Chapter 13
The Judiciary

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." (Alexis de Tocqueville, Democracy in America, 1840)

One of the reasons our democracy works so well, is that, ironically, it contains many undemocratic elements. One of the most visible and powerful of these undemocratic elements is the Supreme Court. The Supreme Court is the nation's highest court. Indeed, this court is supreme is both name and fact. It has the last word on issues of profound importance to the public; issues that may impact some of the most intimate aspects of your life. In recent years the Supreme Court has decided cases that have determined whether you will have access to an abortion, who you can marry, what types of consensual sexual practices you can engage in, whether you can be compelled to recite the pledge of allegiance, whether you can be put to death for committing a crime, what kind of religious freedoms you have, and if you have right to have someone help you terminate your own life.

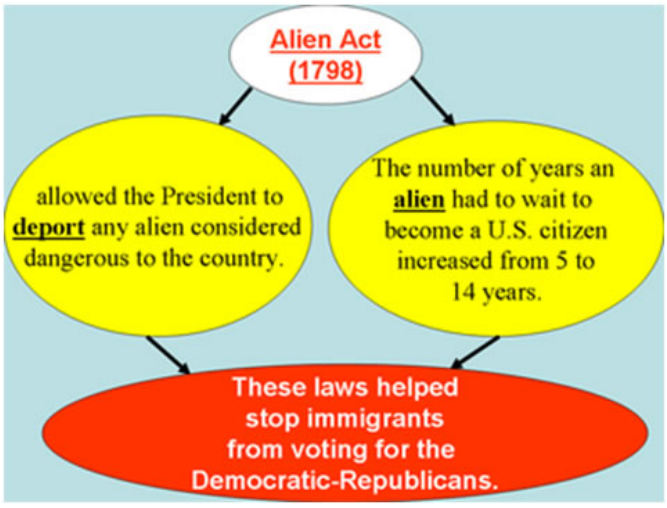
The federal judiciary has the power to strike down the will of the majority as expressed through legislative action. This gives the courts enormous power and responsibility. However, the courts exercise this power independently of the will of the people. Justices are neither elected by the public nor does the public have any direct way of impacting or even accessing the decision making process of the federal courts. How, in a democracy, can the courts be allowed to exercise such incredible power and responsibility in strict secrecy and with no accountability to the public? Although often criticized, it is actually the primary role of the federal judiciary to exercise power in a counter-majoritarian manner. The Constitution was designed to ensure that power remained with the people. The Framers created this fundamental law to prevent any individual or body from taking on too much power and exercising power capriciously. Constitutionalism is important because it protects popular sovereignty. It is therefore interesting that, when creating the Constitution, the Framers failed to include a mechanism to protect the Constitution. They did not specify who interprets what the Constitution means and who ensures that its provisions are not being abridged. How this role was taken on by the Supreme Court is one of the more interesting anecdotes in U.S. political history and will be examined in some detail in the following sections.

This site allows students to follow the daily workings of the Supreme Court http://www.c-span.org/video/?c4478115/clip-supreme-court-operations.

Judicial Review

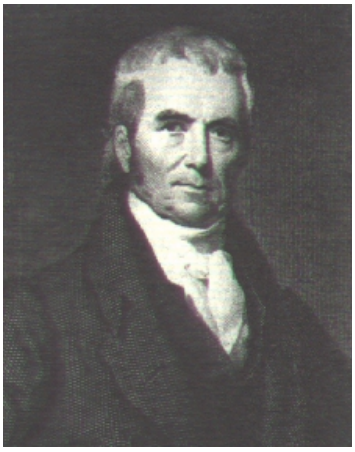
In order to understand how the Supreme Court works today we must, once again, go back to the founding of our political system. George Washington, the first president of the United States, was also arguably the most popular president in the history of the United States. This popular mandate allowed Washington to govern with very little opposition; however divisions simmered close below the surface within his administration. And, soon after Washington left office, these differences developed into factional fights. The second president of the United States, John Adams, became the leader of the faction known as the Federalists. The Federalists represented the major commercial interests of the day and advocated a strong central government. They felt that the commercial and global potential of the young nation could best be realized if the ship of state was piloted by a strong and unified national government. The Anti-Federalists were led by Thomas Jefferson, the third president of the United States. They supported the small farmers and artisans and felt that the interests of these groups could best be represented by smaller state governments which were “closer” to the people.

During the Adams’ administration, the U.S. found itself in an undeclared naval war with France and the foreign policy crisis divided the nation. Citing national security concerns, the Adams administration passed the Alien and Sedition Acts, which made it illegal for the press to criticize the U.S. Government. In addition to clearly violating the First Amendment of the Constitution, these acts turned out to be tactical political errors for Adams and the Federalists in the upcoming election of 1800. Although the Anti-Federalist newspapers were largely muted because of the Sedition Acts, the Anti-Federalists were still able to paint the Federalists as tyrants who were willing to quash civil liberties in order to remain in power. In response, Federalist newspapers claimed that the election of Jefferson, the Anti-Federalist candidate, would result in the “teaching of murder robbery, rape, adultery and incest.”



At the time, electors were able to cast two electoral votes, one for President and one for Vice President although the votes were not specified as such. Consequently, because these votes were cast simultaneously, Thomas Jefferson actually tied in the electoral vote count with his running mate Aaron Burr. Jefferson and Burr each received 73 electoral votes, Adams received 65, Thomas Pinckney received 64, and John Jay received 1. Because no candidate won a majority of the Electoral College vote, Congress was forced to decide the winners. After 36 different ballots were cast, Jefferson emerged victorious when the New York legislature became dominated by Jefferson supporters thus providing him with 12 key electoral college votes; Burr was elected Vice President and Adams went down in defeat. In order to prevent this situation from developing again, a 12th Amendment was added to the Constitution in 1804, instructing that the President and Vice President will be chosen by separate Electoral College votes.

The election of 1800 was one of the first times in history that political power was peacefully transferred from one faction to another. However, the lack of physical violence does not mean that the transition was entirely amicable. The wake of this contentious election set the stage the most important Supreme Court decision in U.S. History. When Adams realized that the Federalists had lost both the Presidency and the Congress, Adams appointed as many Federalists as he could to the only branch of government over which he retained any control: the Judicial Branch. One of his appointments was to make his Secretary of State, John Marshall, Chief Justice of the Supreme Court. Among many other appointments was the appointment of William Marbury as Justice of the Peace to the District of Columbia. At the time, judicial appointments were formally delivered by the Secretary of State. However, a number of appointments, including Marbury's, were not formally delivered before Jefferson began his term. Marbury sued to ask the Supreme Court to order Jefferson's new Secretary of State, James Madison, to deliver his appointment. Such an order is known as a *writ of mandamus*.



The case of *Marbury v. Madison* placed the Marshall Supreme Court in a very awkward position. If the court ruled in favor of Marbury it would look like the court was nothing but another branch of government which decided issues according to partisan political sentiments. This would weaken the overall power and prestige of the court, something Marshall hoped to avoid because, as a Federalist, he possessed a vision of the Supreme Court as a strong national institution commensurate with the Federalist vision for a strong national government. Furthermore, if the court issued a *writ of mandamus*, it was likely that Jefferson would simply ignore the order thus making the Court look weaker still. On the other hand, if Marshall ruled in favor of Jefferson, it would look like the court was subservient to the presidential branch, which would again make the court look weak and deferential. Furthermore, it would look like the decision was motivated by the fear that the President would not deliver the writ even if the Court ordered him to do so. In a stroke of judicial genius, the Marshall Court ruled that

although Madison should have issued the commission, the court could not rectify this situation because the Judiciary Act of 1789, which authorized the courts to issue *writs of mandamus*, exceeded the power given to the courts in Article III of the Constitution and was thus unconstitutional. In so ruling, Marshall not only extricated himself from between his rock and hard place, he took on a significant new power for the Supreme Court, that of Judicial Review. It truly goes without saying, John Marshall was one of the most important Justices to ever serve on the Supreme Court.

The power of Judicial Review allows the Court to declare acts of Congress and the President null and void if they exceed the power of the Constitution; it is thus the power of the Court to determine what is and is not constitutional. The Constitution itself, as noted in Chapter Two, is inherently ambiguous and it thus falls to the Court to apply this ambiguity to specific situations. Essentially, the power of judicial review allows the Court to determine what the Constitution means. Jefferson therefore won the skirmish as Marbury did not receive his commission, but in the process lost a much larger battle to Federalist desires for a stronger Supreme Court. One can imagine Jefferson pulling at his powdered wig ruing the day he decided to refuse to deliver Marbury's appointment because by taking this hard line, he enabled the Supreme Court to become exactly what the Anti-Federalists feared, a more powerful entity that had the power to dominate state law and state courts. This ensured that the Supreme Court would forever be a coequal third branch of the U.S. government.

Please visit www.oyez.org for all up to date information on cases and hearings as well as information on the current operations of the United States Supreme Court.

"The Supreme Court – *Marbury v. Madison*"

Even if it was not explicitly expressed in the Constitution, it was likely that many of the Framers intended that the Supreme Court would take on the responsibility of protecting the Constitution from the vicissitudes of public sentiment. Judges take an oath to uphold the Constitution and they possess the legal training and expertise necessary to carry out this task. Others viewed the power of the new national court with suspicion. Alexander Hamilton attempted to assuage concerns in *Federalist No. 78* when he wrote, "The judiciary from the nature of its functions, will always be the least dangerous to the political rights of the constitution." With no ability to appropriate money or enforce the law, the Hamilton reasoned that the Court posed little threat to the other branches of government. However, in light of the Marshall Court's ruling in *Marbury v. Madison*, it would appear that many of the Anti-Federalist fears about the power of the new Supreme Court were perhaps justified.

Despite the concerns of the Anti-Federalists, the power of judicial review is centrally important to democracy and constitutionalism. Democracy requires that political power

be limited in a Constitution. However if there is no entity to ensure that Congressional and Presidential Acts adhere to the Constitution, such as the Adams' Alien and Sedition Acts, there is no guarantee that political actors will be limited in their capricious exercise of power. As Marshall argued:

> "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

The power of judicial review enables the Court to override the opinion of the majority, even if determined democratically. The judiciary is neither elected nor otherwise beholden to the public precisely because the judiciary is charged with checking the passions of the masses. Essentially, federal judges answer to the Constitution and, in so doing, answer to the interests of everyone and not simply those in the majority. This is particularly important when it comes to the Bill of Rights because it is this part of the Constitution which limits the power of government to interfere with the liberties of individuals. Popular political debate and political action occur within the context of the Constitution and the judiciary is needed to protect this most basic law. Judicial review is one of the most important tools of the Supreme Court.

For an in depth look at Marbury v. Madison go to the following link:
http://www.history.com/topics/marbury-v-madison/videos.

After *Marbury v. Madison*, the Marshall court continued to issue rulings that reaffirmed the supremacy of the U.S. government over the states. As these rulings reinforced the interests of the national government in general, little tension developed between the Court and the other branches of government. The Marshall court was also noted for repeated decisions protecting the rights of property and promoting economic growth. After *Marbury v. Madison*¸ the most important ruling furthering Marshall's nationalist goal of creating a strong central government and a correspondingly strong federal judiciary was *McCulloch v. Maryland* (1819). In *McCulloch*, Marshall led the Supreme Court in affirming the supremacy of the U.S. Constitution over the power of the states by invalidating a Maryland law that sought to tax the Bank of the United States. In this ruling, the Marshall Court interpreted the "necessary and proper" clause in Article I Section 8 of the Constitution in a way that allowed Congress to engage in activities, in this case the creation of a national bank, that were not specifically enumerated in the Constitution. In another clever interpretation of the Constitution that further bolstered the power of the national government, the Marshall Court ruled in *Gibbons v. Ogden* (1824) that the "interstate commerce" clause of Article I Section 8 allowed the national government to supersede state laws in the economic sphere.

John Marshall was replaced as Chief Justice by Roger Taney; Taney was appointed by Andrew Jackson. The Taney Court largely continued the Marshall Court's precedent of promoting capitalist development, although Chief Justice Taney did not share Marshall's nationalist fervor and was far more receptive to the argument of states' rights. The Taney court is most well know for one particular decision that significantly set back Marshall's previous efforts to enhance the power and prestige of the Supreme Court. This decision was *Dred Scott v. Sanford* (1857). Dred Scott was a slave who had been held in bondage while travelling with his owner in the free state of Illinois and the free territory of Wisconsin and, on these grounds, sued for his freedom, arguing that he was emancipated as soon as he travelled into free territory. At the time, the country was polarized over the issue of slavery and the South, in particular, was bitter about the Supreme Court's actions solidifying the power of the central government over the states. Taney ruled against Scott arguing that Blacks were "ordinary articles of merchandise" and "had no rights which the white man was bound to respect." Thus, slaves could never be citizens and bring lawsuits before the court. Because Scott was Black, he had no right to sue. Furthermore, the Missouri Compromise, which outlawed slavery in the Northwest Territories, was unconstitutional. Taney calculated that this ruling would mollify slavery interests and cool tensions nationwide; unfortunately, the ruling had the opposite effect. Not only was the South not placated but now abolitionists were incensed about the Court's actions and their anger was only intensified by Taney's vitriolic and racist remarks. The Dred Scott ruling only fanned the flames of intransigence on both sides of the slavery divide; these passions soon erupted in the conflagration of the Civil War.

Judicial Decision Making

Judicial Activism and Restraint

As Tocqueville points out in the quote at the beginning of this chapter, political questions often end up being decided as judicial questions. This is particularly true of controversial issues such as the rights of criminal defendants or the protection of a minority from the power of the majority. Should judges use their power of judicial review to try to resolve controversial issues that elected leaders are either unable or unwilling to tackle or should judges limit the scope of their decisions to a determination of whether legislation meets a relatively narrow definition of constitutionality?

The doctrine of judicial activism rests on the idea that the Court should actively check the power of the legislative and executive branches and, if necessary, make new policy in their ruling. For a variety of reasons, elected officials are not always able to create legislation that meets these democratic ideals. This may be because they are dealing with the rights of groups who are almost universally without popular sympathy, such as criminal defendants, or because the legislative process is controlled by a

majority who uses that power to limit the liberties or rights of a minority. In other cases, the legislative process may be so dominated by the intransigence of a vocal minority or the issue at hand may be so controversial, such as abortion, that the elected branches are simply either unable or unwilling to come down firmly on one side or the other of the issue. In such cases, it becomes incumbent upon the Court to resolve the issue in accordance with the ideals laid out in the Constitution.

One of the most activist courts of recent history was the Warren Court (1953-1969). The Warren Court handed down important decisions overturning racial segregation, granting rights for women including abortion, and creating rights for criminal defendants such as the Miranda warnings. As a result of the Warren Court's legacy, many assume that judicial activism only occurs in a liberal direction, however this is not true. The Rehnquist court (1986-2005) also made a number of activist decisions in a conservative direction, the most interesting of which were a series of rulings indicating that states, as entities, have "sovereign immunity" from certain federal laws.

"Hugo Black and the Warren Court"

In the course of making new policy, the judicial branch depends on the other branches of government to implement its decisions. These other branches may or may not be so cooperative. When upset about a particular Supreme Court ruling, Andrew Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." At other times, Presidents play a key in role in the implementation of decisions with broad policy ramifications, particularly in the case of controversial decisions such as *Brown v. the Board of Education* (1954). In that instance it appeared that the integration of schools, mandated by the Court's decision, was becoming hopelessly stalled until President Eisenhower sent federal troops to Little Rock, Arkansas to enforce the ruling.

"*Brown v. Board of Education* in PBS' The Supreme Court"

Others argue for a position of judicial restraint. According to this philosophy, the Constitution allows for the creation of legislation from the popularly-elected branches of government and the judicial branch should defer from "legislating from the bench." The doctrine of judicial restraint maintains that, because Congress and the President are elected by the people, they are responsible for carrying out the will of the people. The

judicial branch, on the other hand, is responsible for protecting the Constitution and should limit its activities accordingly. Similarly, the courts should defer to the expertise of bureaucratic administrators who have the training, expertise, and experience necessary to determine public policy. The courts should therefore allow legislation and policies to remain in effect unless they are clearly unconstitutional; anything else oversteps the mandate given to the courts.

"Anthony Lewis – Who are the 'Activist Judges?'"

Critics of judicial restraint argue that deferring to the elected branches means that courts are essentially deferring to those interests which are sufficiently organized to allow them to manipulate the legislative process to their own ends. The argument here is that the legislative and executive branches do not always represent the interests of the masses or minorities who may be suffering at the hands of the majority but, rather, the elected branches often respond to the demands of the elite who may be able to use their economic resources or positions of power to skew the legislative process. One of the prime advantages of lifetime tenure is that judges are not likely to find themselves beholden to these same interests.

Open to Debate:
Original Intent

By what standard should judges decide what is and is not constitutional? Should they look at the Constitution in the context of contemporary social norms or should they strive to look at the Constitution through the eyes of the eighteenth-century understandings of those who drafted the Constitution? The answer remains open to debate. There are many who argue that, in the course of reaching their decisions, federal judges should, if possible, refer to the original intent of the Framers of the Constitution. In order to accomplish this, judges should refer to original documents such as the records kept during the constitutional convention as well as the personal writings of the Framers themselves in or to attempt to discern what the Framers were thinking and what their intentions were as they created this new form of government. Decisions reached in this manner are said to adhere to the doctrine of original intent.

Critics point out that while federal judges are charged with protecting the Constitution and should strive to do so, it is not always possible to discern the intent of the Framers. Many of the issues that are currently debated were not clearly addressed by the Framers of the Constitution. Furthermore, like it or not, society has changed; the United States has

moved from a society that condoned racism to one which has removed almost all legal barriers faced by women and ethnic minorities. They point out that the Framers of the Constitution deliberately constructed a document that was vague and procedural so that it would have the flexibility to adapt to changing social circumstances. The Framers further more intended the government to remain small so that it would be close to the people, or the voters. In response, those who advocate a doctrine of original intent point out that if judges are essentially going to pour new meaning into the Constitution, they are simply undermining the whole idea of constitutionalism and the basic rules by which government must operate. In response, critics of original intent argue that those advocating a doctrine of original intent are not so much concerned with protecting the Constitution as they are with pursuing an agenda of turning back the social and political gains made by those whose interests were not well represented at the constitutional convention. What do you think? The answer remains open to debate.

Structure of the Federal Judicial System

The Supreme Court is the only court specified in the Constitution. Article III of the Constitution specifies that "the judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The lack of specificity regarding the precise structure of the federal court system beyond the Supreme Court reflects the incredible amount of compromise that went into the creation of the Constitution. Reflecting their desire for a strong national government, the Federalists were in favor of an extensive federal court system. The Anti-Federalists, on the other hand, wanted most judicial power to be exercised at the state level and were reluctant to go along with the creation of an extensive judiciary with far-reaching authority. In order to not alienate either party and jeopardize the ratification of the Constitution, the delegates to the Constitutional Convention essentially sidestepped the issue entirely and left it up to Congress to deal with at a later time.

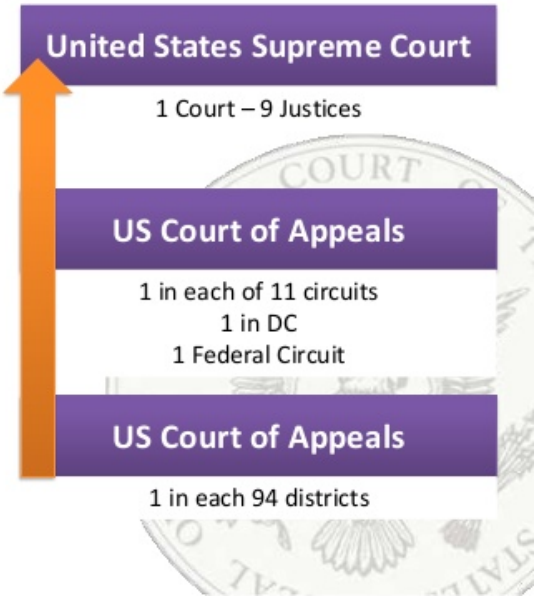
The current structure of the federal court system began to take shape with the Judiciary Act of 1789. After considerable debate, Congress created a three-tier system of courts consisting of district trial courts at the base, appellate courts in the middle, and the Supreme Court, which was already in place, at the top. In addition to the federal court system, each state has its own system of trial and appellate courts. This is known as a dual court system. Currently there are ninety-four District Courts. There is at least one in each of the fifty states as well as district courts in Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and the Panama Canal. District Courts essentially act as trial courts. They are the only level of the federal courts at which juries hear testimony. Most federal cases originate in district courts. These courts have original jurisdiction, or the authority to hear cases, on cases in which the federal government is a party, on suits brought under federal law, on civil suits between citizens of different states, and on other federal questions.

Structure of Federal Courts

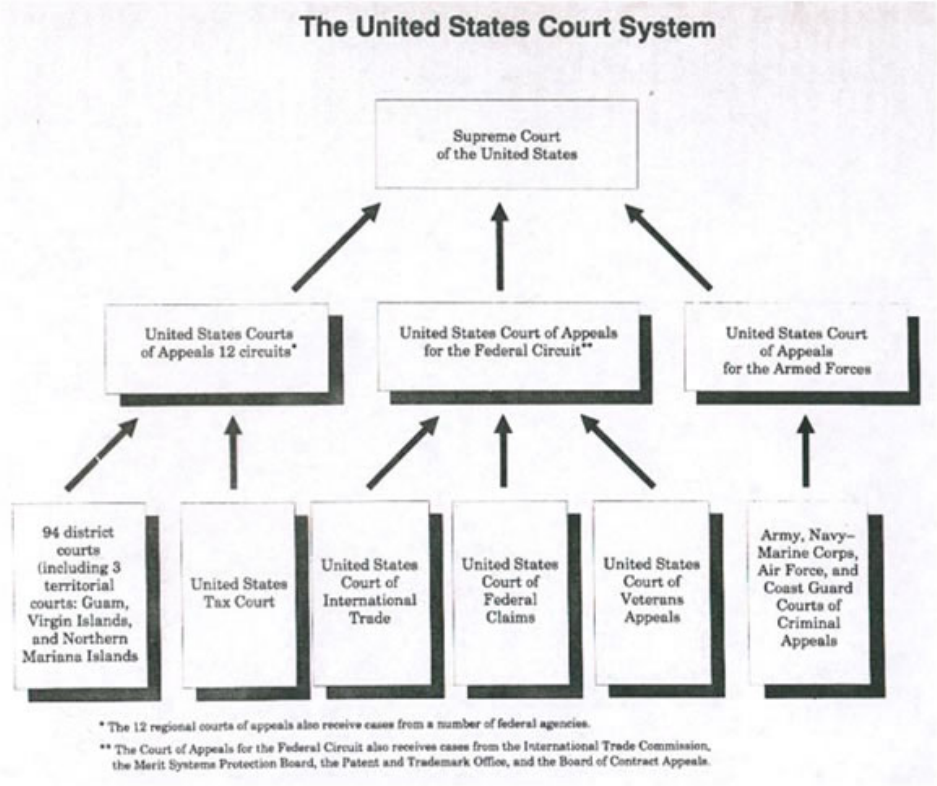
Supreme Court sits at the top of the Federal Court system

Court rejects 96% of the Cases brought to it

Lower courts hear majority of cases



In addition to the district courts, there are a number of special courts with specialized jurisdictions. These include the U.S. Claims Court, the U.S. Court of International Trade, the U.S. Court of Military Appeals, the Tax Court, Bankruptcy Courts, the Foreign Intelligence Surveillance Court, and the Court of Veterans Appeals. These courts all hear very specific types of cases and they are all located in Washington D.C.



The Courts of Appeals are appellate courts; they hear cases which have been appealed from the district courts. The appeals process is designed to correct any errors of laws or procedures in the district courts. There are no juries, no new evidence is introduced, and no new testimony is heard in appellate trials. Rather, judges review the district court records and written briefs. Briefs are arguments submitted to the court from the parties involved. However, lawyers from the two sides of the case do make brief oral arguments outlining their position. Generally a panel of three judges hears the cases, although occasionally all the judges of the circuit will hear particularly controversial cases. There are thirteen courts of appeals, each representing a separate geographical region or "circuit" of U.S. territory.

Although the Supreme Court does have original jurisdiction and acts as a trial court in some circumstances – such as those affecting foreign diplomats or when a state is the party in a law suit – the primary role of the Supreme Court is as the final appellate court. The Supreme Court hears appeals from both the intermediate federal courts of appeals and, if a federal question is invoked, from state supreme courts. Like the courts of appeals, the Supreme Court reviews written briefs as well as documents from lower courts. Briefs are prepared and presented by the attorneys for each of the two parties involved in the case and, in addition, other briefs are presented by parties that have an interest in the case; these are known as *amicus curiae* briefs or "friend of the court"

briefs. Lawyers have only half an hour to present oral arguments to the Justices during which time the Justices often ask very pointed and confrontational questions.

The Court then meets in private to discuss the case. The conference session always begins with a round of handshaking. The least-senior associate justice acts as stenographer and doorkeeper. The discussion is begun by the Chief Justice who states his or her opinion of the case and then each of the other Justices shares their views in order of seniority. While one might think that the knowledge, background, and expertise on constitutional law possessed by Supreme Court Justices would allow them to reach agreement on the issues that come before them, this is often not the case. If the reasoning behind a case is so disputed that it eventually reaches the Supreme Court, even Supreme Court Justices are likely to disagree in their opinions on that case. Once the positions of all of the Justices are made clear, if the majority of the Justices agree on a decision and the reasoning for that decision, a majority opinion or written explanation for this position will be prepared. The Chief Justice will often write the opinion if in the majority or assign the job to another justice. The Justice with the highest seniority will usually write the majority opinion if this reasoning is not shared by the Chief Justice.

Once the majority opinion is written, those Justices who agree with the opinion will add their name to it. At this time Justices can still change their mind and decide to either support or not support the majority opinion regardless of their statements during the initial conference. Opinions may be rewritten repeatedly in order to win the support of other Justices. Occasionally other justices will agree with a decision but not with the reasoning behind that decisions or they may wish to emphasize something that they feel is not adequately represented in the majority opinion. In this case these Justices will write a concurring opinion expressing their particular point of view.

Occasionally, an opinion is reached in which a majority agrees on the decision but not by one single opinion. Under plurality opinion circumstances, the case is decided but no precedent is established. The reasoning of those who are not in the majority is expressed in one or more dissenting opinions. Dissenting opinions are important, as their reasoning is often drawn upon in future court decisions that might eventually result in the Supreme Court reversing its original decision. In a unanimous opinion, all members of the Court agree on the decision and the reasoning behind the decision. Usually opinions will be signed by all the Justices that agree with that opinion although occasionally unanimous written opinions will not be signed. These are called opinions *per curium* or opinions “by the Court.” Decisions made by the Supreme Court are final,

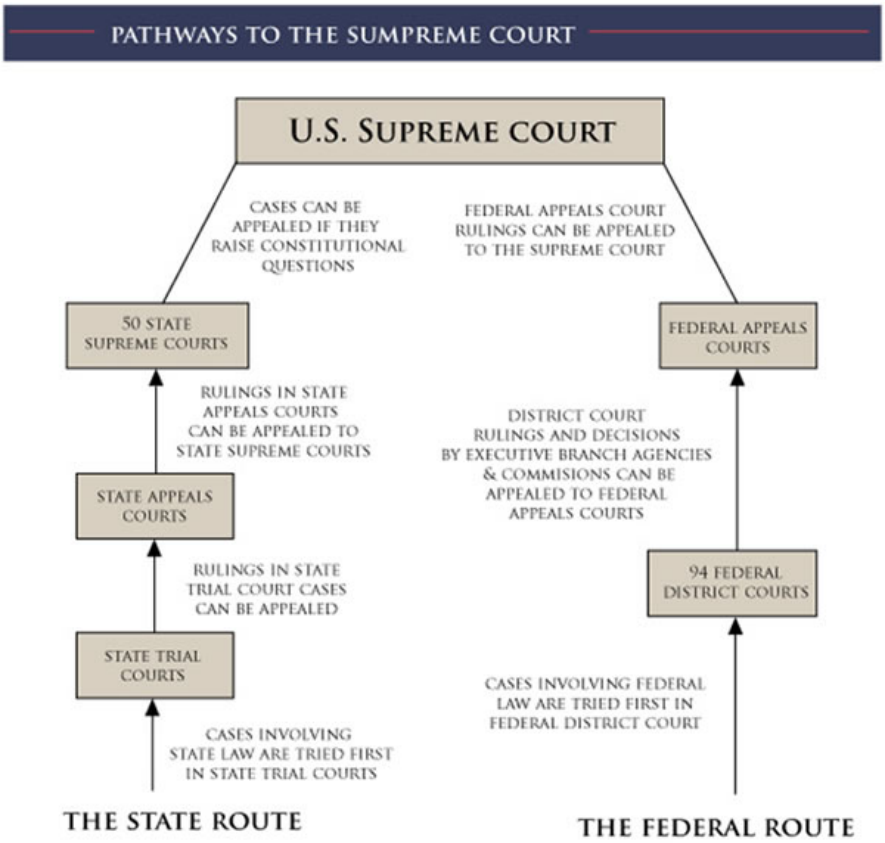
although as Justice Robert Jackson once noted, “We are not final because we are infallible, we are infallible only because we are final.

Supreme Court decisions establish precedent for future decisions made by lower courts. Whenever a higher court issues a ruling, lower courts within the higher court’s jurisdiction must abide by the higher court’s decision when determining the outcome of similar cases. Courts outside of the higher court’s jurisdiction may also use the higher court’s decision as precedent depending on the relevance of the case, the margin of the decision, and the reputation of the judges issuing the decision. This principle of using precedents is called *stare decisis* (*et non quieta movere*), which means to stand by decided matters (and not to disturb settled matters). The principle of *stare decisis* was borrowed from English Common Law and allows for similar cases with similar facts to be decided in the same way. However, in reality, material facts are rarely identical and it may often be difficult to clearly apply a precedent to a new case. Nevertheless, whether precedent is formally established or not, Supreme Court and other federal court rulings cast shadows that influence the resolution of conflicts both within and without courts throughout the nation.

The number of Supreme Court Justices is not specified in the Constitution. When the Court first met it had only five Justices; that number increased, at one point, to ten Justices although the Court has consisted of nine justices since 1869. The question over the number of Supreme Court Justices was most recently raised during the administration of Franklin Delano Roosevelt. In the years following the Civil War, the Supreme Court had been dominated by majorities who interpreted the Constitution as a document that fundamentally limited the ability of government to interfere in the affairs of commerce. This laissez faire disposition compelled the court to overturn a number of pieces of legislation in which popularly elected legislators tried to limit the power of large corporate capitalist empires, or trusts, in order to protect citizens from economic exploitation. The Court’s opposition to state and federal regulation of the economy reached a head in *Lochner v. New York* (1905), when the Supreme Court struck down a New York law limiting the maximum number of working hours for bakery workers. The Court ruled that it was a violation of “due process of the law” for the government to interfere with the contractual freedom of employers and employees. Following this reasoning the Court also struck down child labor laws, minimum wage laws, and antitrust laws. The Supreme Court allowed some business regulations to stand during the progressive era of the 1910s but reverted to its “hands off” attitude toward business regulation during the 1920s and 1930s.

In 1936, President Roosevelt was elected in a landslide by an electorate who desperately wanted something to be done about the economic depression in which the country was immersed. Roosevelt immediately began to usher his New Deal reforms through the Democratically-controlled Congress, only to find them struck down by the Supreme Court. In order to circumvent this impasse, Roosevelt proposed adding

additional Justices to the Supreme Court, presumably ones that would be more amenable to his New Deal policies. Despite the widespread unpopularity of the recent Supreme Court rulings, the public did not approve of Roosevelt's "court packing" plan. Nevertheless, the Court did approve two pieces of New Deal legislation in the Spring of 1937, the National Labor Relations Act and the Social Security Act. This was the Court's famous "stitch in time that saved nine" and, during the next year, deaths and resignations allowed Roosevelt to appoint a majority to the Supreme Court that was more amenable to his New Deal policies.



The Appeals Process

Despite cinematic promises to sue someone "all the way to the Supreme Court," there is no right to appeal in the United States. The formal appeal process begins when the losing party to a case requests or "petitions" a *writ of certiorari* which is Latin for "to be informed of" to an appellate court. If the appellate court feels that there was an error in the way the decision was reached or the way the law was applied, they may issue the *writ of certiorari* or "*cert*" and request the records from the lower court. If the appellate court denies the petition for a *writ of certiorari*, the lower court's decision stands.

In turn, appeals may be made from the appellate courts to the Supreme Court. The Supreme Court may also receive appeals from state courts, but only if an issue of federal law is involved. The Supreme Court receives thousands of "cert petitions" every

year of which it will only hear about 75-100. The decision to hear cases is at the discretion of the Supreme Court. The Supreme Court only issues a *writ of certiorari* if the case impacts many individuals, raises important Constitutional issues, or is needed to resolve conflicting decisions between some combination of circuit courts, state courts of last appeal, or the Supreme Court. The Court will review cert petitions if three of the Justices feel the case is of significant public interest or if a significant question of federal law is raised. The Supreme Court agrees to hear cases if requested to do so by four of the Justices; this is known as "the rule of four."

The only other party who has any sway in this process is the federal Solicitor General who requests that the Supreme Court hear cases important to the federal government. The Supreme Court has traditionally agreed to hear about three-quarters of the cases requested by the Solicitor General. Because of the massive amount of petitions for a *writ of certiorari* which are received each year, much of the process of winnowing down the requests is done by law clerks. Clerks to Supreme Court Justices are typically the top graduates from the nation's most prestigious law schools. They are responsible for carrying out much of the research for the Justices. Each justice typically has 3-5 clerks and it is, of course, considered an incredible honor to be accepted as a Supreme Court clerk.

The federal courts have, over time, developed certain criteria to be used in deciding which cases within their jurisdiction they will hear. The first of these is that the case must by an actual, not a hypothetical, controversy. This means that cases must be between two actual adversarial parties. Further, courts will not offer advisory opinions nor will they consider the constitutionality of a law until it is actually applied. Second, parties to a case must have standing. That means that they must have a personal stake in the issue at hand or have suffered specific injury to be able to bring a case before the court. In the 1960s and 1970s the Supreme Court expanded the idea of standing to allow public interest groups to challenge the activities of federal agencies. For example, if the activities of a federal agency have adverse consequences to the environment, interest groups could challenge those activities under the National Environmental Policy Act. Further, the court allows cases to be brought before the court on behalf of broad categories or classes of individuals with common interests in "class action" suits. The third criterion in deciding which cases the courts will hear is mootness. If the relevant problem has changed or already been resolved by some other means, the case is deemed to be moot and will not be heard. This rule has also been relaxed, particularly in cases where the situation is likely to come up again. For instance, the Supreme Court agreed to hear *Roe v. Wade*(1973) even though the pregnancy in question had already come to term by the time the case made it through the lengthy appeals process.

For more information, visit: http://education-portal.com/academy/lesson/the-court-system-trial-appellate-supreme-court.html#lesson.

The Judicial Nomination Process

Federal judges are nominated by the President and then approved by the Senate, as part of the Senate's "advise and consent" responsibilities. The President first submits his nominees to the Senate Judiciary Committee, which carefully evaluates the nominees. If acceptable to the committee, nominees are almost always approved by the Senate as a whole. In addition, the tradition of senatorial courtesy ensures the senior senator of the president's party from the state in which the vacancy occurs also plays an important role in the process. If the senator objects to the president's nominee, the Senate will reject the nominee. Therefore, presidents typically discuss possible nominees with the senior senator from that state and obtain the senator's consent before formally submitting the nomination to the Senate Judiciary Committee.

The selection process is a very important one because federal justices serve for life or, as the Constitution puts it, federal judges "shall hold their Offices during good behavior." Federal judges can be impeached, however only six have ever been removed from the bench. Because federal judges are likely to still be sitting on the bench long after a President has left office, the selection of federal judges allows presidents the opportunity to leave a legacy that will have a lasting effect on the political system. Subsequently, Presidents first try to choose someone who shares the president's political philosophy and has similar opinions about how the political system should work, because a federal judge will be able to carry that ideological torch far into the future. Ronald Reagan, for example, was able to appoint over half of all federal judges during his eight years in office; this had the effect of lending a noticeable conservative tenor to federal court rulings long after Reagan left office.

However, it is often difficult to predict whether potential nominees will continue to support the political philosophy of the President over time. Once approved, federal judges are no longer beholden to any one person or ideology. Given the gravity of their position and the importance of their decisions, the views of some judges evolve over time. Theodore Roosevelt was surprised when his appointee, Justice Oliver Wendell Holmes, struck down Roosevelt's efforts to limit the power of trusts. Similarly, Justice Earl Warren was appointed by President Eisenhower, a Republican, who later said that appointing Warren was, "the biggest damn fool thing I ever did." Justice Harry Blackmun was appointed by President Richard Nixon as a law-and-order conservative but became a champion of women's rights, gay rights, and a staunch opponent of capital punishment. Perhaps it is important the Judges take their role as protectors of the Constitution more seriously than they do the ideology of the President who appointed them. After all, this counter-majoritarian mandate ensures the protection of unpopular groups who have little support from the mainstream political parties.

Historically, the confirmation process has centered on the technical competency of the candidate. During the Constitutional Convention, Benjamin Franklin actually

proposed having lawyers select judicial nominees because only lawyers possessed the expertise necessary to select judges on the basis of merit. However, in practice, the power to nominate federal judges was considered one of the powers of the presidency and while one party might not like the president's selections, they bided their time until they controlled the presidency. However, during the mid 19th century, the confirmation process became more politically contentious. This was a period of intense partisan differences and divided government when competing parties controlled the Senate and the Presidency.

Similar circumstances have existed during the last thirty years and, similarly, the nomination process has become much more politicized. This is especially true of Supreme Court nominees. The stakes have appeared particularly high in light of recent Supreme Court decisions on abortion, civil rights, civil liberties, states' rights, and the outcome of the 2000 presidential election. In addition, many of these decisions have been decided by a 5-4 margin heightening the impression that any new Supreme Court Justice might shift the balance of power in one direction or the other. Historically, the Senate has failed to confirm about twenty percent of all presidential appointees. Subsequently, in order to get their nominees confirmed, presidents must consider candidates who are both agreeable to the president and palatable to the Senate. Some judicial observers have welcomed the more active role played by the Senate as a preclusion of the nominations of judges with extreme ideological views. However, others decry this process as one that merely ensures the nomination of middle-of-the-road judges with mediocre views. Justices themselves hold personal political affiliations and each have an internal belief system on the various issues that arise.

The political nature of the nomination process was most visible with President Reagan's nomination of Robert Bork in 1987. While Bork's qualifications were unassailable, his rather extreme conservative ideological beliefs were of deep concern to civil rights groups and women's rights groups who feared *Roe v. Wade* would be overturned with Bork on the bench. These groups mounted a campaign to reject Bork's nomination in the Senate. During televised testimony before the Senate Judiciary Committee, Bork spoke in detail about his positions advocating that the court should decide cases based on the original intent of the Framers of the Constitution. He felt that the national government had overstepped its constitutional boundaries and usurped state legislative authority to decide issues like the legalization of abortion, privacy rights, and due process of the law. Traditionally judicial nominees refrained from answering how they might rule on specific cases but Bork was forced to respond to a number of specific questions and charges. Bork did not present a likable image to the public and eventually his nomination was rejected.

During the confirmation process of Reagan's next nominee, Douglas Ginsberg, it was discovered that Ginsberg had smoked marijuana in college, which scuttled his chances for the Supreme Court. Interestingly, the Ginsberg confirmation hearings

resulted in a subsequent series of press conferences in which a number of legislators admitted to having smoked marijuana in the past. They universally expressed regret at having engaged in such youthful indiscretions and asked for the forgiveness of their constituents and the nation. Eventually Justice Anthony Kennedy was confirmed to fill the open seat on the Supreme Court.

During the Clinton presidency, the Republican-controlled Senate did not care for many of the federal court appointees of President Clinton, a Democrat. However, the Republicans had little justification for rejecting these nominees other than that they were not the nominees a Republican president would have chosen. Consequently, rather than hold ratification hearings which would likely end in the approval of Clinton's nominees, the Senate Judiciary Committee simply failed to schedule debate on the appointments at all. These stalling tactics resulted in scores of judicial vacancies going unfilled and contributed to a backlog of federal court cases. In turn, during the George W. Bush administration, the Democratically-controlled Senate first stalled Bush nominees and later, when in the minority, Democrats used the filibuster to thwart the approval of ten of George W. Bush's judicial nominees.

President Obama was able to appoint two new members to the US Supreme Court: Sonja Sotomayor (2009), a liberal Hispanic female, who filled the seat of retired justice David Souter. And he appointed Elena Kagan (2010), a liberal Jewish female, to replace retiring John Paul Stevens. When Justice Antonin Scalia dropped dead of a sudden heart attack in March 2016, President Obama appointed a very moderate nominee, Merrick Garland to fill the vacancy. In normal times, since the inauguration of a new president was ten whole months away, the Senate would have quickly taken up hearings on the nominee and within a few weeks confirmed or rejected him. That is not what they did. The highly partisan Republican controlled Senate declared that they would not even debate the nominee, not hold any hearings, not ask to meet with him or even call a vote on whether or not to approve Garland to the bench. They insisted that they were going to wait for a new (hopefully, to them, Republican) president to appoint someone more in tune with their highly conservative views. The adamant refusal to even consider the nominee that many months before a presidential election was unprecedented, and resulted in a calm moderate not being admitted to the Supreme Court. Instead, after the surprising upset victory of Donald Trump as president, he nominated extreme conservative Neil Gorsuch to the Court.

Objectivity and Partisanship

While Supreme Court Justices are supposed to be objective, it is unreasonable to expect that their experiences and political opinions would not influence their judicial decision making; as Justice Felix Frankfurter once noted:

"The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views… Let us face the fact

that five Justices of the Supreme Court are the molders of policy rather than the impersonal vehicles of revealed truth."

However, the drive toward objectivity, or at least the effort to appear objective, is important given the particular manner in which judges decide cases. While there is not much specificity about the judicial branch in the Constitution, it is clearly intended that judges are to remain above the fray of politics. While Congressional Representatives get their authority through elections, judges are appointed for lifetime terms. Their authority stems not from majority rule but from their legal training and expertise. They base their decisions on precedents and not moral feelings or political expediency. Similarly, trials are extremely ritualized proceedings in which the judge is ensconced both literally and symbolically above the parties involved; the gravity and importance of the proceedings is reinforced by the elaborate appearance of the courtroom and court building. Subsequently, it is particularly important that judges behave in a manner reflecting the perception that they are above partisan politics. Although lawyers who wish to become judges must often become active in party politics in order to curry favor with a Senator or Governor to become initially appointed to the bench, once in place, judges are supposed to eschew partisan politics in favor of a more legalistic style of reasoning.

Some have questioned the diversity on the Court and whether this matters in stances on issues the Court decides. Currently the court is made up of three women and five men, one African American, one Hispanic, four Jews and four Catholics. Neil Gorsuch, if he is confirmed, is a white male who was raised Catholic but attends an Episcopal church.

Open to Debate:
Bush v. Gore (2000)

The appearance of nonpartisanship in the Supreme Court was called into question when the Supreme Court intervened in the disputed election between George W. Bush and Al Gore. In the case of Bush v. Gore (2000) the Supreme Court ruled that the state of Florida should discontinue a manual recount of presidential election ballots because the standards for determining valid ballots differed from one county to another and thus denied equal protection to some voters. The reasoning for this decision was widely criticized in the legal community. The Justices in the majority abandoned longstanding convictions regarding precedent, federalism, and judicial restraint in order to intervene in a political dispute that could be resolved through political means already in place; in short they could simply allow the recount of the ballots to take place. To argue that different standards for verifying ballots constitutes a problem for equal protection is a bit of stretch when other more blatant equal protection concerns went unexamined. For instance, the court ignored the fact that wealthier counties used better voting machines that rejected far fewer ballots and thus gave a bias to

the candidates favored by the voters in wealthier counties. Also, just prior to the election, Florida incorrectly purged tens of thousands of voters from the rolls of eligible voters because they were suspected of being convicted felons; over half of those wrongly-disenfranchised were African-Americans who traditionally vote strongly for the Democratic Party. In controversial cases such as this, the illusion of objectivity is reinforced if the court acts unanimously. However, Bush v. Gore was decided by a 5-4 margin with all of the most conservative members of the Court in the majority. In short, the opinion of the legal community was that the decision was out of character for the Court and appeared to be driven by partisanship. What do you think? Perhaps the Court was solely motivated by a desire to maintain order and put an end to a disputed election however this could have been accomplished by political procedures already in place. Even if the majority acted out of a desire to avoid chaos, it still must be said that they disregarded law, precedent, and the illusion of objectivity and nonpartisanship to do so. The answer remains open to debate.

"How to Fix the Judicial Confirmation Process"

Glossary

Alien and Sedition Acts: An act passed by the Adams administration which made it illegal for the press to criticize the government.

Appellate Courts: Federal courts that hear cases which have been appealed from the district courts.

Counter-Majoritarian: The idea that the Court should strike down popularly approved legislation if that legislation violates some part of the Constitution.

District Courts: Federal trial courts that hear cases in which the federal government is a party, on suits brought under federal law, on civil suits between citizens of different states, and on other federal questions.

***Dred Scott v. Sanford*:** The case in which Chief Justice Richard Taney ruled that the Missouri Compromise outlawing slavery was unconstitutional and that Blacks had no rights and could never be citizens.

Judicial Review: The power of Judicial Review allows the Court to declare acts of Congress and the President null and void if they exceed the power of the Constitution.

Jurisdiction: The authority to hear cases.

***Marbury v. Madison*:** The case in which Chief Justice John Marshall adopted the power of judicial review for the Supreme Court.

Supreme Court: The final appellate court of the United States.

Selected Internet Sites

http://memory.loc.gov/ammem/mtjhtml/mtjhome.html. The Thomas Jefferson papers at the Library of Congress.

http://www.fed-soc.org/. The Federalist Society offers a conservative perspective on Supreme Court cases and other legal issues.

http://www.fjc.gov/. The Federal Judicial Center is the education and research center for the federal courts.

http://jurist.org/. The University of Pittsburgh School of Law maintains a web site with a lot of information on the Supreme Court and Constitutional law.

http://www.law.com. This site is designed to serve legal professionals but contains a lot of interesting information.

...http://www.rominger.com/supreme.htm. Rominger Legal provides links to various levels of the federal and state court systems.

http://www.uscourts.gov/. The web site of the Federal Court System.

http://www.whitehouse.gov/history/presidents/. The White House web site which has links to all previous presidents including Adams and Jefferson.

WebQuest

Introduction:

The Supreme Court makes decisions that have a dramatic and direct impact on all individuals in the United States. As opposed to the popularly elected branches of government, the judicial system is not beholden to popular will. How does the Supreme Court exercise this immense power and responsibility?

This WebQuest consists of two separate tasks; complete the first then the second.

Task One:

Shortly after the Supreme Court has made a controversial and widely unpopular decision on the rights of criminal suspects, a justice agrees to a television interview. The justice sets out to justify to the public the Court's enormous power and secretive ways. Write a script for the justice. How will the justice explain the Court's counter-majoritarian role? How will the justice justify the Court's secrecy and lack of direct accountability? Draw on material from the chapter for your response.

Task Two:

Now that you have a better understanding of the responsibilities and mandate of a Supreme Court Justice, apply your knowledge to a case currently before (or on the

"docket" of) the Supreme Court. Select one of the cases from the following links or select another case currently before the Supreme Court. Choose a case that has yet to be decided and you think sounds particularly exciting or controversial.

- http://www.supremecourt.gov/

Task Three:

Choose 3 cases that have been high profile cases for the Supreme Court and discuss the outcomes of the cases, in your own words. Include the various decisions in the decision making process.

Process and Resources:

Carefully read the summary of the case. Research the issues of the case. Pay attention to these questions: What is the issue? What is controversial about the issue? What does the Constitution say? The Bill of Rights? And what has the Court said in previous rulings? Some places you may want to start your search are:

- The Constitution of the United States http://www.archives.gov/exhibits/charters/constitution.html.
- The Supreme Court website http://www.supremecourt.gov/.
- FindLaw http://www.findlaw.com/.
- Oyez, Oyez, Oyez http://www.oyez.org/, or
- The Legal Information Institute http://www.law.cornell.edu/supct/.
- The University of Pittsburgh School of Law ...http://www.jurist.law.pitt.edu/.
- American Lawyer Media's http://www.law.com.
- Rominger Legal http://www.rominger.com/supreme.htm.

You are welcome to use other relevant sites you may find on your own.

Evaluation:

This WebQuest allowed you to get a hands-on understanding of how a Constitution written in 1787 continues to be employed in 21st century issues. Hopefully you noted the inherent tension between popularity and constitutionality in the process of judicial review. Did you figure out the problems that might result from having justices popularly elected or having their debates open to public scrutiny? The decisions faced by Supreme Court justices are difficult; otherwise they would not be before the Supreme Court. If you took your job as a Supreme Court Justice seriously, you may have noticed that limiting yourself to constitutionality does not always allow you to make the decision you would like to make based on your own personal political preferences.

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