions starting with Brown v. Board of Education.
   - c. the Court’s reversal of Plessy v. Ferguson, lower-level courts’ complementary decisions, and enforcing actions by President Eisenhower and President Kennedy.
   - d. cultural change that inspired most people in segregated school districts to embrace desegregation.

3. Why might it be appropriate in a democracy that federal judges help formulate public policy?
   - a. Federal judges are the elected representatives of the people.
   - b. Federal judges can be fired if their decisions too often run contrary to the sentiments of the majority.
   - c. Some democratic principles (such as individual rights) can conflict with majority sentiments. Federal judges, appointed for life and insulated from the pressures of popular sentiment, are well positioned to preserve such principles.
   - d. Federal judges are appointed by governmental officials who are themselves elected. The votes that elected officials receive represent a level of citizen trust that transcends the changeable sentiments of a majority, making judges appointed by these officials a purer expression of democracy than elected judges would be.

**Discussion Questions**

1. Are courts powerful or weak?
2. How could a president be required to enforce a decision of the U.S. Supreme Court?

**What YOU can do!**

One way to know whether the Supreme Court’s decisions make a difference is through measuring public awareness and public opinion. Look at the cases decided during the last term of the Supreme Court at [http://www.supremecourtus.gov/](http://www.supremecourtus.gov/), and conduct your own informal poll to determine whether your classmates and co-workers are aware of the Court’s rulings on particularly high-profile issues. As a comparison, go to the Web site of the Library of Congress at [http://thomas.loc.gov/](http://thomas.loc.gov/), and generate a list of public laws from the last congressional term. Is public awareness of the Supreme Court similar to or different from levels of awareness about the work of Congress?
Judicial Policymaking and Democracy

Is it appropriate for judges to shape public policy in a democracy?

Notwithstanding the framers’ expectation that the judiciary would be the weakest branch of government, the court pathway presents an avenue for pursuing public policy objectives because American judges possess important powers. But these powers often stir up debates about the role of courts in the constitutional governing system. These controversies are most intense when focused on the actions of appointed, life-tenured, federal judges. In a democratic system, how can unelected, long-serving officials be permitted to make important decisions affecting public policy? This is an important question for Americans and their government.

The power of the judicial branch poses significant potential risks for American society. What if life-tenured judges make decisions that create bad public policy? What if they make decisions that nullify popular policy choices made by the people’s elected representatives or that force those elected representatives to impose taxes needed to implement those decisions? Because of these risks, some critics call judicial policymaking undemocratic. They argue that judges should limit their activities to narrow decisions that address disputes between two parties in litigation and avoid any cases that might lead judges to supersede the preferences of the voters’ accountable, elected representatives in the legislative and executive branches. These critics want to avoid the risk that a small number of judicial elites, such as the nine justices on the U.S. Supreme Court, will be able to impose their policy choices on the nation’s millions of citizens.

Although judicial policymaking by unelected federal judges does not fit conceptions of democracy based on citizens’ direct control over policy through elections, advocates of judicial policymaking see it as appropriate. According to their view, the design of the governing system in the U.S. Constitution rests on a vision of democracy that requires active participation and policy influence by federal judges. Under this conception of democracy, the U.S. Constitution does not permit the majority of citizens to dictate every policy decision. The Constitution facilitates citizen participation and accountability through elections, but the need to protect the rights of individuals under the Bill of Rights demonstrates that the majority should not necessarily control every decision and policy. In 1954, for example, racial segregation was strongly supported by many whites in the North and the South. Should majority rule have dictated that rigid racial segregation continue? In essence, the American conception of constitutional democracy relies on citizen participation and majority rule plus the protection of rights for individuals, including members of unpopular political, religious, racial, and other minorities.

For example, in the aftermath of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, public opinion polls indicated that a majority of Americans favored requiring Arabs, including those who are U.S. citizens, to undergo special searches and extra security checks before boarding airplanes in the United States. Imagine that Congress responded by enacting a law that imposed these requirements based on ancestry without regard to its detrimental impact on U.S. citizens of Arab extraction. Such a policy, if supported by a majority of citizens, would meet many of the requirements for democratic policymaking. However, it would collide with the Fourteenth Amendment’s requirement of “equal protection of the laws” for Americans from all races and ethnic groups.

“Do the Supreme Court justices follow the wishes of the majority? Should they?”

—Student Question
rights of minorities, the Constitution positions federal judges as the decision makers to protect constitutional rights. In this position, because they are appointed, life-tenured officials, federal judges are supposed to have the independence and the insulation from politics necessary to make courageous decisions on behalf of minority group members, no matter how unpopular those minorities may be. In practice, federal judges do not always go against the wishes of the majority, even when the rights of minority group members are threatened or diminished. Such was the case when the Supreme Court endorsed the detention of innocent Japanese Americans in internment camps during World War II (Korematsu v. United States, 1944). But in other cases, the Supreme Court and other courts can provide a check against the excesses of majority policy preferences.

There is broad agreement that judges must uphold the U.S. Constitution, state constitutions, and laws enacted by legislatures through the use of their power of interpretation. Disagreements exist, however, about whether judges have acted properly in interpreting the law, especially when judicial decisions shape public policy. Was it ever proper for the Supreme Court to recognize a constitutional right of privacy that grants women the opportunity to make choices about abortion (Roe v. Wade, 1973)? Should the U.S. Supreme Court have prevented the Florida courts from ordering recounts of votes during the closely contested presidential election of 2000 (Bush v. Gore, 2000)? These and other questions will continue to be debated for decades to come for three primary reasons. First, courts are authoritative institutions that shape law and policy in ways that cannot be directly controlled by the public and other institutions of government. Second, court decisions often address controversial issues that reflect Americans’ most significant disagreements about social values and public policies. And third, elected officials may choose to avoid taking action on controversial issues, thereby leaving the court pathway as the sole avenue for government action.

### PATHWAYS of Change from Around the World

**What would you do if the independence of the American judiciary was threatened?** What if members of Congress sought to impeach a federal judge simply because they disagreed with his or her decision in a criminal case? Would it matter to you? To the country? Would you even notice? In 2007, law students in Pakistan took to the streets with hundreds of lawyers to protest President Pervez Musharraf’s effort to suspend and remove from office the chief justice of Pakistan’s Supreme Court. These students felt so strongly about the need for judicial independence that they literally risked their lives as armed soldiers tried to stop the protests. Thankfully, contemporary issues in the United States rarely produce large-scale violence. But the question remains—what would you do under similar circumstances? Write a letter? Call your members of Congress? What could you do if an American president sought to ignore orders of the U.S. Supreme Court or otherwise diminish the power of the judiciary?[^18]

### Judicial Policymaking and Democracy

#### Practice Quiz

1. The framers of the U.S. Constitution expected that the judiciary would eventually become the most powerful branch of government.
   - a. true
   - b. false

2. One justification for judicial policymaking in the democratic governing system of the United States relies on
   - a. the fact that federal judges are elected by and accountable to the voters.
   - b. the provision in Article I of the U.S. Constitution that declares "judges shall have power over public policy."
   - c. the need for independent judges to make decisions that protect the constitutional rights of individuals, including members of minority groups.
   - d. the UN Declaration on Judicial Power in the Modern World.

#### Discussion Questions

1. Are the principles of American democracy violated when judges make decisions that shape public policy?

### What YOU can do!

Justice Harry Blackmun was appointed to the U.S. Supreme Court by President Nixon with the expectation that he would vote consistently with Chief Justice Warren Burger, a conservative who had been a childhood friend from Blackmun’s days in Minnesota. However, Blackmun’s jurisprudence evolved during his time on the court, and he grew more liberal, even authoring the Court’s majority opinion in Roe v. Wade (1973). You can view Blackmun’s papers and memos, which are held in the Library of Congress, through this digital archive found at [http://epstein.law.northwestern.edu/research/Blackmun.html](http://epstein.law.northwestern.edu/research/Blackmun.html). Since federal judges are appointed for life, is it problematic in a democracy that a judge might change his or her mind about how to decide cases over an often decades-long career?
Conclusion

The judicial branch serves important functions under the constitutional governing system of the United States. Judges and juries resolve disputes, determine whether criminal defendants are guilty, impose punishment on those convicted of crimes, and provide individuals with a means to challenge actions by government. These functions are carried out in multilevel court systems, made up of trial courts and appellate courts, that exist in each state as well as in a national system under the federal government. Each system is responsible for its own set of laws, though all must be in accord with the U.S. Constitution, “the supreme law of the land.”

The judicial branch provides opportunities for individuals and interest groups to seek to shape law and public policy. Through the litigation process in the court pathway, they can frame arguments to persuade judges as to the best approaches for interpreting the law. Judicial opinions shape many significant public policies for society, including those affecting education, abortion, the environment, and criminal justice. These opinions interpreting constitutions and statutes are written by judges who are selected through political processes, including elections in many states and presidential appointment in the federal system. American judges are exceptionally powerful because of their authority to interpret the U.S. Constitution and their ability to block actions by other branches of government through the power of judicial review. The important impact of federal judges on major public policy issues raises difficult questions about the proper role of unelected officials in shaping the course of a democracy.

Think back to the story that opened the chapter, the Supreme Court’s decision in Lindsay Earl’s challenge to her school’s drug testing policy. In light of what you have learned in this chapter, can you understand why she pursued a litigation strategy instead of just lobbying the school board, the state legislature, or Congress on the issue? Were you surprised or disappointed to learn that cases are determined by human factors beyond merely the words of a law? Do you agree or disagree with the Supreme Court’s decision about whether such random, suspicionless drug testing is improper as an “unreasonable search” under the Fourth Amendment? Was it proper for the Supreme Court to decide this issue? Why?

The courts are not easily accessible to citizens, because their use depends on expensive resources, including the patience to sustain extended litigation and the funds to hire expert attorneys and pay for litigation expenses. Because of their resources and expertise, organized interest groups are often better positioned than individual citizens to use the court pathway in pursuing their own policy objectives or in blocking the policy goals of other interest groups. However, the limited ability of judges to implement their own decisions is one factor that leads some observers to debate whether the court pathway provides processes that can consistently and properly develop public policies that are useful and effective.

Lawyers and law students in Pakistan endured beatings and arrests at the hands of police in order to protect against the president’s interference with the independence of their country’s supreme court. When people display such courage in seeking to protect courts and law, does it give you confidence that democracy will survive and thrive?
Court Structure and Processes
(pages xxx–xxx)
The United States has a “dual court system,” in which each state, as well as the federal government, operates its own multilevel system with trial and appellate courts. The U.S. Supreme Court carefully selects a limited number of cases each year and then decides important issues of law and policy.

KEY TERMS
Adversarial System xx Inquisitorial System xx
Dual Court System xx Criminal Prosecutions xx
Civil Lawsuits xx Jury Trials xx
Original Jurisdiction xxx Appellate Jurisdiction xxx
Settlements xx Plea Bargains xx
Intermediate Appellate Courts xx Courts of Last Resort xx
Appellate Briefs xx Majority Opinion xx
Concurring Opinion xx Dissenting Opinion xx
Writ of Certiorari xx

CRITICAL THINKING QUESTIONS
1. Does the adversarial system lead courts to discover the truth, or does the system simply produce victory for whichever side has the best attorney?
2. Does a court system really need appellate courts? Why not just treat the original decision in each case as the final decision?

INTERNET RESOURCES
Explore the federal court system: http://www.uscourts.gov
Explore the state court system: http://www.uscourts.gov and http://www.uscourts.state.tc.us

ADDITIONAL READING

The Power of American Judges
(pages xx–xx)
In contrast with judicial officers in other countries, American judges are especially powerful because of their authority to interpret constitutions and statutes, their power of judicial review, and in the federal system, their protected tenure in office.

KEY TERMS
Case Precedent xxx Statutes xx
Judicial Review xx Marbury v. Madison (1803) xx
Judiciary Act of 1789 xx Writ of Mandamus xx
Impeachment xx Court-Packing Plan xx

CRITICAL THINKING QUESTIONS
1. Does the power of judicial review improperly make the judicial branch more powerful than the executive (President) and legislative (Congress) branches of the federal government?
2. Some commentators suggest that federal judges should serve only limited terms in office. What impact, if any, would limited terms have on the judicial branch and its role in the governing system?

INTERNET RESOURCES
Read judicial opinions from the U.S. Supreme Court and other courts: http://www.law.cornell.edu and http://www.findlaw.com

ADDITIONAL READING
Judicial Selection
(pages xx–xx)
Many states use election systems or merit selection to choose judges, while federal judges must be appointed by the president and confirmed by the Senate.

KEY TERMS
- Senatorial Courtesy
- Filibuster
- Merit Selection
- Retention Elections

CRITICAL THINKING QUESTIONS
1. What is the best way to select judges?
2. How could you design a merit selection system that would truly select the most qualified individuals for judgeships?

INTERNET RESOURCES
Examine competing perspectives on judicial selection:
- http://www.ajs.org
- http://www.judicialselection.org

ADDITIONAL READING

Judges’ Decision-Making
(pages xxx–xxx)
Despite the close connections between the judicial branch and the political system, judges seek to preserve the courts’ image as the “nonpolitical” branch of government. Debates exist about the proper way to interpret the Constitution and statutes, and these debates affect choices about who will be selected to serve as judges.

KEY TERMS
- Flexible Interpretation
- Legal Model
- Attitudinal Model
- Rational Choice Model
- New Institutionalism

CRITICAL THINKING QUESTIONS
1. Should judges be required to follow case precedent, or would it be better for them to make decisions based entirely on their best judgment?
2. Is there any way to prevent judges from using their own values and attitudes in making decisions?

INTERNET RESOURCES

ADDITIONAL READING
**Key Objective** Review, Apply, and Explore

### Action in the Court Pathway
**pages 134–137**

Individuals and interest groups use many strategies in the court pathway, and their likelihood of success will be enhanced if they have expertise, resources, and patience.

**KEY TERMS**
- Pro Bono
- Test Case
- Amicus Briefs

**CRITICAL THINKING QUESTIONS**

1. Why did the NAACP use a litigation strategy instead of lobbying Congress and mobilizing voters to pressure the president to take action against racial segregation?
2. If you wanted to challenge a mandatory drug testing policy imposed by your college, what strategies would you need to use to succeed in the litigation process?

**INTERNET RESOURCES**


**ADDITIONAL READING**


### Implementation and Impact
**pages 138–139**

Judges cannot always ensure that their decisions are implemented. As a result, their ability to shape public policy may vary from issue to issue.

**CRITICAL THINKING QUESTIONS**

1. Are courts powerful or weak?
2. How could a president be required to enforce a decision of the U.S. Supreme Court?

**INTERNET RESOURCES**

Learn about upcoming law and policy controversies that will be addressed by the U.S. Supreme Court of Northwestern University’s “On the Docket” Web site: http://www.journalism.medill.northwestern.edu/docket

**ADDITIONAL READING**

Judicial Policymaking and Democracy
(pages xxx–xxx)

Vigorous debates continue to occur about whether it is appropriate for life-tenured, federal judges to create law and public policy in a democracy.

CRITICAL THINKING QUESTIONS

1. Are the principles of American democracy violated when judges make decisions that shape public policy?

INTERNET RESOURCES

Examine information about lawsuits seeking to persuade judges to tell corrections officials how prisons should be run. Consider whether such litigation and resulting judicial policymaking should be considered as proper under the American constitutional governing system: http://www.middlegroundprisonreform.org/main/

ADDITIONAL READING


Chapter Review  Critical Thinking Test

1. What happens as a result of politicians’ recognition that judges’ interpretations of the Constitution and statutes are influenced by values and attitudes and not just based on established law?
   a. Only the best qualified and most experienced judges receive appointments.
   b. Political parties, interest groups, and elected officials want to see judges selected who share their political values.
   c. Presidents and governors will fire judges whom they believe to be incompetent.
   d. The Senate will only approve judicial nominees who receive top ratings from lawyers’ associations.

2. The power of judicial review permits the Supreme Court to invalidate
   a. federal statutes and executive actions that the Court deems unconstitutional.
   b. the tradition of checks and balances by the other two branches.
   c. constitutional amendments that the Court finds to be superfluous or inconsistent with modern jurisprudence.
   d. constitutional amendments that the Court finds to be inconsistent with trends in public opinion.

3. All the following statements about the landmark Supreme Court case Marbury v. Madison are correct EXCEPT:
   a. It asserted the Court’s authority without directly challenging the powers of the president.
   b. It established judicial review by striking down a section of the Judiciary Act of 1789, without elaboration.
   c. The power of judicial review established a useful check on the power of the two elective branches of government.
   d. The power of judicial review has not been used since Marbury, but the power makes Congress careful to enact statutes that comply with the Constitution.

4. Lifetime appointments for federal judges are considered essential, because
   a. well-qualified judges are so rare they must be given incentives to serve.
   b. they must not be able to cater to political preferences or public opinion.
   c. they must be discouraged from running for elective office.
   d. they require years of experience before they can perform their duties effectively.

5. Regarding presidential selection of Supreme Court nominees, which of the following statement is the most accurate?
   a. Justices are selected based upon their reputation for honesty and impartiality.
   b. Only candidates with prior experience as lower-court judges can be nominated.
   c. Candidates are usually selected based on their presumed political values and policy preferences.
   d. All Supreme Court nominees are subject to approval by a majority vote of both chambers of Congress.

6. Most cases heard by the Supreme Court arrive by way of
   a. original jurisdiction.
   b. appellate jurisdiction.
   c. writ of habeas corpus.
   d. writ of certiorari.

7. If you are the chief justice on the U.S. Supreme Court, when do you get to decide which justice writes a majority opinion for the Court?
   a. in all cases.
   b. when you are the most senior (longest-serving) justice in the majority.
   c. when the most senior justice gives you permission to make the assignment.
   d. when you vote with the majority in a case.

8. Which statement accurately describes the Supreme Court’s relationship to public policy?
   a. Article III of the Constitution says, “The Supreme Court shall have jurisdiction over all public policy matters.”
   b. The Supreme Court uses its powers of constitutional interpretation and statutory interpretation to shape public policy.
   c. The president and Congress recognize that they must always obey and enforce policy-related decisions of the Supreme Court.
   d. Article III of the Constitution says, “The Supreme Court can interpret the Constitution, unless its decisions will affect public policy.”

9. All of these statements about Supreme Court procedure are correct EXCEPT:
   a. Each attorney is limited to 2 hours of uninterrupted time to present their case.
   b. Appellate briefs must be submitted prior to oral argument.
   c. Four justices must agree to hear a case before it will be accepted.
   d. In spite of thousands of petitions, very few are granted a hearing.

10. A traditional legal order requiring a government official to take a specific action is known as on:
    a. writ of habeas corpus.
    b. writ of certiorari.
    c. writ of mandamus.
    d. obiter dictum.

11. President Franklin D. Roosevelt’s plan to appoint additional justices to the Supreme Court in order to challenge the Court’s hostility to the New Deal was known as
    a. gerrymandering.
    b. court-packing.
    c. court-bashing.
    d. executive privilege.

12. The tactic of using lengthy speeches in the Senate to delay proposed legislation or block the appointment of a federal judge is known as
    a. senatorial privilege.
    b. gerrymandering.
    c. log-rolling.
    d. filibuster.
13. The method of selecting state judges from a list compiled by a committee appointed by the governor, and then permitting voters to decide whether to retain these judges for an additional term, is commonly known as
   a. partisan election.
   b. the Missouri plan.
   c. the renewal cycle.
   d. the qualification plan.

14. Regarding the impact of partisan politics on the selection of state judges, which of the following statements is NOT accurate?
   a. Listing only the names of judges—not their party affiliations—ensures that the public will choose the most impartial judges.
   b. Political parties often choose the judicial candidates and support their campaigns, even in nonpartisan elections.
   c. Most voters know little about the candidates and will often vote to retain the incumbent judge.
   d. By electing judges, voters can hold judges accountable and remove them from office.

15. A legal rule established by a judicial decision that guides subsequent judicial decisions is known as
   a. judicial courtesy.
   b. judicial restraint.
   c. statutory interpretation.
   d. case precedent.

16. Those Supreme Court justices who interpret the Constitution based on the writings and rationales of the founders are following the ________ approach.
   a. flexible interpretation
   b. preferred freedoms
   c. original intent
   d. gradual expansionist

17. The political science model suggests justices reach their decisions based upon strategic calculations to achieve their preferred case outcomes is known as
   a. the legal model.
   b. the attitudinal model.
   c. the rational choice model.
   d. new institutionalism.

18. Those groups best positioned to make effective use of the court pathway for policy impact are
   a. indigent petitioners and minorities.
   b. organized interests and wealthy individuals.
   c. ideological conservatives.
   d. ideological liberals.

19. Regarding enforcement of judicial decisions, which of the following statements is the most accurate?
   a. Judges may issue directives but have limited ability to ensure that they are implemented.
   b. Courts are designed to obey legislative bureaucracies.
   c. The intent of the executive branch will always overcome the intent of the judicial branch.
   d. The doctrine of federalism prohibits judges from interpreting the actions of state legislatures.

20. What can be said about federal judges and the protection of rights for members of minority groups?
   a. Interest groups effectively used litigation to persuade federal judges to make decisions supporting the concept of equal rights.
   b. Interest groups failed in their efforts to persuade federal judges to issue decisions to advance equal rights.
   c. Federal judges decided that Congress is solely responsible for protecting the rights of minority groups.
   d. Federal judges decided that the president is solely responsible for protecting the rights of minority groups.
You decide!

In the aftermath of the Virginia Tech campus shooting, in which a psychologically troubled student shot and killed more than 30 students and professors in April of 2007, your college has instituted a policy that all students will be frisked and their backpacks and other bags searched by police when entering a university building, including dormitories. A female friend approaches you and describes her anger at having female police officers feel around her body and look inside her purse every time she enters a building. Your friend asks for your advice about how to fight against the policy. (Refer to Student Profile, page xxx: “You have studied about courts and law—is there anything that could be done?”) What advice would you give? Would it be possible to challenge this policy in court? What steps would your friend need to take? What resources and strategies would she need?