American Federal Government

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10. The Federal Judiciary

Chapter Roadmap

In this chapter you will learn the role of the federal judiciary, its crucial importance to liberal democracy with special attention to the concept of the "countermajoritarian difficulty," the justification for the unusual selection process and service period for federal judges, and the structure of the federal judiciary, and how individuals can access it.

10.1 Overview of the Federal Judiciary

The federal judiciary (the Supreme Court and lower federal courts) is said to be the third branch of the federal government because it is defined in Article III of the U.S. Constitution. Article III is much shorter than Article I (the legislative branch), and shorter even than Article II (the executive), so the judicial branch has much less constitutional definition than either Congress or the presidency. The Framers specified that there would be one Supreme Court, and whatever number of lower (inferior) courts Congress would from time to time decide were needed. Of the three branches, only the judiciary has higher and lower level parts. The members of the judiciary, the federal judges, are also unusual in that they are not elected as Congressmembers and Presidents are (which is why those two are called "the political branches"), and only justices serve for life. The distinct role of the federal courts is to resolve disputes about the meaning of the law and the Constitution, and to constrain the political branches, state governments, and the people of the states from violating the Constitution.

The Framers understood three distinct tasks in government: making law, enforcing law, and judging (interpreting) the meaning of the laws and the enforcement of them. Following the ideas of Montesquieu they

believed there should be separation between these functions, believing that to let any person or group of persons have authority over each of these functions was the very definition of tyranny. Each of the three functions is necessary – even inevitable – in government, but each should act as a check on the others to keep them from becoming too powerful. In particular, the judiciary's role is to ensure the liberal democratic ideal of keeping government following the rule of law: that is, to keep the government lawful instead of lawless.

10.2 The Authority of Judicial Review

The federal judiciary's particular distinct power is the power of judicial review, which is the power to review laws, both federal and state, and strike them down (nullify them) if the judges decide they violate the U.S. Constitution. Each state has its own judicial system, which can strike down state laws that violate either their state's constitution or the federal constitution, but cannot strike down federal laws, and the federal judiciary cannot strike down a state law for violating the state's constitution.

The power of judicial review is not mentioned in the Constitution, which makes it mildly controversial, but it seems to have been understood by the Constitution's supporters and opponents that the federal judiciary that this power would exist. Opposing the adoption of the Constitution in Antifederalist paper 78, Brutus (believed to be Robert Yates, a member of the Constitutional Convention from New York) pointed out that the judges in England did not have the power to set aside acts of parliament, but the U.S. Supreme Court would be able to set aside acts of Congress, so "the judges under this constitution will control the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress."[1] Brutus thought this was a dangerous power, but Alexander Hamilton writing in defense of the Constitution in Federalist 78, countered that "[n]o legislative act . . . contrary to the Constitution, can be valid," and explained his reasoning as follows.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore

> belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[2]

Another foundation for judicial review is the Supremacy Clause in Article VI of the Constitution, which says that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." This suggests that any law that is not made "in Pursuance" of the Constitution, that contradicts it, cannot be the law of the land, but is void.

The early history of judicial review is uncertain, and scholars do not fully agree on when the Court began to use it. The Supreme Court may have first exercised the power of judicial review in 1794, eight years after the Constitution was ratified, in the obscure case of U.S. v. Yale Todd, in which it struck down a statute involving pensions, but the case seemed to draw little attention and the Court did not report it. The next use was in either 1795 or 1796, depending on how one interprets the relevant cases, but in those cases the Court upheld challenges to federal law, so there was no controversy about their exercise of power. In 1800 it struck down the particular application of a statute, but did not nullify the statute itself.

The significant historical moment came in 1803, in the case of *Marbury v. Madison*, a case entangled in the partisan politics of the day. In 1796 John Adams had narrowly defeated Thomas Jefferson for the presidency, but in 1800 Jefferson challenged him again and won. Because Adams was aligned with Washington and Hamilton in what became the Federalist Party, while Jefferson was at the head of the first true party, the Democratic-Republicans, this was the first change of presidency from one party to the other. The Democratic-Republicans had also taken control of the House and Senate, so before leaving office the Federalists tried to preserve outposts of power in the federal government. They encouraged Supreme Court Chief Justice Oliver Ellsworth to resign, replacing him with the younger John Marshall, who had a brilliant mind, a dominating character, and a determination to promote the Federalists' goal of a strong national government, whereas Jefferson preferred it to be weaker, keeping more authority in the state governments. The outgoing Federalists also

passed the Judiciary Act of 1801, which created new federal judgeships, attempted to reduce the size of the Supreme Court by one the next time a justice retired, so Jefferson could not appoint a replacement, and also created some justice of the peace positions. The Senate quickly ratified all of Adams' appointments, but in the last-minute rush not all of the commissions were delivered before Jefferson took office. He and his Democratic-Republicans were outraged by what the sore-loser Federalists had done, and he ordered James Madison as his Secretary of State not to deliver the remaining commissions, leading William Marbury, one of the appointees, to sue Madison.

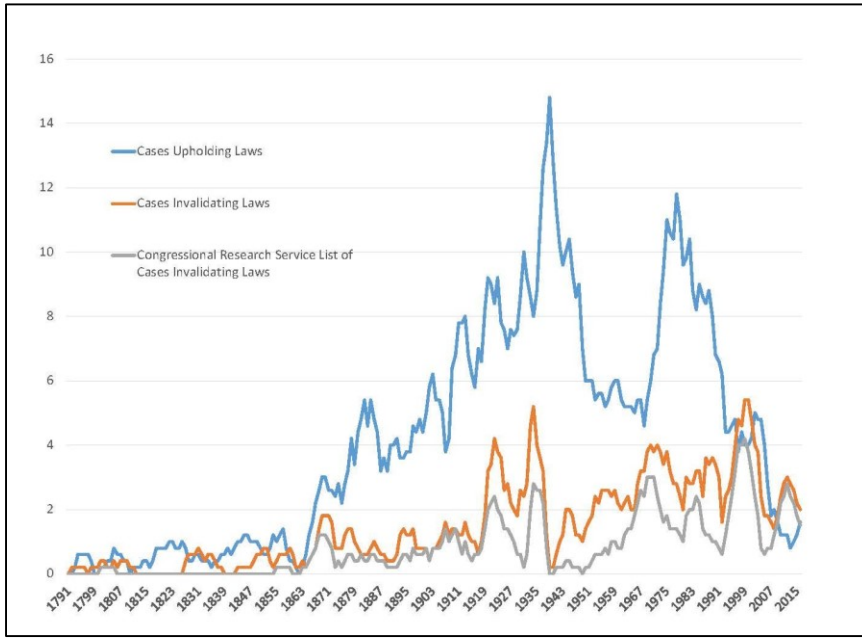
John Marshall showed his strategic brilliance in the decision; he gave Jefferson the win, so Jefferson could not disobey the Court, but in a way that outraged Jefferson. Under Marshall's influence, the Court ruled that Marbury did indeed deserve his commission, but the Court could do nothing, because the law under which Marbury brought his suit (a prior Judiciary Act of 1789) violated the Constitution. So Marshall put his thumb in Jefferson's eye both by telling he had done wrong and by claiming more power for the court, the power to invalidate statutes passed by Congress, but by saying the Court had no authority to deal with the case he denied Jefferson the chance to ignore the Court by violating an order to deliver the commission.

The ruling was important because it is the case where the Court clearly claimed authority to judge the constitutionality of acts of Congress. In the ruling, Chief Justice John Marshall echoed Hamilton, saying that "It is emphatically the province and duty of the Courts to say what the law is." There is a very strong constitutional argument for that position: of what use is a constitution if the legislature and executive can simply ignore it? But that does not mean it was uncontroversial then, and even as the Court's use of it has become normalized over the centuries, it is often controversial even now. The Constitution is one expression of the "will of the people," but so are the laws that the Court strikes down. The justification for the federal courts being able to override the "will of the people" as expressed in bills passed by Congress is that the "will of the people" as expressed in the Constitution is more fundamental, and there is a proper process for changing it if we desire to, but a process that has a higher standard than legislation does.

The figure below shows the frequency of judicial review cases over time, and the number of cases in which the Supreme Court has upheld the challenged law (the blue line, top) and the number of cases in which it has

invalidated (struck down) the challenged law (the lower lines, which are two different counts of these cases).

As for the supposed danger of the judiciary, Hamilton declared it to be "the least dangerous" branch, least threatening to the rights guaranteed by the Constitution, having neither the power of the purse (the laws and budgets passed by Congress) nor the sword (the executive's power to enforce law via the violence of the state), but only judgement,[3] and that judgement either persuades people or it doesn't. When it doesn't, elections, public pressure, and continuing challenges through new laws sometimes persuades the Court to reverse its position, if not completely then at least in part (examples are its failed attempt to prohibit the death penalty, explicitly mentioned in the Constitution, its ruling that women have a constitutional right to manage their own reproduction through abortion, and its reversal of its 1891 "separate but equal" ruling when it decided *Brown v. Board of Education*). At other times, the public eventually moves toward agreement with the Court, as happened after the controversial *Brown v. Board* ruling prohibiting racial discrimination in schools. But Brutus was not entirely wrong. He worried that the judiciary would expand the power of the federal government at the expense of the states (curtailing federalism), and this has happened, with the Supreme Court allowing much more expansive federal authority than the Framers would have countenanced



Keith E. Whittington, The Judicial Review of Congress Database (May 2019) (available at https://scholar.princeton.edu/kewhitt/judicial-review-congress-database)

10.3 Liberal Democracy vs. the Counter-majoritarian Difficulty

Because laws struck down by the federal courts have been passed by a majority of legislators, and generally are supported by a majority of the public, academics talk about the "counter-majoritarian difficulty," an awkward term meaning the Court – which is not accountable to the public – sometimes overturns the will of the majority. How can that be in a democracy? First we have to remember that the U.S. is not a pure democracy, but a constitutional liberal democratic republic. And we must remember that *liberal* democracy ensures protection of the rights of the people, even if those whose rights are injured are in the minority.

Supreme Court justices themselves, in an effort to not take too much power on themselves, becoming the philosopher-kings the Anti-federalists worried about, are sometimes concerned about overriding the will of the majority. In a dissenting opinion in the famous case of *Lochner v. New York*, striking down a New York law that set maximum working hour limits on bakers of 10 hours a day ad 60 hours a week, Justice Oliver

Wendell Holmes argued that the federal judiciary should not interfere with "the right of a majority to embody their opinions in law." But it matters what those opinions are. The standard view of the New York law is that it was a legitimate economic regulation to protect bakers from unscrupulous bosses that demanded too many work hours. But legal scholar David Bernstein points out that big bakers with unionized work forces supported the law, it was the smaller bakeries with non-unionized work forces who opposed it. The large bakeries and their unionized bakers knew the smaller bakeries couldn't compete effectively under the law, and in addition there was a racial element to it, as Bernstein explains.

> The larger New York bakeries tended to be unionized, and were staffed by bakers of Anglo-Irish and (primarily) German descent; the latter group came to dominate the Bakery and Confectionery Workers' International Union ("the bakers' union"). The smaller bakeries employed a hodgepodge of ethnic groups, primarily French, Germans, Italians, and Jews, usually segregated by bakery and generally working for employers of the same ethnic group.[4]

If the New York law was about protecting certain businesses staffed by particular ethnic groups against other businesses run by other ethnic groups, the majority does not have a clear right to "embody their opinions in law."

The risk of following Holmes' model of letting the majority embody their opinions in the law is revealed in another case decided while he was on the Supreme Court, *Buck v. Bell*. In that case he upheld a Virginia law requiring the forcible sterilization of mentally disabled people. Carrie Buck's mother was allegedly mentally retarded, and Buck had been adopted, but was later committed to a state institution on the claim that she was "mentally feeble." She was also considered immoral because she had become pregnant and had a child out of wedlock, but it was later discovered that her adoptive mother's nephew had raped her. The state wanted to forcibly sterilize her at age 17, and writing for the Supreme Court Holmes wrote,

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains

> compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

At another time, in a letter to fellow Justice Felix Frankfurter, Holmes wrote that "a law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell." But this is the danger of majority rule that James Madison wrote about in Federalist 10, where he said that in, "a pure democracy . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies . . . have ever been found incompatible with personal security. . ."

The power of judicial review, even if not always used well, is critical for the defense of people's rights. Various measures of the rights and liberties of people in democratic countries suggest that Montesquieu was partly wrong about separation of powers. Parliamentary democracies, many of which don't separate the Chief Executive from the legislature, are not in general more tyrannical than countries that do separate them. But a separate and independent judiciary may be more crucial for preventing tyranny and maintaining the liberal aspect of democracy: protecting the rights of the people and ensuring government follows the rule of law. Hamilton's defense of the Constitution in Federalist 78 touched directly on this point, as he argued that "[t]he complete independence of the courts of justice is peculiarly essential" to preserve a constitution that limited the powers of the government to preserve individuals' rights.

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[5]

Remember that democracy itself is not a sufficient protection for the rights of all the people in a polity, but only for the rights of a majority.

James Madison warned in Federalist 10 that a pure majoritarian democracy left unpopular minorities defenseless against majorities, and political scientist Barbara Gamble showed that state-level citizen initiatives that limited the legal rights of certain people were more likely to pass than other initiatives. *Liberal* democracy is about constraining what we would define as an illegitimate will of the majority, whether they exert their will directly or let their elected representatives do it for them.

This theory that judicial independence is important for ensuring rights has held up to more modern scientific scrutiny. In one study comparing countries' judiciaries and political rights, the authors demonstrated that countries with fully independent judiciaries tended to have stronger political rights protections than countries without judicial independence, and concluded that "judicial independence is an important, if not absolutely necessary, condition for the development of political and civil liberties. "[6]

The constitutional structure for independence rests on the twin statements in Article III that justices serve during "good behavior," meaning they serve as long as they like unless impeached, and that their salary cannot be reduced, which would be an effective way of pressuring judges to either change their rulings or resign. But judicial independence also depends on extra-constitutional norms, the "soft guardrails of democracy," such as presidents, Congress, state and local police, and so one respecting their rulings and complying with them. But compliance does not mean acquiescence; it is legitimate for these parties to challenge the boundaries of the judiciary's rulings with new cases, or even to directly challenge a prior ruling with a new case. But, for example, when the Supreme Court ruled that President Richard Nixon had to turn over materials subpoenaed by Congress in impeachment hearings, Nixon did give Congress those items. In contrast, a violation of those norms was committed by President Franklin Roosevelt, when he proposed adding more justices to the Supreme Court so he could overcome the Court's majority that was striking down his New Deal legislation. Fortunately, a majority of his fellow Democrats in Congress opposed the idea.

10.4 Dispute Resolution

While judicial review is the Court's most controversial role, most of its work load involves the general task of resolving disputes about the meaning and application of the laws in order to resolve legal disputes. These disputes occur between individuals (including businesses or other organizations, which for legal purposes are treated as individuals), between individuals and government (whether local, state, or federal), between state governments and the federal government, and between the executive and legislative branches of the federal government. A few real-world examples ill make these fairly abstract ideas more concrete.

Resolving Conflicts Between Individuals

An example of the Supreme Court resolving legal conflicts between individuals is the case of *Snyder v. Phelps* (2011). Fred Phelps is the leader of the Westboro Baptist Church, a religious organization that is so virulently anti-gay that the website address is godhatesfags.com, and that thinks God is punishing the U.S. for tolerating homosexuality, especially in the military. To promote their message, they began picketing at military funerals. They picketed the funeral of Lance Corporal Matthew Snyder, who was killed in Iraq, carrying signs with slogans such as "God hates the U.S.A." and "Thank God for dead soldiers." Snyder's father, Albert Snyder, sued Phelps in the Federal District Court for the District of Maryland for causing him emotional distress. Note that the case was in federal court as a *diversity* case, meaning the parties were from different states: Phelps was from Kansas, and Snyder was from Maryland, where the funeral was held. If they had been from the same state, the case would have begun in a state court. Snyder won in the federal district court, and a jury ruled that Phelps had to pay compensation to Snyder. Phelps appealed the case to the 4th Circuit Court of Appeals, which reverse the jury's decision, ruling that Phelps' picketing was protected speech under the First Amendment. Snyder appealed to the Supreme Court, which upheld the Appeals Court's ruling on the grounds that Phelps and his congregation were not publicly attacking Snyder on purely personal grounds, but were addressing issues of public concern; i.e., they were engaged in political speech.

Resolving Conflicts Between Governments and Individuals

It is not always possible to sue the government because of the doctrine of "sovereign immunity," which means exactly what it sounds like, that the sovereign power – the government – is immune from lawsuits unless it decides to allow individuals to sue it. But in certain circumstances individuals can sue their local or state governments (usually in state court), or even the federal government (only in federal court). And individuals can usually appeal rulings by administrative agencies in the federal courts (although it is not guaranteed the court will take the case), or adverse criminal justice decisions.

An example is the case of *Kelo v. City of New London, CT* (2005). The City of New London condemned Suzette Kelo's house, along with others, so they could transfer the property to a private developer for a redevelopment project. All governments retain the authority to condemn property, and the 5th Amendment's relevant clause is the Takings Clause – one of the first clauses of the Bill of Rights incorporated to apply to the states, in 1897 – which says that "private property [shall not] be taken for public use, without just compensation." New London paid Ms. Kelo compensation, but she didn't want compensation; she wanted to keep her house. She sued the city on the grounds that "public use" meant building streets, schools, and the like, not transferring private property to another private property owner just because the city expected property tax revenues to increase. In a ruling that stirred great political controversy, the Supreme Court ruled against Ms. Kelo. Whether the decision was right or wrong, it authoritatively settled the dispute between her and the city government.

Resolving Disputes Between States and the Federal Government

Federalism divides political authority between the federal government and the states, but just how that authority is divided is not always precisely clear, and the states and the federal government sometimes challenge each other for authority on certain issues. Then it falls to the Supreme Court to "police" the contours of the federal division of power. An example is the case of *South Dakota v. Dole* (1987), a lawsuit filed by the State of South Dakota against President Reagan's Secretary of Transportation Elizabeth Dole. The case challenged the National Minimum Drinking Age Act, which stated that any state that did not raise

its minimum drinking age to 21 would lose 5% of its federal highway funding. The Supreme Court ruled that the federal government had the authority to put such conditions on federal expenditures.

Resolving conflicts between the executive and legislative branches

Finally, the Court sometimes resolved disputes between the other branches of the federal government. The justices prefer not to, and sometimes refuse to do so by invoking the "political question" doctrine, which says that some questions are of their very nature fundamentally political, not legal, so it would be improper for the Court to try to resolve it. This doctrine is not constitutionally required, but is one that the Court created itself, primarily for its own self-protection. If it was to try to resolve a political question and the losing party see their ruling as illegitimate, it might ignore the Court, weakening its authority. Since the Constitution was ratified, the Supreme Court has ruled in only a handful of such cases.

10.5 The Structure of the Federal Judiciary

Article II of the Constitution says "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." These inferior courts (also called Article III courts) that Congress has created over the years consist of 94 Federal District Courts and a few territorial and specialty courts at the bottom level, and the United State Circuit Courts of Appeal between them and the Supreme Court. The court system is mostly based on geographic jurisdiction, with each Federal District Court covering either a state or just part of a state, and the Circuit Courts of Appeal covering a particular set of states. The specialty courts cover the whole country but each has limited subject matter jurisdiction.

Level One: Federal District Courts and Specialty Courts

Each state has at least one Federal District Court, with larger states being divided into two to four federal districts, depending on the state's population. Washington D.C. and Puerto Rico also each have one Federal District Court. Guam, the Northern Marianas Islands, and the U.S. Virgin Islands each have a territorial courts, which function like District courts but are established under Article IV, and whose judges serve ten year

terms rather than for life. Among the she specialty courts that have subject matter jurisdiction over specific issues are the U.S. Tax Court, the Patent Trial and Appeal Board, the U.S. Court of International Trade, the U.S. Court of Federal Claims, the U.S. Foreign Intelligence Surveillance (FISA) Court, and the U.S Bankruptcy Court. All these courts are trial courts, where federal civil and criminal cases begin.

Cases in the federal courts must involve a federal question, such as a matter of federal law, a claim against an agent of the federal government, or – specifically stated in the Constitution – a lawsuit between individuals from different states, called a diversity case. That authority was embedded in the Constitution because the Framers did not trust each other's' state courts to be fair to outsiders. All state level cases, from serious violent crimes to misdemeanors, traffic offenses, divorces, and most civil lawsuits are handled by state courts, and constitute close to 99% of all cases. Because of the federalist political and legal structure of the U.S., the Federal District Courts hear only about 1% of all legal cases in the U.S.

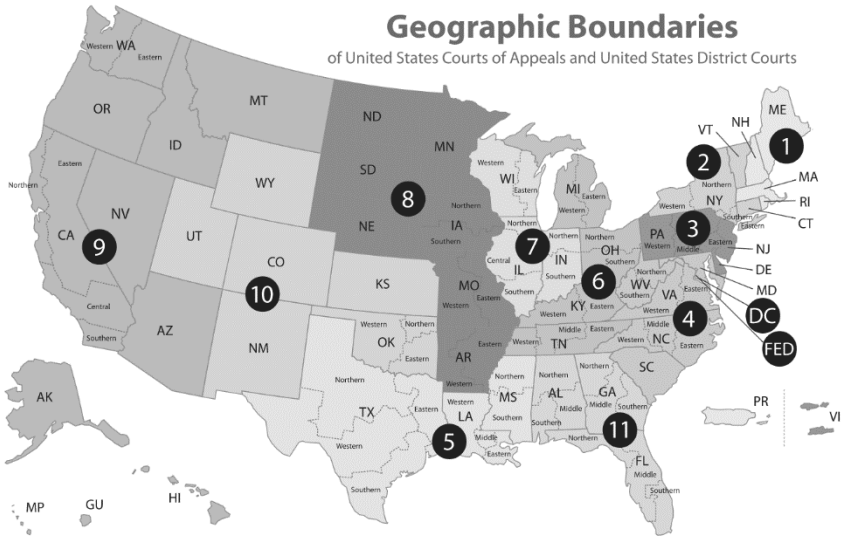
Level Two: United States Circuit Court of Appeals

The party to a case that has an adverse outcome in one of the federal trial courts may try to appeal their case to the appropriate U.S. Circuit Court of Appeals. The Courts of Appeals only hear appeals based on claims about the meaning of the law or whether a trial or civil case was conducted fairly; they do not reconsider the facts of a particular case. For example, an appeal by someone convicted of a federal crime cannot be based on the claim that the person is really innocent, but could be based on claims that the defendant was denied due process of the law. For example, evidence perhaps should have been excluded from trial, a confession was coerced, the judge gave improper instructions to the jury, the defendant's lawyer provided an incompetent defense, and so on.

All District and Appeals Courts are bound by the decisions of the Supreme Court, and cannot rule differently than it does. Likewise, each District Court is bound by the decisions of its relevant Circuit Court. However, many cases present new issues or new variations on old issues, so prior Supreme Court or Circuit Court rulings do not always provide clear guidance. When a case is appealed, a Circuit Court may overrule the decision of a District Court, and the Supreme Court may overrule a decision of either a District or Circuit Court. One of the motivating factors

in lower court judges' decision-making is to avoid having their decision overturned on appeal.

The District, specialty, and Appeals courts are the ones that Congress can from time to time make. As with the Supreme Court, the judges are nominated by the President and must be confirmed by the Senate, and once confirmed they serve until they retire, die, or (on rare occasion) are impeached and convicted. The number of these courts has grown as the population has grown, and Congress has authority to create new District courts by splitting or reorganizing the districts within a state and new Circuit Courts of Appeal by splitting or reorganizing districts. For many years there have been proposals to split the 9th Circuit into two, proposals motivated both by its size and, on the part of conservatives, because it has a reputation for being the most liberal of the Circuits.



Level Three: The Supreme Court

The Supreme Court is the ultimate authority on the interpretation of laws, regulations, and the Constitution. This does not mean its decisions are always "right," simply that they are final, until such time as they, or their successors on the Court, change their mind. Former Supreme Court Justice Robert Jackson described this authority pragmatically, saying "We are not final because we are infallible, but we are infallible only because we are

final." If the Supreme Court exercises judicial review and strikes down a law or federal regulation as unconstitutional, neither Congress nor the President can overrule it. If Congress thinks the Supreme Court has interpreted a law incorrectly, it cannot simply assert what it thinks is the proper ruling. What Congress can do is revise the law, or the President can have the executive branch agencies revise the regulation, so that it complies with the Supreme Court's interpretation. Nor can Congress overrule the Court on an interpretation of the Constitution through legislation, but only by amending the Constitution, which requires the concurrence of ¾ of the states. Congress successfully did this with the 16th Amendment allowing income taxes, but, for example, an attempt to pass an amendment to exclude flag burning from First Amendment protection in response to the 1989 case of *Texas vs. Johnson* repeatedly failed to pass in Congress.

The Constitution does not specify how many justices the Supreme Court should have, leaving that decision up to Congress. The Judiciary Act of 1789 specified that there would be 6 justices on the Court. After the elections of 1800 the Federalists reduced the number to 5 to try to deny Thomas Jefferson the chance to appoint a justice, but after Jefferson and his newly elected congressional allies took office they repealed that act, and a few years later added a 7th justice when they added a 7th Federal Circuit Court (in those years the Supreme Court justices each "rode circuit," hearing cases in the circuit assigned to them). In 1837 the Court was expanded to 9 justices, then briefly to 10. Shortly after the Civil War, in 1866, Congress passed legislation to reduce the Court to 7 justices through attrition (because they serve for life, no justice could be fired), but in 1869 the number was again set at 9. The number has not changed since then, but in 1937, President Roosevelt attempted to pack the Court by adding one new justice for every justice over 70, ostensibly to "help" with the workload, but in fact so he could appoint supporters who would uphold his economic regulations. The effort faced great opposition, however, and his proposal failed. In the current era, Democrats who were angered by the Republican controlled Senate's refusal to approve Democratic President Obama's last Supreme Court nominee, handing that nomination then to Republican President Trump, have talked about packing the Court if they regained control of the Presidency and Senate in the 2020 elections.

Very few people – including professional political commenters – seriously consider the constitutional logic of Supreme Court justices' rulings. They know what outcomes they prefer as a policy matter, and they care only about that outcome, not about whether it is truly congruent with the text of the Constitution. This leads people into contradictions. They may argue against an "activist" judiciary that overturns the will of the people in one case, then turn around and argue for overturning the will of the people on the grounds that "America is a republic, not a democracy." There is little considered principle in their arguments; they simply want to get their way, consistent with the understanding of politics as who gets what, when, and how, or as the authoritative allocation of values – ideally, to them, their values.

[1] Brutus. Antifederalist 78.

[2] Hamilton, Alexander. Federalist 78.

[3] Ibid.

[4] Bernstein, David E. 2005. "Lochner v. New York: A Centennial Retrospective." *Washington University Law Review* 83(5): 1469-1527.

[5] Ibid.

[6] Howard, Robert M., and Henry F. Carey. 2004. "Is an Independent Judiciary Necessary for Democracy?" *Judicature* 87(6): 284-290.