

JUDICIAL INDEPENDENCE: Essential, Limited, Controversial

A Lesson by Linda Weber

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SUMMARY

In a constitutional system of government, the role of the judiciary is essential for maintaining the balance of power, protecting individual rights, upholding the rule of law, interpreting the Constitution, and ensuring equal justice for all.

“The Framers established an independent judiciary because they realized that judges would sometime have to make difficult decisions that the law requires but that are unpopular with a majority of the citizenry. Without the protections afforded to the judiciary by the Constitution, the federal courts may not have been able to issue decisions in . . . cases that have had a dramatic impact on American life and law.” (uscourts.gov)

In this lesson, students learn about the role of an independent judiciary in the United States. Through a cooperative learning jigsaw activity they focus on operational differences, essential functions, limited powers, and controversial issues. Students also consider the importance of an independent judiciary to the preservation of a constitutional democracy and the quality of life for all Americans.

NOTES AND CONSIDERATIONS

- This lesson presumes that students have been introduced to Supreme Court cases and have a basic understanding of legal vocabulary and concepts.
- Due to the specialized nature of the in-class sessions, materials are provided to help students build essential knowledge and understanding before coming to class so they are best prepared to learn.
- Technology is relied on in this lesson to enhance learning by facilitating information access, information gathering, and analysis.
- This is a comprehensive lesson with a variety of resources and activities that can easily be adapted to different teaching styles, length of classes, and levels of students.

Snapshot of Lesson

Grades: Middle School; High School

Subject Focus: Civics/Government

Estimated Time: 2 sessions

Alignment to National Standards for Civics and Government:

Grades 5-8; Grades 9-12

Materials/Equipment Needed:

- Paper and pencil
- Variety of materials for presentations
- Computer with Internet access for each student.

Resources and Materials Included:

Readings and Resources

- From *The Pursuit of Justice* by Kermit Hall and John Patrick - “Introduction: The Supreme Court as a Mirror of America”
- From *Our Constitution* by Donald Ritchie - “Chapter 5: How is the Constitution Interpreted?”
- U.S. Constitution: Article III
- *Understanding Democracy: Judicial Independence*
- *Judicial Independence: Selected Definitions and Writings*
- Commentary by Sandra Day O’Connor in the Wall Street Journal - “The Threat to Judicial Independence”
- Article from the Washington Post
- 2006 survey on the judiciary from The Annenberg Public Policy Center
- News release from The Annenberg Public Policy Center’s 2007 judicial conference

Student Materials

- Class-Prep: Assignment Sheet
- Jigsaw Activity: Judicial Independence
- Follow-Up Activity
- Tips for Writing an Op-Ed Piece
- How to Write a Letter-to-the-Editor

National Standards for Civics and Government
Standards level detail: grades 5-8; grades 9-12

TOPICS

- Branches of government
- Checks and balances
- Constitutional authority
- Democratic principles and values
- Role of the judiciary
- Roles and responsibilities
- Rule of law
- Separation of powers
- Supreme Court

NATIONAL STANDARDS

Document: National Standards for Civics and Government (1994) Center for Civic Education
<http://www.civiced.org/index.php?page=stds>

Grades 5-8 Organizing Questions

The national content standards for civics and government are organized under five significant questions. The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - C. What are the nature and purposes of constitutions?
 - D. What are alternative ways of organizing constitutional governments?

- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - B. What are the distinctive characteristics of American society?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?

- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - E. What is the place of law in the American constitutional system?
 - F. How does the American political system provide for choice and opportunities for participation?

- V. What are the roles of the citizen in American democracy?
 - C. What are the responsibilities of citizens?
 - D. What dispositions or traits of character are important to the preservation and improvement of American constitutional democracy?
 - E. How can citizens take part in civic life?

Grades 9-12 Organizing Questions

The national content standards for civics and government are organized under five significant questions. The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - C. What are the nature and purposes of constitutions?
 - D. What are alternative ways of organizing constitutional governments?

- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - B. What are the distinctive characteristics of American society?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?

- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - B. How is the national government organized, and what does it do?
 - D. What is the place of law in the American constitutional system?
 - E. How does the American political system provide for choice and opportunities for participation?

- V. What are the roles of the citizen in American democracy?
 - C. What are the responsibilities of citizens?
 - D. What civic dispositions or traits of private and public character are important to the preservation and improvement of American constitutional democracy?
 - E. How can citizens take part in civic life?

Note: A more detailed standards-level alignment related to these questions can be found in the “Standards” section at end of this lesson plan.

OUTCOMES

Knowledge, skills, and dispositions

Students will . . .

1. Define judicial independence and explain why it is important.
2. Identify the qualifications, roles, and responsibilities unique to the judiciary.
3. Identify the essential functions of an independent judiciary.
4. Identify ways in which judicial powers are limited and strengthened.
5. Provide examples of historical and contemporary controversies involving the judiciary.
6. Discuss the role of the judiciary in maintaining the delicate balance of powers.
7. Explain the importance of an informed citizenry for preserving an independent judiciary.
8. Identify other factors beyond the shared powers structure defined in the Constitution that are essential for making the Constitution work for all Americans. (e.g., dispositions or traits of character, commitment to democratic principles and values, personal and civic responsibilities).

Integrated Skills

1. Information literacy skills

Students will . . .

- Analyze primary and secondary sources to gather, organize, and analyze information.
- Use skimming and search skills.
- Make informed decisions.
- Use prior and background knowledge as basis for new learning.
- Use technology as a tool for learning.

2. Media literacy skills

Students will . . .

- Read, view and listen to information delivered via different media formats in order to gather implicit and explicit information.

3. Communication skills

Students will . . .

- Write and speak clearly to contribute ideas, information, and express own point of view.
- Write in response to questions.
- Collaborate with others to deepen understanding.

4. Study skills

- Take notes
- Manage time and materials

5. Thinking skills

Students will . . .

- Think historically
- Analyze cause-and-effect relationships
- Describe and recall information
- Make personal connections
- Draw conclusions
- Synthesize information
- Evaluate and judge opinions
- Use sound reasoning and logic

6. Problem-solving skills

Students will . . .

- Use sound reasoning as the basis for decisions.
- Ask meaningful questions.
- Explain the interconnections within a process that are needed to achieve resolution.

7. Participation skills

Students will . . .

- Contribute to small and large group discussion.
- Work responsibly both individually and with diverse people.
- Express own beliefs, feelings, and convictions.
- Show initiative and self-direction.

ASSESSMENT

Evidence of understanding may be gathered from student performance related to the following:

- Class-Prep Assignment
- Jigsaw work
- Follow-up activity
- Optional take-home quiz

VOCABULARY

bias

branches of government

coordinate branches

freedom

independence

judicial independence

judicial review

judicial sovereignty

judiciary

justice

limited government

politics

prejudice

rule of law

separation of powers

Resources for Definitions

Annenberg Classroom Glossary

<http://www.annenbergclassroom.org/terms>

FindLaw—Law Dictionary

<http://dictionary.lp.findlaw.com/>

American Bar Association

<http://www.abanet.org/publiced/glossary.html>

Understanding Democracy, A Hip Pocket Guide—John J. Patrick

<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>

LESSON OVERVIEW

Class-Prep for Students

Study and Work Before Class

This lesson recommends that students spend time reviewing and studying specific print and Internet resources to build background knowledge and understanding so they are best prepared for class. Therefore, a class prep assignment sheet is provided with the lesson.

Ideally, a single folder with the print resources and materials for before-class preparation should be loaded and made available to the students so they have at least one night to prepare and take notes before class.

DAY 1: Divide and Conquer

Students work in “expert” study groups on behalf of their learning teams by reviewing preselected Internet resources related to judicial independence in order to prepare 5-min. presentations to “teach” their original learning teams.

DAY 2: Learn from the “Experts”

“Expert” students teach others in their learning groups about the topic they studied by using approaches developed in their “expert” groups.

Note to Teachers:

Throughout the lesson, help students recognize the values and principles that are working behind the scenes to make judicial independence work for them, especially the qualifications of the judges and the importance of a knowledgeable and informed citizenry.

Courts may help with problem-solving in a constitutional democracy, but the extent of their success, and the success of democracy itself, depends on all Americans exercising certain dispositions or traits of character, adhering to democratic principles and values, and understanding and exercising personal and civic responsibilities.

Civic Dispositions /Traits of Character	Civic Responsibilities	Personal Responsibilities
<ul style="list-style-type: none">• individual responsibility• self discipline/self governance• civility• courage• respect for the rights of other individuals• honesty• open mindedness• critical mindedness• negotiation and compromise• persistence• civic mindedness• compassion• patriotism	<ul style="list-style-type: none">• obeying the law• respecting the rights of others• being informed and attentive to public issues• monitoring political leaders and governmental agencies and taking appropriate action if their adherence to constitutional principles is lacking• performing public service• serving as a juror	<ul style="list-style-type: none">• taking care of one’s self• accepting responsibility for the consequences of one’s actions• adhering to moral principles• considering the rights and interests of others• behaving in a civil manner

Source: National Standards for Civics and Government (1994)

MATERIALS AND EQUIPMENT FOR THIS LESSON

Materials/Equipment Needed

- Paper and pencil
- Computer lab
- Variety of materials for presentations

Resources and Materials Included

Resources

- Our Democracy: Judicial Independence
- From *The Pursuit of Justice* by Kermit Hall and John Patrick – “Introduction: The Supreme Court as a Mirror of America”
- From *Our Constitution* by Donald Ritchie – “Chapter 5: How is the Constitution Interpreted?”
- U.S. Constitution: Article III
- Judicial Independence: Selected Definitions and Writings
- Commentary by Sandra Day O’Connor in the Wall Street Journal, October 1, 2006: “The Threat to Judicial Independence”
- Washington Post Article, May 30, 2007: “The Attack Ads Will Come to Order”
- May 23, 2007 Press Release and Survey from The Annenberg Public Policy Center on the election of judges
- May 25, 2007 Press Release: Judicial Campaigns: Money, Mudslinging and an Erosion of Public Trust

Student materials

- Class Prep: Assignment Sheet
- Jigsaw Activity: Judicial Independence: Essential, Limited, Controversial
- Follow-Up Activity: Judicial Independence Makes the News: What’s Your Opinion?
- Tips for Writing an Op-Ed Piece
- How to Write a Letter-to-the-Editor

Internet Resources

While a variety of Internet resources are needed, they are all easily accessible through the direct links in this lesson. This reduces the need for additional searching so students can focus on learning.

Videos and Video Clips from Annenberg:

- “A Conversation with Chief Justice John G. Roberts, Jr. on the Origin, Nature, and Importance of the Supreme Court” (37 min.)
<http://www.annenbergclassroom.org/page/a-conversation-on-the-origin-nature-and-importance-of-the-supreme-court>
- “Our Constitution: A Conversation” (30 min):
<http://www.annenbergclassroom.org/page/our-constitution-a-conversation>
- “Key Constitutional Concepts” (62 min.): <http://www.annenbergclassroom.org/page/key-constitutional-concepts>
- “The Constitution Project: An Independent Judiciary” (34 min.):
<http://www.annenbergclassroom.org/page/an-independent-judiciary>
- “A Conversation on the Constitution: Judicial Independence” (32 min)
<http://www.annenbergclassroom.org/page/conversation-judicial-independence>

Other Resources from Annenberg:

- Understanding Democracy: A Hip Pocket Guide
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
- The Annenberg Guide to the United States Constitution: What It Says, What It Means
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>
- Our Constitution, Chapter 2: What Kind of Government Did the Constitution Create?
http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/Chapter%202_Our%20Constitution.pdf
- Our Constitution, Chapter 5: How is the Constitution Interpreted?
http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/Chapter%202_Our%20Constitution.pdf
- From The Pursuit of Justice by Kermit Hall and John Patrick “Introduction: The Supreme Court as a Mirror of America”
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_Intro.pdf
- The Pursuit of Justice, Chapter 1: The Rise of Judicial Review
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/12_21_Ch_1.pdf
- The Pursuit of Justice, Epilogue: “We are All Slaves of the Law”
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/200_203_Epilogue.pdf

Additional Internet Resources

- Pages 1-8 from the “2007 Year End Report on the Federal Judiciary (Chief Justice’s Year End Reports on the Federal Judiciary) <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf>
- Americans Trust Courts but also Believe them Biased, Surveys Find
<http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=13>
- An Independent Judiciary
<http://www.crf-usa.org/bill-of-rights-in-action/bria-14-2-c.html>
- Pages 1-8 from the “2006 Year End Report on the Federal Judiciary” (Chief Justice’s Year End Reports on the Federal Judiciary) written by Chief Justice John Marshall
<http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>
- Justice for Sale
Frontline Interview: Justices Stephen Breyer & Anthony Kennedy
<http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>
- 2006 survey conducted for the Annenberg Public Policy Center on the election of judges
<http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=218>

NOTE: This lesson recommends that the Teacher preview the resources listed in the Jigsaw Activity for each of the following study categories:

- Operational Differences
- Essential Functions
- Limited Powers
- Controversial Issues

ABOUT ANNENBERG VIDEO RESOURCES IN THE LESSON

Note to Teacher:

The following videos or video collections are incorporated in this lesson either in full or in part. Because teaching time and needs vary, complete descriptions are provided below should you wish to expand the lesson with additional viewing. This symbol (**) indicates the specific resources used in the lesson and extension activities.

1. Our Constitution: A Conversation (30 min)

<http://www.annenbergclassroom.org/page/our-constitution-a-conversation>

Description: In the summer of 1787, delegates to the Constitutional Convention gathered in Philadelphia to create a document that would establish the government of the United States. On September 17, that landmark document – our Constitution – was signed into law. This conversation on the Constitution, featuring Supreme Court Justices Sandra Day O’Connor and Stephen Breyer in a dialogue with Pennsylvania high school students at the Supreme Court in 2005, is the first in a series produced by the Annenberg Foundation Trust at Sunnylands for use in classrooms on Constitution Day.

2. A Conversation with Chief Justice John G. Roberts, Jr. on the Origin, Nature, and Importance of the Supreme Court (37 min)

<http://www.annenbergclassroom.org/page/a-conversation-on-the-origin-nature-and-importance-of-the-supreme-court>

Description: The establishment of a federal judiciary was a top priority for this nation’s founding fathers. In December 2006, Chief Justice of the United States John G. Roberts, Jr. and a group of high school students participated in a conversation about the high court – from its history and evolution to the methods Justices use in selecting and hearing cases to the role of an independent judiciary and other issues crucial to a healthy democracy today.

Questions covered in this video:

- Why is it important to have courts?
- Why does the Constitution devote less space to the courts than to the Congress and the Presidency?
- How do cases get to the Supreme Court?
- What gave Gideon the right to petition the Court directly?
- Does it matter whether a case comes from the Federal or State Court?
- How does the court decide which cases to hear?
- How did you prepare to argue before the Supreme Court?
- How are cases decided?
- Do justices ever change their minds while deciding a case? (Start time 18:24; Stop time 19:55) **
- Why do justices write opinions? (Start time 19:56; Stop time 22:10) **
- Which Chief Justice was the greatest? (Start time 22:11; Stop time 25:33) **
- What are the special responsibilities of the Chief Justice? (Start time 25:34; Stop time 27:31) **
- Why do we have nine Supreme Court Justices on the Court? **
- How do the courts apply the Constitution to contemporary issues?
- Is it difficult to look at the claim of a convicted murderer?
- Misconceptions about the courts. (Start time 33:31; Stop time 35:38) **

3. Key Constitutional Concepts (62 min)

<http://www.annenbergclassroom.org/page/key-constitutional-concepts>

Description: These three 20-minute video segments examine key constitutional concepts. The first explains why the nation’s framers created the Constitution. The second describes the protection of individual rights by highlighting the Supreme Court case of Gideon v. Wainwright, affirming the right to an attorney. The last explores the separation of powers using the Supreme Court case of Youngstown v. Sawyer, a challenge to President Truman’s decision to take over steel mills during the Korean War.

Segment 1: Creating a Constitution (Start: 00:00)

Segment 2: One Man Changes the Constitution (Start Time: 23:02)

Segment 3: Check and Balances (Start Time 41:52) **

4. The Constitution Project: An Independent Judiciary (34 min) **

<http://www.annenbergclassroom.org/page/an-independent-judiciary>

Description: This film chronicles two key moments that defined our understanding of the role of the judiciary: the Cherokee Nation's struggles before the Supreme Court in the 1830s to preserve its homeland, and *Cooper v. Aaron*, the 1958 Supreme Court case that affirmed that states were bound to follow the Court's order to integrate their schools. *An Independent Judiciary* features Supreme Court Justice Stephen Breyer and some of the nation's leading Constitutional scholars.

5. A Conversation on the Constitution with Justice Ruth Bader Ginsburg on the Fourteenth Amendment (42 min.) **

<http://www.annenbergclassroom.org/page/conversation-14th-amendment>

Description: Incorporating three integral constitutional tenets – due process, equal protection and privileges and immunities – the Fourteenth Amendment to the United States Constitution was originally intended to secure rights for former slaves, but over the years it has been expanded to protect all persons. In December 2006, Justice Ruth Bader Ginsburg and a group of students gathered at the Supreme Court to discuss the importance of the Fourteenth Amendment and how it came to embody and protect the principle of “We the People.”

Segments in this video:

- The meaning of the key clauses in the fourteenth amendment
- To whom did the fourteenth amendment originally apply and to whom does it apply now?
- The fourteenth amendment and women
- How has the courts approach to gender discrimination changed over time?
- Changes in the interpretation of the fourteenth amendment
- How has the Court's approach to racial discrimination changed?
- Do we need an equal rights amendment to the Constitution?

6. A Conversation on the Constitution: Judicial Independence (32 min)

<http://www.annenbergclassroom.org/page/conversation-judicial-independence>

Description: Judicial independence is a cornerstone of democracy, guaranteed by the Constitution and enshrined in our system of government. In a conversation with students from California and Pennsylvania, three Supreme Court Justices – Sandra Day O'Connor, Stephen Breyer and Anthony Kennedy – discuss the Constitution and the role of judges who are sworn to uphold the laws of this nation and to protect the rights of all citizens.

Teaching Activities:

Class Prep for Students- (See Student Assignment Sheet)

Several days before class, either load the print materials on the computer or distribute hard copies to the students. Review the Class-Prep: Assignment Sheet with the students and give them at least one night to do the work before the lesson in class.

During preparation time, students will read resource material, view videos, and take notes which they may use later during the lesson.

Materials and Resources Needed

Print Materials (included with this lesson)

- Understanding Democracy: Judicial Independence (pg. 45)
http://www.annenbergclassroom.org/Files/Documents/Books/Understanding%20Democracy/Understanding_Democracy.pdf
- Judicial Independence: Selected Definitions and Writings
<http://www.abanet.org/judind/downloads/jidef4-9-02.pdf>
- From *The Pursuit of Justice* by Kermit Hall and John Patrick
“Introduction: The Supreme Court as a Mirror of America”
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_Intro.pdf
- From *Our Constitution* by Donald A. Ritchie: “Chapter 5: How is the Constitution Interpreted?”
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_Intro.pdf
- U.S. Constitution: Article III
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

Annenberg Video Resources

- Video “A Conversation on the Constitution: Judicial Independence”
<http://www.annenbergclassroom.org/page/conversation-judicial-independence>

Advance Preparation:

1. Before giving the class-prep assignment, **organize the class for the jigsaw lesson and preview the lesson ahead.**
2. Divide students into learning groups of 4 or 5. Have students in each group count off . . . 1-2-3-4. The 1’s from each group will become the “expert” group that works on Study #1, the 2s work on Study #2 and so on. If there is a 5th student for more than one group, assign each student a number then assign him/her to the appropriate study group.
3. Distribute the Class-Prep Assignment Sheet for homework.

Remind students to bring all work to class.

DAY 1: **Divide and Conquer**

Overview: Students work in “expert” study groups on behalf of their learning teams by reviewing pre-selected Internet resources related to judicial independence in order to prepare 5-min. presentations to “teach” their original learning teams. Goal: Enhance learning about judicial independence through the use of teamwork and cooperative learning skills so students can develop a depth of knowledge about the material that would be more difficult to achieve if each student worked alone.

Materials/Equipment Needed:

- Class Prep: Assignment Sheet and each student’s completed work
- Computer lab (essential setting for this session)
- Variety of materials for presentations
- Paper and pencil for note-taking

Included with this lesson:

- Jigsaw Activity: Judicial Independence: Essential, Limited, Controversial (1 per student)

Internet Resources (See jigsaw activity chart)

- Direct links in the jigsaw activity are provided to reduce the search time needed.

Advance Preparation:

1. Ensure Internet access for each student.
2. Gather a variety of materials for presentations.
3. Important: Review the jigsaw activity and determine the scope of research your class is capable of handling in the time available and make adjustments accordingly. Only a few resources are included with this lesson.

Procedure:

1. Briefly review and discuss the class-prep work.
2. Distribute the jigsaw activity then go over the instructions and your expectations for working in cooperative groups.
3. Make sure students are clear about the scope of the research required if you have adjusted the task in any way.
4. Be sure to point out the list of cases and legislation at the end.
5. Allow students the remaining time to get organized and get started.
6. Because the jigsaw actually began with the class-prep assignments, the group can take advantage of in-class time to plan, prepare, and do more research.
7. Students will likely need homework time to finish up.

DAY 2: Learn from the “Expert”

Overview: “Expert” students teach others in their learning groups about what they studied by using the approach and materials developed in “expert” groups.

Goal: All students in the learning groups will gain knowledge and understanding about these four aspects of judicial independence—operational differences, essential functions, limited powers, and controversial issues.

Materials/Equipment Needed:

- Presentation materials: varies by “expert” group.
- Jigsaw activity chart
- Paper and pencil
- Follow-Up Activity: Judicial Independence Makes the News: What’s Your Opinion

Advance Preparation

Reserve a large space (e.g., lunch room, media center) or go outside so simultaneous presentations can be conducted without undue interference from other groups.

Procedure:

1. Allow some time for students to meet and tie up loose ends.
2. Ask students to return to their learning groups to present their 5-min. presentations. (Total presentation time 20 min.)
3. Listening students take notes.
4. After all have presented, go over the cases and legislation listed at the end of the jigsaw chart as a way to review and discuss key points as a class.

Note: The following chart contains the same list as the student jigsaw, but includes examples of rationales for teacher reference.

Supreme Court Cases and Legislation	Rationale (may vary)	Study Group
1. <i>Marbury v. Madison</i> (1803)	judicial review	Essential Functions
2. <i>City of Boerne v. Flores</i> (1997)	courts protected their independence from encroachments from the political branches	Controversial Issue
3. <i>Brown v. Education</i> (1954)	unpopular decision; protection of civil rights	Essential Functions Controversial Issue
4. <i>Baker v. Carr</i> (1962)	protection of voting rights	Essential Functions
5. <i>Gideon v. Wainwright</i> (1963)	preserve fair judicial process	Essential Functions
6. <i>U.S. v. Nixon</i> (1974)	restricting presidential powers	Essential Functions
7. <i>Texas v. Johnson</i> (1989)	protection of symbolic speech	Essential Functions

Supreme Court Cases and Legislation	Rationale (may vary)	Study Group
8. <i>Hayburn's Case</i> , 2 U.S. (2 Dall.) 409 (1972)	"...the Court decided that it could not participate in regulatory activities as directed by an Act of congress because this was a legislative power reserved by the Constitution to Congress, and not a judicial power reserved by the Constitution to the Courts." www.uscourts.gov	Limited Powers
9. Impeachment trial of Justice Samuel Chase (1804)	"...established a precedent that impeachment proceedings should not be used to remove judges who issue unpopular rulings." www.uscourts.gov	Operational Differences
10. <i>Cherokee Nation v. Georgia</i> (1831)	court decision not enforced by the President	Limited Powers
11. <i>Aaron v. Cooper</i> (1958)	court decision enforced by the President	Limited Powers
12. Court Reform Bill proposed by Franklin Roosevelt in 1937	attempt to stack the court	Controversial Issue
13. <i>Weinberger v. Wiesenfeld</i> (1975)	gender lines in the law were unfair for everyone (Ruth Bader Ginsburg video)	Controversial Issue
14. Judicial Conduct and Disability Act of 1980	Under the Act, any person may file a written complaint alleging that a judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all duties of office by reason of mental or physical disability."	Operational Differences
15. Article III of the U.S. Constitution	judges, judicial business; separation of powers, limited powers	Essential Functions, Operational Differences, Limited Powers
16. <i>Mistretta v. United States</i> (1989)	legitimacy of the judicial branch depends on its reputation for impartiality and nonpartisanship	Operational Differences

5. Assign Homework: Follow Up Activity or Take-Home Quiz

- Follow-Up Activity: Judicial Independence Makes the News: What's Your Opinion?

OR

- Take-Home Quiz: Select questions appropriate for the level of your students from the following sources:

1. Questions and vocabulary on the Class Prep: Assignment Sheet
2. Statements that are listed as "Outcomes" for this lesson.
3. Questions used on the Annenberg surveys included with this lesson.
4. Allow students to develop (and answer) several significant questions of their own related to each area of study.

EXTENSION ACTIVITIES

Have more time to teach?

1. Develop and conduct a survey.

Have students conduct a self-assessment of their knowledge of the judiciary by answering the same questions that were used in the Annenberg survey included with this lesson. Students may also survey parents and others then tabulate all the scores, compare them with the Annenberg results, make observations, draw conclusions, and make predictions. <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=13>

2. Explore the controversial topic of judicial elections and campaigning that threatens to undermine the judiciary.

Should Judges be elected or appointed?

<http://www.factcheck.org/article470.html>

Judicial Campaigns: Money, Mudslinging, and an Erosion of Public Trust

<http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=219>

Judgment Day In Wisconsin

Battle to oust a judge

http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html

Judges as Politicians, Attack Ads and All

http://www.factcheck.org/announcements/judges_as_politicians_-_attack_ads_and.html

Judicial Fight Prompts Dueling, Distorted Ads

http://www.factcheck.org/politics/judicial_fight_prompts_dueling_distorted_ads.html

The Attack Ads Will Come to Order

<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052901638.html>

3. Review Supreme Court cases named in the lesson in greater depth.

Search cases via the database at OYEZ.org <http://www.oyez.org/cases/>

4. America Bar Association: Law Day Lesson on Judicial Independence

http://www.americanbar.org/groups/public_education/resources/resources_for_judges_lawyers/hs_judicialindependence.html

5. Find more activities, lessons, and strategies for teaching Supreme Court cases.

Visit www.landmarkcases.org.

Supporting Resources from AnnenbergClassroom.org, its affiliates, and others

Separation of Powers

Ask The Expert: Teaching Separation of Powers With Kathryn Kolbert
<http://www.annenbergclassroom.org/Asset.aspx?Id=923>

Judiciary

<http://www.annenbergclassroom.org/Chapter.aspx?Id=17>

More About Courts and Cases

Ask a Supreme Court Justice
<http://www.annenbergclassroom.org/AssetDetail.aspx?myID=1178>

The Courts

<http://www.annenbergclassroom.org/Chapter.aspx?Id=31>

Our Rights (online book)

<http://www.annenbergclassroom.org/Asset.aspx?Id=1329>

Pursuit of Justice: Supreme Court Decisions that Shaped America (online book)

<http://www.annenbergclassroom.org/Asset.aspx?Id=1257>

Our Constitution (online book)

<http://www.annenbergclassroom.org/Chapter.aspx?Id=66>

The Justice Talking Listening and Learning Guide

<http://www.annenbergclassroom.org/Asset.aspx?Id=887>

Constitutional Timeline

<http://www.annenbergclassroom.org/Chapter.aspx?Id=27>

Issue Timelines

<http://www.annenbergclassroom.org/Chapter.aspx?Id=45>

Key Constitutional Concepts (62 min. video)

<http://www.annenbergclassroom.org/Asset.aspx?Id=12>

Justice Learning

Guide to the Constitution. What it says. What it means. Interactive timelines.
http://www.justicelearning.org/justice_timeline/Articles.aspx

Justice Talking

Search by “Supreme Court” to get a listing of the many relevant programs.
<http://www.justicetalking.com/>

New York Times Learning Network

<http://www.nytimes.com/learning/>

Additional Resources

Learn More: Separation of Powers and an Independent Judiciary

- Supreme Court of the United States
<http://www.supremecourt.gov/>
- Power of the Supreme Court
http://supreme.lp.findlaw.com/supreme_court/supcthist.html
- National Archives: Teaching with Documents: Constitutional Issues: Separation of Powers
<http://www.archives.gov/education/lessons/separation-powers/>
- C-span: Supreme Court
<http://www.c-span.org/Topics/Supreme-Court/>

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FindLaw

<http://www.findlaw.com/casecode/supreme.html>

GPO Access

<http://www.gpoaccess.gov/supcrt/index.html>

OYEZ

<http://www.oyez.org>

“Chief Justice Rehnquist has stated that the independent judiciary is one of the ‘crown jewels’ of the nation’s system of government. Certainly, judicial independence is an essential ingredient of the protection of individual liberty and equality in our constitutional system. Moreover, the independent judiciary checks the legislative and executive branches of the federal government, thereby helping to maintain our constitutional commitments both to separation of powers at the national level and to federalism in nation-state relations.”

-Excerpt from: “Report of the Task Force on Federal Judicial Selection,” in *Uncertain Justice: Politics and America’s Courts*. Reports of the Task Forces of Citizens for Independent Courts. New York: The Century Foundation Press, 2000 (p. 13).

Source: <http://www.abanet.org/judind/downloads/jjidef4-9-02.pdf>

Readings and Resources

- *The Pursuit of Justice* by Kermit Hall and John Patrick
“Introduction: The Supreme Court as a Mirror of America”
- *Our Constitution* by Donald Ritchie
“Chapter 5: How is the Constitution Interpreted?”
- U.S. Constitution
Article III
- *Understanding Democracy* by John J. Patrick
Judicial Independence
- Judicial Independence: Selected Definitions and Writings
- Commentary by Sandra Day O’Connor in the Wall Street Journal, October 1, 2006: “The Threat to Judicial Independence”
- Article from the Washington Post, May 30, 2007: “The Attack Ads Will Come to Order” by Ruth Marcus
- May 23, 2007 Press Release and Survey from The Annenberg Public Policy Center on the election of judges
- May 25, 2007 Press Release: Judicial Campaigns: Money, Mudslinging, and an Erosion of Public Trust

http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_Intro.pdf

Introduction

The Supreme Court as a Mirror of America



The Supreme Court of the United States seems a mysterious, distant institution. Its justices conduct their business in an imposing marble building; they don formal black robes to hear oral arguments and issue decisions; and they announce those decisions through the technical language of the law. On closer examination, however, this seemingly inscrutable institution of legal oracles turns out to be a uniquely human enterprise shaped by the personalities of its justices and by the disputes that constantly roil American society. Each case that comes before the Court is a unique slice of American life, not just an abstract legal matter, and the outcomes of these cases tell the story of the nation and its development. They also chronicle the institution’s successful struggle to secure its power to review the actions of the other branches of government, to establish its independence, and to settle conclusively what the Constitution means.

The high court is simultaneously the least and the most accessible branch of government. Unlike the President and Congress, the Supreme Court invariably explains its actions through written opinions. Since the Court’s founding in 1789 it has delivered enough opinions to fill more than five hundred fat volumes, known to us today as *United States Reports*. The justices reach those decisions through a process that involves open argument in court and intense media coverage. In almost every case, one justice speaks for the Court publicly, and his or her colleagues may concur or dissent with the decision, also publicly.

Still, the Court’s reputation for mystery is well deserved. It reaches its decisions through highly confidential meetings, called conferences, in which the justices discuss the cases before them out of public earshot. Secrecy is so strict that the justices have adopted rules that preclude even their clerks from attending these meetings. The newest court appointee has the task of sending out messages and guarding access to the conference. We know about what transpires in these conference sessions only through the fragmentary notes that a few justices have left behind.

Even the well-known practice of an individual justice writing and signing an opinion gives way at times. The justices in some instances may decide to issue an opinion

per curiam, or “for the court.” Such an opinion is rendered either by the whole Court or a majority of it, rather than being attributed to an individual justice. This practice of issuing per curiam opinions means that the public cannot readily determine how the justices aligned themselves, adding to the mystery of the entire decision-making process. Early in the Court’s history such opinions were used to dispose of minor cases in a terse, summary fashion; more recently, they have also become vehicles for major opinions. For example, the Court issued one of its great and controversial twentieth-century First Amendment decisions, *Brandenburg v. Ohio* (1969), per curiam. So, too, was *Bush v. Gore* (2000), in which the justices decided who would be the next President of the United States.

The framers of the Constitution intended just such a mix of secrecy and accessibility. They meant the justices to be judges, not politicians subject to direct public pressure. The justices serve during good behavior, a virtual grant of life tenure. The President appoints them with the advice and consent of the Senate; they can be removed only through impeachment by the House of Representatives and conviction by the Senate for “Treason, Bribery, or other high Crimes and Misdemeanors.” Only one justice, Samuel Chase, has been impeached, but the vote to convict him fell short of the needed two-thirds majority.

The justices are insulated from politics in other ways as well. They do not have to stand for election. Their salaries cannot be diminished while they are in office. They alone decide when they will retire from the Court, even if they are infirm. They are, in the strongest sense of the term, agents of the law, whose ultimate responsibility is to uphold the Constitution without regard to political pressures or the standing of the people whose cases they decide. The words carved above the entrance of the Supreme Court building sum up its noblest ambitions: “Equal Justice under Law.”

The Court is distinctively American and has been since it first opened its doors for business in 1789. Alexis de Tocqueville, a French visitor to the United States during the early nineteenth century, was astonished by the new nation’s reliance on courts and judges. In his classic

book *Democracy in America*, he wrote, “I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans....A more imposing judicial power was never constituted by a people.” In more recent times, Chief Justice Charles Evans Hughes, who served during the Great Depression of the 1930s, explained the unique nature of the Court by pointing to the justices’ power to review acts of the other branches and, if necessary, overturn them. Only a few other courts in the world have powers in scope and operation similar to that of the U.S. Supreme Court; no other court figures so centrally in the life of its nation.

The Court was the most novel, yet least debated, institution to emerge from the Constitutional Convention of 1787. One reason that the delegates gathered in Philadelphia was to address the concern that rule of law—the concept that a nation should be governed by laws, not people—was under serious threat in the newly formed United States of America. The English government had a judiciary, but its judges did not hold tenure during good behavior; instead, they were effectively servants of the crown and, as a result, distrusted by many of the colonists. The colonies had courts of their own, but the final authority on legal matters rested with the distant Privy Council in London.

Moreover, under the Articles of Confederation, which were ratified in 1781 and represented the first attempt to establish a government for the new nation, there was no national judiciary; instead, state courts addressed almost all judicial matters, even those with national consequences. The framers of the Constitution, whose staunchest advocates were known as Federalists, wanted an independent judiciary capable of upholding standards of national law and restraining what they believed were the excesses of popular government. Thus, in Article 3 of the Constitution the delegates established a national judiciary, composed of one Supreme Court and as many lower federal courts as Congress wished.

The framers granted the new Supreme Court limited original jurisdiction (the power to hear cases in the first instances as a trial court) and left Congress to sketch the boundaries of its appellate jurisdiction (the power to hear cases on appeal from other courts). Article 3 provided that the power of the federal courts in general and the Supreme Court in particular extended to “all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties...to Controversies to which the United States shall be a Party;—to Controversies between two or more states; [between a State and Citizens of another State] between Citizens of different States....”

The framers chose the words in Article 3 carefully. Particularly important was their decision to merge the concepts of law and equity under one set of courts and judges, a practice that departed from the English system. Law constituted the formal rules adopted by legislatures and courts; equity, on the other hand, consisted of ideas about justice that rested on principles of fairness and that were administered in the English system by chancellors. Colonial Americans were deeply suspicious of equity courts because they operated under the control of English governors and were, therefore, often highly political, and they were able to defeat rights, especially property rights, that were otherwise protected through the law.

The crucial purpose of Article 3 was to empower, not limit, the courts in general and the Supreme Court in particular. The framers gave the Court a power of decision equal to that, in its appropriate sphere, of Congress. Article 6 established that the Constitution was “the Supreme law of the land,” so by inference it followed that the Court, the nation’s primary legal body, was to be its most important interpreter, one authorized to overturn an act of a state court or legislature and perhaps to set aside an act by another branch of the federal government.

It was left to Congress to determine how many justices were to exercise that power. In theory, the Supreme Court could function with only two justices—the chief justice and an associate justice. Today, the number of justices stands at nine, where it has remained since 1837 except for a brief period during the Civil War and Reconstruction, when it was as low as eight and as high as ten. At its inception, the Court had six justices, a number dictated in part by the requirement that each of these justices perform his duties in one of the six circuit courts of the United States. These circuit court duties included conducting trials, making the justices into republican teachers who brought through their circuit riding the authority of the federal government to the distant states. Circuit riding also exposed the justices to local political sentiments and legal practices. The justices continued to ride circuit until 1911, when Congress formally ended the practice.

Throughout the nineteenth and into the early twentieth century, Presidents tried to make sure that each of the circuits and the associated region had a representative on the bench. The number of justices was reduced briefly in 1801 to five, with the temporary abolition of circuit riding, but the number reverted to six with the passage of a new judiciary act in 1802. The number of justices grew to seven in 1807, and the eighth and ninth justices were added in 1837. That number remained constant until 1866, when Congress, in an attempt to deny President Andrew John-

son a chance to appoint any new justices, provided that the Court's number would decline by attrition to seven. The number dropped by one, to eight, and then the Judiciary Act of 1869 reestablished the number at nine. During the New Deal in the 1930s, President Franklin D. Roosevelt attempted unsuccessfully to expand the Court by as many as six new slots.

Whatever the number of justices, there is no constitutional requirement that they be lawyers, although all of them have been. Unlike the President, members of the Court can be foreign born, and several have been: James Wilson, James Iredell, David J. Brewer, George Sutherland, and Felix Frankfurter.

The Court has had several homes throughout its history. Until the Supreme Court moved into its present building in October 1935, it had always shared space with other government institutions. The Court held its first session at the Royal Exchange Building in New York City, which was also home to the lower house of the New York legislature. In December 1790 the nation's capital moved to Philadelphia and the justices had space in the newly constructed city hall of Philadelphia. Pierre Charles L'Enfant had designed a building for the Court in the new capital city of Washington, D.C., but it was never erected, in part because Congress never deemed a new home for the justices as particularly important. The justices moved in 1801 to an unfurnished chamber on the first floor of the Capitol. After the British burned the Capitol at the end of the War of 1812, the Court operated from a rented house on Capitol Hill for two years, but then went back to the Capitol, where the justices remained until moving to their current home in 1935. The tortured journey of the Court to its new magisterial home is a reminder of its growing prestige in the American scheme of government.

The new building was the singular triumph of Chief Justice William Howard Taft, the only justice also to have served as President of the United States. Following the design of architect Cass Gilbert, the building was constructed of white marble, with a central portico and matching wings. The imposing "White Palace" has come to symbolize the power and independence of not just the justices but the entire judicial branch.

The Court's most important business has always been exercised through its appellate jurisdiction. Again, this term simply means cases that have been heard and decided before they are brought—appealed—to the justices. For the first hundred years of the nation's history Congress was wary of giving the Court too much responsibility, fearing in part that the justices might become too powerful. For example, through the Judiciary Act of 1789, Con-

gress granted the Court power to hear cases and controversies appealed to it based on diversity jurisdiction. This concept, contained in Article 3 of the Constitution, means that in order for a case to come to the Court, the parties to it must be from different, or diverse, states. Congress in 1789 could have granted the Court greater power by designating that it could hear any case—even if the parties were from the same state. The framers of the Constitution had also provided that Congress could specify that the justices could hear cases "arising under" the Constitution, but the members of the First Congress decided not to invoke the broader power that these words in Article 3 conveyed.

Since then, Congress has not only significantly expanded the Court's jurisdiction but has also given it greater discretion in deciding which cases to hear. The Court has increasingly moved from one that decided cases it had to, to a court that decided those cases it wanted to. In the early years of the Court, the justices typically heard cases based on a mandatory writ of error, an assertion by a plaintiff that a lower court had made a mistake of law. The justices were required to hear these cases. Not surprisingly, as the nation expanded, the docket of the high court grew dramatically. In the first ten years of the new nation, the justices heard just one hundred cases, but by the 1880s they were drowning, hearing and deciding more than six hundred cases a year.

Beginning in the late 1890s and gaining momentum in the 1920s, Congress granted the justices far more discretion over their docket. One of the most important steps was the Judiciary Act of 1925, a measure for which Chief Justice Taft lobbied intensively. It broadened the use of the writ of certiorari and brought an immediate decline in the numbers of cases heard and decided by the justices.

The law often relies on Latin words to convey meaning. For example, the word "writ" means a formal written order by a court commanding someone to do something or to refrain from doing something. Certiorari is a Latin word that means "to ascertain" or, more liberally translated, "to make more certain."

The words are important because this particular writ, or order, is meant to bring cases to the Court that will make the law more certain in areas where there is conflict. But as Tocqueville so wisely reminded us, the resolution of conflicting legal interpretations almost always has political repercussions. Through this writ a petitioner comes to the Court and asks that the justices order a case to be heard. The writ is discretionary; the Court is not required to issue it or hear a case from anyone seeking such a writ. There are more than seven thousand petitions for "cert" sent to the Supreme Court annually. Only a handful—less

than 2 percent—of these are accepted; the others are usually dismissed, almost always without written comment, leaving the parties to wonder why their plea for justice went unanswered. When that happens, the law stands as it was before. The denial of a writ of certiorari does not mean that the Court has decided that the lower court was correct; it only indicates that the justices are unwilling to make a decision, although as a matter of law the decision below stands.

The expanded use of the writ of certiorari and the declining use of the writ of error have helped the justices better manage their caseload. In recent years, the Court has decided as few as seventy cases a term, compared with the hundreds that it was deciding through most of the twentieth century. Moreover, with fewer cases to decide the justices are able to devote more time to the ones that they do decide. Throughout its history the Court has been important in resolving disputes, but it has become even more important in addressing major political issues, such as the limits of free speech, the boundaries of church-state relations, and reproductive rights. The Court can choose which cases it wishes to hear, and that means the justices can have an even deeper influence on the particular issues they do address, such as the rights of criminal defendants. And even when the justices refuse to hear a case they shape public policy by leaving the law to stand as it was. The broadened use of the writ of certiorari has permitted the Court to emerge as a tribunal of constitutional and statutory interpretation rather than as a mere forum to resolve disputes among parties making competing claims under the Constitution.

The Court has also further refined the rules that it imposes when considering which cases to decide. The most important of these is justiciability. That term entails an important principle: the justices will hear and decide only those disputes that are subject to being resolved through the judicial process. The Court's actions have political consequences, but the Court itself should not be overtly political. The rule of justiciability is the Court's way of deflecting those cases that seek to use it as a political rather than a legal tool. To be justiciable the dispute must present a real case and controversy, the parties to it must have a direct interest in it (called standing), it must be ready for decision (ripeness), and it must not have already been decided by other actions (mootness). For example, the Supreme Court, although not explicitly prohibited from rendering advisory opinions, early in its history decided that it would not do so. The justices reasoned that their future influence depended on being a court of law rather than a political forum.

The justices have also resisted hearing collusive suits (suits in which the parties conspire to bring a case before the Court) and ones that raise political questions (that is, questions better settled by the elected branches). As the contested role of the Court in the 2000 Presidential election between George W. Bush and Al Gore reminds us, the political questions doctrine has itself become the subject of controversy. In the 2000 election, the Court decided by a narrow margin that Al Gore, although he had won the popular vote nationally, could not have officials in Florida perform a recount of the ballots there to see whether he had captured that state's electoral votes. The Court's per curiam opinion made Bush the President of the United States. Critics charged that the Court was never intended to resolve such weighty political matters as who should be President and that the justices should never have agreed to hear the case in the first place.

These rules underscore that the Supreme Court is first and foremost a legal institution. Cases have to come to it; it cannot go looking for parties to plead cases of interest to the justices. Those who do appear must argue through the conventional processes of the law, including the use of the important concept *stare decisis* (literally, "let the decision stand"), or precedent. This idea holds that the justices should extend respect to previous decisions made by the Court as a way of promoting constitutional stability and certainty.

Controversy and constitutional change, however, have gone hand in hand on the Court. The Court is a place where advocates for conflicting political, social, economic, and cultural demands seek the blessing of the justices. Once again, Tocqueville had a critical insight. "Scarcely any political question arises in the United States that is not resolved, sooner or later," he observed, "into a judicial question." Americans generally and their political leaders especially have willingly transformed divisive political disputes—whether over slavery, the hours of work of men and women, the practice of segregation by race, or abortion—into constitutional conflicts. The Court's constitutional decisions, then, reflect the society it serves. Justice Oliver Wendell Holmes Jr. summed up matters nicely when he described the law as a "magic mirror" that reflected the assumptions, attitudes, and priorities of each generation. In that light, the Court can be thought of as the hand holding and turning that mirror. For example, through the nineteenth century, issues involving speech, press, church-state relations, and civil rights drew little attention from the justices. In the twentieth century, on the other hand, just such concerns have framed central conflicts in American society and dominated the Court's docket.

The Court's history has moved through clear phases or epochs. The first of these ran from the English founding in 1607 through the Constitutional Convention in 1787. Though neither the Court nor the Constitution existed, these years were nevertheless critical to establishing broad constitutional principles that endure to this day and to which the Court often turns. These included the value of a written constitution, the doctrine of limited government, the concept of federalism, and the idea of separation of powers.

From the nation's founding in 1787 through the end of Reconstruction in 1877, the most crucial constitutional issues were framed as conflicts between the states and the nation. These included disputes about the power of the federal courts in relation to their counterparts in the states, the power of the national government to regulate commerce, the right of property holders to remain free of regulation by either state or federal governments, and the expansion of slavery into the new territories and states. The struggle over state versus federal authority culminated in the secession movement, the Civil War, and Reconstruction. The constitutional legacy of the era appeared dramatically in the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Of these, the Fourteenth, through its due process, equal protection, and state action clauses, reframed the work of the high court for the following century and a quarter in the areas of civil liberties and civil rights.

Among the most pressing issues in America from 1877 to 1937 were industrialization and immigration. Industrialization raised new questions about the role of government in regulating the conditions of labor, the rights of laborers to organize, the rights of corporations to control and use their capital, and the appropriateness of government intervention in the marketplace. The First World War brought a direct challenge to the civil liberties of Americans and the first sustained debate in the Court about the scope of freedom of speech and press. Equally important, a wave of immigration and a newly freed black population raised questions about the authority of government to regulate social change. The justices were forced to fit a document crafted in the eighteenth century to the realities of the industrial market economy of the late nineteenth and early twentieth centuries.

Initially, the justices gave preference to the rights of property holders, raised strong objections to government involvement in the marketplace, and viewed corporations more favorably than unions in the struggle between capital and labor. The Great Depression, however, placed increasing pressure on government to take an active role

in the economy. The Court raised constitutional objections to many of President Franklin D. Roosevelt's solutions to the massive economic dislocation caused by the depression. In the face of FDR's proposal to pack the Court, the justices in 1937 retreated from their strong objections to government involvement in the economy and signaled their support for both state and federal initiatives designed to bolster the well-being of Americans.

After 1937 the Court again shifted gears, this time placing an emphasis on equality and such human rights as freedom of conscience, expression, and privacy. The emergence of the nation onto the world stage also posed new questions about the scope of Presidential power. The Second World War and then the Cold War, along with conflicts from Korea, to Vietnam, to Iraq, were accompanied by increasingly bold assertions about the authority of the chief executive in time of war. Moreover, the emergence of a national civil rights movement for African Americans, Native Americans, and Latinos, along with the emergence of feminism, tested the boundaries of long-accepted discriminatory practices in housing, employment, schooling, jury service, the right to hold and seek office, and the administration of the death penalty. It also produced a powerful counter-reaction from groups that believed the state should not engage in programs such as affirmative action that were designed to favor one group over another as a way of ameliorating the consequences of past discrimination.

These eras of the Court remind us of how the Court has mirrored the times while trying to administer the rule of law. That makes any determination about the most important cases in the history of the Court a challenge. Lawyers interested in serving the immediate needs of their clients might find the most important cases to be those that address a current point of constitutional law. Historians, on the other hand, may search for the impact of the Court over time, attempting to explain how crucial decisions have shaped and been shaped by conflicts in American society. Throughout these various epochs of its history, the Court has developed routine processes by which to dispatch its business.

The modern Court has settled on an established routine for its operations. The justices begin their term the first Monday in October and continue through the third week of June. They meet twice a week, typically on Wednesday afternoon, to hear cases argued on the previous Monday, and on Friday to hear cases argued on Tuesday and Wednesday. At these conferences they screen petitions, deliberate on cases that have been argued, and transact miscellaneous business. They do so in a paneled confer-

ence room to which they are summoned by a buzzer. Tradition requires that the justices exchange handshakes and then take preassigned seats around a long table with the chief justice at one end and the senior associate justice at the other end. Once the door closes the conference begins and no other person may enter.

The chief justice presides over the conference, making him first among equals and providing an important opportunity to exercise leadership. The chief directs the justices to consider the certiorari petitions that at least one of the justices considers worthy. Indeed, one of the chief's duties is to indicate to his colleagues why a particular petition should be considered on its merits. If four of the justices conclude that a case on this "discuss list" is sufficiently important, it will be added to the Court's docket for full briefing and oral argument. After the chief speaks, the other eight justices comment in order of seniority.

The chief is responsible for leading the discussion of cases that have been argued. He will start with a review of the facts in the case, its history, and the relevant legal precedent. In descending order of seniority, the other justices then present their views. The justices typically signal how they will likely vote on the case and on that basis the chief justice tallies the vote. If the chief justice is in the majority he will assign responsibility for preparing an opinion; if he is not, then the senior justice in the majority assumes that role. The greatest of the chief justices have used their power to assign opinions to shape the overall direction of the Court.

The conference is a critical stage in the development of the Court's work, but it is not the end of the process. The justice assigned to prepare an opinion will often work through several drafts, sharing her or his work with colleagues and invariably revising and refining the opinion in response to their comments. An important part of the Court's work is the informal interaction among the justices as they develop an opinion. A justice's opinion may well change through the process, and in especially difficult cases maintaining a majority can be challenging. The deliberations that began with the conference continue until the Court announces its decision, a process that can take months.

When the Court convenes in public, the justices sit according to seniority. The chief justice is in the center and the associate justices are on alternating sides, with the most senior associate justice on the chief justice's immediate right. The most junior member of the Court is seated on the left farthest from the chief justice.

To assist them through this process the justices have law clerks. The practice of hiring law clerks began

in 1882 when Justice Horace Gray hired a Harvard Law School graduate to assist him with his work on the Court. Today, a justice may have as many as seven clerks, who come from a pool of about 350 applicants to each justice, who has total control over whom is selected. Most of these clerks are graduates of prestigious law schools with extraordinary academic records who have usually clerked for a lower federal court judge. Their duties include reading, analyzing, and preparing memoranda for the justices and assisting in preparing opinions. Thirty-three clerks have gone on to become justices. They are today the most important of the Court's support staff, without whom the justices could not conduct their business.

Over the course of more than two centuries the justices have issued thousands of opinions. Culling from this long list the handful of decisions that represent pivotal moments in the Court's impact on American life is more an art than a science. With that consideration in mind, we have applied several general criteria. First, the Court's decision had to be a response to a pivotal public issue, which had a deep and abiding impact on the course of U.S. history. The Dred Scott case, for example, represents dead law. No lawyer today would attempt to defend a client based on the Court's actions. Still, the decision was a milestone in the history of the nation with regard to slavery. Second, a case must have overturned a significant precedent and thereby acted as a catalyst for political and social change. The benchmark case of *Brown v. Board of Education* (1954, 1955) signaled an end to segregation by race and opened a new chapter in the history of civil rights. Third, the Court's decision must include memorable and edifying statements of enduring American constitutional principles expressed in opinions of justices either for the Court or in dissent. The opinion of Chief Justice John Marshall in *McCulloch v. Maryland* (1819), for example, continues to resonate today because of Marshall's approach to the question of the powers of Congress and the Court and the memorable words with which he framed his opinion (for example, "the power to tax, is the power to destroy"). We likewise turn to Justice John Marshall Harlan's dissent in *Plessey v. Ferguson* (1896) precisely because it so forcefully rejected the majority's view that race relations could never change.

Fourth, the Court's decision must have been a definitive or illuminating response to an issue about a core principle of American constitutionalism, such as federalism, separation of powers, checks and balances, civil liberties, or civil rights. The justices' decision in *United States v. Nixon* (1974) dealt with the fundamental idea that the President is not above the law and the belief that the Court

has a duty to establish the outer boundaries of executive privilege. Fifth, the Court's decision in some way must be included in the content standards or curricular frameworks of state departments of education, an indicator of the case's importance in cultivating standards of civic education.

Sixth, and finally, we have selected cases that tell compelling stories about the personal courage required to bring and sustain a case before the high court, whether on the winning or the losing side.

We also settled on this list of cases because individually and collectively each of them contributed to the dramatic rise in the high court's powers. Not all Americans have agreed with the Court's decisions; indeed, not all Americans agree that the Court should have the final word in saying what the Constitution means. The debates about the justices' powers today stand in sharp relief from the promise made by Alexander Hamilton in *The Federalist* No. 78 that the Court would be the "least dangerous branch" to the liberties of Americans. What has emerged is a powerful national institution that has through its history staked out the right to review the constitutionality of the actions of the other branches of federal government and of state governments. This power of judicial review, nowhere explicitly specified in the Constitution, has been a flashpoint for controversy. That power, however, could not have been exercised had the justices not also achieved independence from direct popular and political pressure. But, most important, the Court has fostered successfully the concept of judicial sovereignty. This idea holds, in simple terms, that what the Court says the Constitution means is what it means; its power to interpret the Constitution is final, unless and until it is amended by the people.

No matter how one feels about the current power exercised by the justices, there is no disputing that historically they have played and continue to play an extraordinary role in American life. The United States has had only one national constitutional convention, in part because the Supreme Court has emerged as a kind of continuing constitutional convention, adjusting and modifying the ruling document to suit changing demands. Each case in this volume reminds us of how central the development of judicial review, judicial independence, and judicial sovereignty have been not only to the fate of the Court but to our entire constitutional experiment. As Justice Holmes might have noted, the Supreme Court has been a mirror of America.



5

How is the Constitution Interpreted?

“Those who put their names in the Constitution understood the enormity of what they were attempting to do: to create a representative democracy, with a central government strong enough to unify a vast, diverse, then and now politically fractious nation; but a government limited enough to allow individual liberty and enterprise to flourish. Well, 213 years later, we can say with thanks, they succeeded. Not only in keeping liberty alive, but in providing a strong, yet flexible, framework within which America could keep moving forward, generation after generation, toward making real the pure ideals embodied in their words.”

—President Bill Clinton, dedicating the National Constitution Center in Philadelphia on September 17, 2000

It irked President Thomas Jefferson that the Supreme Court in *Marbury v. Madison* (1803) and other cases had taken upon itself the power to declare acts of Congress unconstitutional. “There is not a word in the Constitution that has given that power to them,” Jefferson fumed in a letter to W. H. Torrance on March 11, 1815, about the Federalist justices who dominated the court in his day, “more than to the executive or the legislative branches.” Since then, other Presidents and congressional leaders have expressed similar outrage over Court rulings that truck down their legislative accomplishments. Liberals and conservatives alike have decried “judicial activism,” whenever rulings went against them. Despite these complaints, the Supreme Court has reserved the final word on whether the actions of the executive and legislative branches comply with the Constitution.

Constitutional law consists of the applications and legal interpretations of the Constitution, as distinguished from statutory law (the acts of Congress) and common law (the precedents established by lower court rulings). Constitutional law deals with the government’s legitimate functions and the limits that the Constitution places upon it. The executive and legislative branches constantly address new issues and establish new policies. Because Article III of the Constitution only gives federal courts the power to hear “cases or controversies,” only those persons who have been harmed by a law will have “standing” to challenge it.

An example of the question of “standing” occurred in 1995, when Congress enacted a “line-item veto” that enabled Presidents to veto a single funding item within a larger appropriations bill without having to veto the whole bill. A few members of Congress who had voted against the line-item veto brought suit in the federal courts on the grounds that their legislative “power of the purse” had been diminished. However, a court found that they lacked

standing—that is they had not been harmed by the line-item veto—and dismissed their suit. Then President Bill Clinton used the line-item veto to strike out funding that would have gone to New York City, and the courts heard the city’s suit because it did clearly have standing. In *Clinton v. City of New York* (1998), the Supreme Court struck down the line-item veto as unconstitutional.

Although all federal officers take an oath to uphold the Constitution, they often read that document very differently. Presidents assert powers that they believe the Constitution gives them by implication. Congress enacts laws it deems “necessary and proper” to carry out its constitutional role. Their overlapping powers and responsibilities are an invitation to struggle. “The Constitution was designed to force conflict,” said House Speaker Newt Gingrich in a December 6, 2004, interview on National Public Radio’s *Morning Edition*. “You elect 100 senators, two per state. They’re not part of the president’s team. They work with the president, not for the president. You elect 435 House members by population; they work for the people who elect them. Then you have the president, who’s elected every four years by the whole country.” And, often the struggle between the executive branch and the legislature involves the President’s nomination of and the Senate’s right to approve or reject judicial appointments, who will interpret the Constitution.

Political parties also play a role in the varying interpretations of the Constitution, even though the Constitution made no mention of them. Those who favor a limited national government and more states’ rights have gravitated toward one party, while those favoring a stronger, more active federal government tended toward another. Presidents George Washington and John Adams were identified with the Federalist Party, which tended toward a dominant federal government, but their party lost the Presidency and majorities in both houses of Congress to the Democratic-Republicans, who favored states’ rights, in the election of 1800. This first transfer of power between the parties left only the judiciary under the control of the Federalists, since only Federalist-appointed judges were then serving. President Thomas Jefferson, a Democratic-Republican, then set out to purge the Supreme Court by encouraging his supporters in the House to impeach Supreme Court justice Samuel Chase. A bitter partisan who never hesitated to speak his mind, Justice Chase struck many of Jefferson’s supporters as lacking a judicial temperament; however, this was hardly an impeachable offense. Jeffersonians in the House accused Chase of some minor infractions on the bench, but essentially accused him of having rendering legal interpretations of the law in “an arbitrary, oppressive, and unjust way.” Had these trumped-up charges succeeded in convicting Chase, the Jeffersonians might have also tried to remove Chief Justice John Marshall. However, Justice Chase was acquitted at his Senate trial, discrediting the notion of using impeachment as a political tool.

Within a few years, the Federalist Party crumbled and the United States entered into a period of one-party rule, called the Era of Good Feelings. Although unified on the surface, political leaders had sharply different opinions over what the Constitution meant and how the government should operate. The Era of Good Feelings ended with the hotly contested election of 1824, in which Andrew Jackson won the greatest share of the popular vote but lost the election in the House of Representatives to John Quincy Adams. Jackson’s followers created their own party, the Democrats, while his opponents called themselves the Whigs, borrowing that name from the British political party that opposed the king, and supported social reforms in Parliament. In 1828 Jackson won the

Presidency and began to spar with the Whigs in Congress—where the majorities fluctuated between Democrats and Whigs.

One of the clashes during this period between the executive and judicial branches dealt with efforts to remove Native Americans from their lands in the East and relocate them west of the Mississippi River. After the discovery of gold on Cherokee lands, the state of Georgia refused to recognize the Cherokees as a sovereign nation and opened tribal lands to white settlers. The Cherokees appealed to the courts, and in the case of *Cherokee Nation v. Georgia* (1832), Chief Justice John Marshall upheld their rights. President Jackson, who disagreed with the Court's order, refused to carry it out. "John Marshall has rendered his decision," Jackson supposedly said, "now let him enforce it." Jackson instead supported the Indian Removal Act, which paid the tribes for their land in the East and relocated them to new territory in the West. In 1838 the U.S. Army carried out that act and forcibly evicted the Cherokees who had resisted, sending them on the Trail of Tears to Oklahoma, so named because so many Cherokees died on the rugged journey.

Slavery also became a political and constitutional question. The question of whether slavery should be allowed to spread into the newly acquired western territories split apart the existing parties and encouraged the creation of the new Republican Party. When Abraham Lincoln became the first Republican to be elected President, eleven Southern states seceded from the Union out of concern that Lincoln would prevent the extension of slavery into the West, and perhaps move to abolish it completely. Lincoln denied being an abolitionist. Although he opposed the spread of slavery, he believed that the Constitution protected slaveholding where it already existed. During the Civil War, Lincoln signed an executive order known as the Emancipation Proclamation that freed people enslaved in territories under insurrection against the federal government. This act did not free anyone in the border states that had remained within the Union. Not until after the South was defeated did the Thirteenth Amendment abolish slavery entirely.

After Lincoln's assassination, in the period of Reconstruction that followed the war, Congress fought fiercely with President Andrew Johnson over how to treat the defeated southern states. Johnson believed in carrying out Lincoln's lenient policies, while congressional Republicans preferred a much tougher stance designed to protect the newly freed African Americans in the South. To prevent the President from dismissing cabinet officers sympathetic to the congressional Republicans, the Tenure of Office Act in 1867 required Senate approval to remove a cabinet officer, just as the Senate needed to confirm appointments. President Johnson called the act unconstitutional and defiantly fired his secretary of war, Edwin Stanton. The House of Representatives impeached Johnson for this action and related issues in 1868. At his Senate trial, Johnson came within one vote of being removed from office. Congress later repealed the Tenure of Office Act, and in 1924 the Supreme Court belatedly confirmed the President's right to remove executive branch appointees.

As a condition for being readmitted to the Union, the North required the southern states to ratify the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, known as the Reconstruction Amendments. On the surface, the amendments provided African Americans with citizenship, equal protection of the laws, and the right to vote. But, the language of the amendments, especially the sweeping nature of the Fourteenth Amendment, opened wide new

areas for Congress to legislate and for the Court to interpret.

As the United States became a more industrial nation, the Supreme Court recognized the rights of corporations as “persons” under the Fourteenth Amendment and struck down efforts by the state and federal governments to regulate business as a violation of the amendment’s guarantee that no state shall “deprive any person of life, liberty, or property, without due process of law.” It would take another half century before the Supreme Court revised its interpretation of the amendment to permit laws that prohibited child labor, protected women workers, and set minimum wages for workers in general. Increasingly, the courts also used the Fourteenth Amendment to apply the restrictions and guarantees of the Bill of Rights to the states as well as to the federal government, using it to interpret laws related to voting and the rights of aliens and of criminal defendants. As the American industrial society developed, the federal courts changed their positions, becoming more tolerant of Presidential and legislative efforts to experiment with new means of protecting and improving the public welfare.

For the most part, the judicial branch has resisted intervening in the internal operations of the Congress. In the 1920s, when the Senate held highly publicized investigations into executive branch corruption, the Supreme Court confirmed the right of Congress to call any witnesses, even those who were not government officials, and to investigate anything remotely related to its legislative functions. Drawing on this authority, in the 1930s, congressional committees aggressively investigated the economic conditions that contributed to the Great Depression, the use of business lobbyists to shape legislation, and other issues.

After the Second World War, committees in both the House and Senate held sensationalized hearings into alleged Communist infiltration and subversion of government agencies. They subpoenaed numerous witnesses who had little connection with the government and interrogated them about their past political

JUSTICE JOHN MARSHALL HARLAN DISSENTS

The highest courts in some countries issue rulings without indicating what the votes of the justices were, or publishing dissenting opinions. The U.S. Supreme Court by contrast identifies how the justices voted and allows the majority to explain its rationale and the dissenters to explain their objections. As social thinking and public opinion change over time, however, these dissenting opinions may eventually prevail.

In the late nineteenth century, many southern states passed laws, called Jim Crow laws, requiring racial segregation in schools, transportation, and other public accommodations. African Americans sued on the grounds that these Jim Crow laws violated their civil rights under the Fourteenth Amendment’s guarantee of equal protection of the laws. When the African American Homer A. Plessy refused to leave the first-class compartment of a train in Louisiana, for which he had purchased a ticket, he was arrested and convicted of violating state law. The case went to the Supreme Court, which, in *Plessy v. Ferguson* (1896), decided that racial separation was constitutional so long as both races were treated equally, this became known as the doctrine of separate but equal. Justice John Marshall Harlan vigorously dissented from that opinion, arguing that “the thin disguise of ‘equal’ accommodations . . . will not mislead anyone, nor atone for the wrong this day done.”

Born in Kentucky, Justice Harlan had fought in the Union Army during the Civil War. President Rutherford B. Hayes, who had served as a Union general nominated him to the Supreme Court in 1877. A strong advocate of civil rights and civil liberties, Justice Harlan consistently argued in favor of a color-blind Constitution that would equally protect all citizens, black and white, and argued that Congress had the authority under the Fourteenth Amendment to protect the rights of African Americans. Although Justice Harlan was far out of step with his times, his arguments won favor with later generations. After the Supreme Court allowed segregation in general to continue for another half century, it voted unanimously in the case of *Brown v. Board of Education of Topeka, Kansas* (1954) to strike down segregation in public schools. Regardless of whether equal facilities were provided, the court now decided, segregation was inherently unequal because it created feelings of inferiority in those who were being segregated. Although he had died forty years earlier, Justice Harlan’s reasoning had finally prevailed.

beliefs and activities, particularly any involvement with the Communist Party. The Supreme Court eventually concluded that these practices had overstepped constitutional bounds. In *Watkins v. United States* (1957) the court insisted that an investigative committee had to demonstrate a legislative purpose to justify its probing. The Supreme Court further ruled that the Bill of Rights applied fully to all witnesses before Congress.

The civil rights movement for racial equality also pressed the various branches of the federal government to readjust their thinking. Since its 1896 ruling in *Plessy v. Ferguson*, the Supreme Court had tolerated racial segregation as long as all races were treated equally. In the 1954 case of *Brown v. Board of Education*, the Supreme Court reversed itself and found that segregated schools violated the constitutional ideal of equal treatment. Concluding that “separate but equal” facilities had been, in reality, grievously unequal, the Court ordered school integration “with all deliberate speed.”

Some southern states resisted this order, and when the governor of Arkansas refused to protect African American students trying to attend a previously all-white high school, President Dwight D. Eisenhower sent in the National Guard to ensure the students’ safety. When the state of Arkansas asserted that it had not been a party to the *Brown v. Board of Education* case and therefore was not bound by the Court’s decision, the Supreme Court responded unanimously. In the 1958 case of *Cooper v. Aaron* the Court ruled that it would tolerate no resistance to its judicial authority.

While the courts struck down segregation in schools, Congress enacted legislation to require racial integration in all forms of public transportation and accommodation. The legislation passed the House of Representatives but encountered a filibuster in the Senate. Opponents of the legislation conducted the longest filibuster in the Senate’s history, from March until June 1964, until a coalition of Democrats and Republicans gained enough votes to invoke cloture and shut off the debate. The Civil Rights Act of 1964 then won speedy passage.

The Supreme Court’s reversal of its stand on segregation marked the beginning of a dramatic shift in the Court’s outlook. Chief Justice Earl Warren’s dramatic rulings struck down traditionally sanctioned behavior as unconstitutional. Warren believed that the Supreme Court itself had contributed to national problems by not taking bolder action in the past. He pointed out that for most of the twentieth century, the population of the United States had been shifting from rural to urban areas, but state legislatures had not been redistricted to reflect these changes, and the courts had not objected. “Because of its timidity, it made change hopeless,” Warren wrote in his memoirs about the Supreme Court before his tenure. “It refused to enter, or to permit lower federal courts to consider, any litigation [or lawsuits] seeking to remedy unequal apportionment.” The justices had not intervened because they saw reapportionment as a political question best handled by the politicians. But the Warren Court, in the 1962 case of *Baker v. Carr* insisted that all legislatures must be reapportioned to guarantee one person, one vote.

Justice William J. Brennan Jr., who served on the Supreme Court from 1956 to 1990, promoted the idea of a “living Constitution,” in which legislators and federal judges adapted the Constitution “to cope with current problems and current needs.” For example, Justice Brennan believed that even though the death penalty had existed when the Constitution was adopted, it had become “cruel

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“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. . . . The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”

—Chief Justice John Marshall,
Marbury v. Madison (1803)

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and unusual punishment” by modern values and could therefore be declared unconstitutional. Justice Brennan’s arguments had a profound impact on the way the Court dealt with such issues as voting rights, free speech, and the separation of church and state. A liberal in outlook, Brennan believed that the Court should promote broader notions of opportunity, liberty, equality, and human dignity.

Conservatives countered this notion of a “living Constitution” with an insistence that the courts should limit their rulings to the original intent of the framers of the Constitution. Justice Antonin Scalia, who joined the Supreme Court in 1986, called himself an “originalist.” At a conference in 2005 he declared that “the Constitution is not a living organism, for Pete’s sake; it’s a legal document and like all legal documents, it says some things and it doesn’t say others.” He explained that he did not mean that the Constitution has to be interpreted strictly, but it needs to be interpreted reasonably. “I do believe you give the text the meaning it had when it was adopted.” Justice Scalia dissented in the case of *Roper v. Simmons* (2005), which banned the execution of convicted criminals less than eighteen years old. He reasoned that because minors could be executed in 1787, it was still constitutional. He used the same reason for disagreeing with *Roe v. Wade* (1972), which permitted abortions, arguing that abortion was largely illegal when the Fourteenth Amendment was first adopted.

Those who argue for “original intent,” say that the courts should leave social change to elected officials who can pass laws or introduce constitutional amendments to bring about such changes. President George W. Bush pledged to appoint judges who would not try to “legislate from the bench,” that is, who would apply the law as written and leave policy decisions to the politicians. By this, Bush meant that he intended to appoint neutral, apolitical, but ideologically conservative judges. Yet, those who spoke for a “living Constitution” pointed out that conservative justices have been just as likely to overturn legislation as liberals, although for different reasons.

The debate between “original intent” and a “living Constitution” has taken place essentially between those who view the Constitution as a limit on the powers of government and those who believe that the Constitution is flexible enough to cover modern contingencies without frequent amendment. Senator Barry Goldwater insisted in his 1960 book *The Conscience of a Conservative* that “the Constitution is what its authors intended it to be and said it was—not what the Supreme Court says it is.” Justice Brennan responded that the Constitution should not be judged in terms of “a world dead and gone,” but that judges should apply the Constitution’s basic principles to modern problems. Justice Thurgood Marshall, the first African American to serve on the Supreme Court, from 1967 to 1991, commented that he did not accept the notion that the Philadelphia convention had forever “fixed” the Constitution. Instead he believed that the compromise with slavery had made a government that was “defective from the start” and it took a civil war, a civil rights movement, and several constitutional amendments to develop a federal system that respected the individual rights and freedoms of all its citizens. Yet, Marshall appreciated the progress that the United States had made over the past two centuries, and at the time of the Constitutional bicentennial in 1987 he said that he would “celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights, and other amendments protecting individual freedoms and human rights.”

This debate has taken place against the backdrop of major clashes between the branches of the federal government. The Vietnam War and the Watergate

scandal helped further refine interpretations of the Constitution. In 1971, the Supreme Court upheld the right of the New York Times and other newspapers to publish classified government documents on how the United States had gone to war in Vietnam, despite the government's protests that the "Pentagon Papers" jeopardized national security.

After five men were arrested while breaking into the Democratic National Committee offices in the Watergate building to plant eavesdropping devices in 1972, evidence mounted that implicated members of President Richard Nixon's administration. The Senate appointed a special committee to investigate these allegations, and during its hearings the committee learned that President Nixon had been secretly taping his conversations in the White House. The committee subpoenaed the tapes, but Nixon resisted, citing executive privilege. The case went to the Supreme Court, where eight of the nine justices, including those he had appointed, ruled that executive privilege did not cover evidence in a criminal case. (The decision was still unanimous as Justice William H. Rehnquist recused himself as a former official in the Nixon Justice Department.) The forced release of the tapes provided evidence that President Nixon had participated in a cover-up of the crime, forcing his resignation. The outcome of the Watergate scandal demonstrated that no one, not even the President of the United States, is above the law.

Following Watergate, Congress reasserted much of the authority it had lost to the Presidency over past decades. Sparring between the President and Congress grew more intense, particularly over the appointment of judges. In 1987, the Senate rejected President Ronald Reagan's nomination of Robert Bork to the Supreme Court. Although the former law professor and judge had extensive experience, liberal Democrats, who held the majority in the Senate, complained that his conservative ideology was beyond the mainstream. Bork's defeat was

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"It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text."

—Justice Joseph Story,
Commentaries on the Constitution of the United States, (1833)

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THE FIGHT OVER THE WATERGATE TAPES

A mighty struggle took place between all three branches of the government over the release of President Richard M. Nixon's secret tape-recordings. This struggle tested the separation of powers, with the Congress, a special prosecutor, and the President disagreeing over the release of the tapes and the Supreme Court deciding among them.

In 1973, a special committee of the Senate was investigating irregularities in the previous year's Presidential campaign. Men associated with the Committee to Reelect the President had been arrested while breaking into Democratic National Committee headquarters at the Watergate building in Washington, D.C., in order to plant listening devices. The Senate Watergate Committee called various White House officials to testify, and one of them admitted that the President had secretly tape-recorded his own conversations in the Oval Office. The Committee immediately sought access to the tapes, but President Nixon refused to provide them on the grounds that the information they contained was covered by "executive privilege." The President argued that in order for the officers of the executive branch to make internal decisions and weigh policy choices they are entitled to keep internal discussions private and should not have to provide them to Congress or the courts. Although President Nixon later agreed to provide edited transcripts of selective tapes, he effectively stonewalled the committee's request.

At the same time, Archibald Cox, a special prosecutor looking into the Watergate break-in sought access to the tapes. President Nixon not only refused to comply but also fired Cox. Public opinion was so outraged over his action that Nixon eventually bowed to public pressure and appointed another special prosecutor, Leon Jaworski. Jaworski also demanded the tapes, taking his case to the U.S. Supreme Court. In *Nixon v. United States* (1974), the Court ruled 8-to-0 that executive privilege did not cover evidence needed for criminal prosecution. (Justice William Rehnquist did not participate because he had been previously involved in the case while he served in the Justice Department.) The Court ordered the President to turn the requested tape recordings over to the special prosecutor, which he did. One of these recordings, known as the "smoking gun," gave evidence that the President had been personally involved in a coverup of the Watergate burglary. With that revelation, Congress moved to impeach the President, who chose to resign from office instead.

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*“Our Constitution was
not written in the sands to be
washed away by each wave
of new judges blown in by
each successive political wind.”*

—Justice Hugo L. Black,
dissenting opinion,
Turner v. United States (1970)



followed by accusations on both sides that political “litmus tests” were being applied to nominees, whose nominations and confirmations often depended on how they stood on the most controversial issues of the day, rather than their legal qualifications.

Changes in the political parties created further tensions. For most of the twentieth century, both the Democratic and Republican Parties had been internally divided between liberals, moderates, and conservatives. As a result, there were few straight party-line votes in Congress, as bipartisan coalitions of conservatives voted against similarly bipartisan coalitions of liberals. By the 1990s, the two parties had grown far more internally cohesive. In Congress, the party members stuck together until almost every vote became a party-line vote, with the balance occasionally tipped one way or the other by a small number of moderates who forged compromises.

In 1994, Republicans won control of both houses of Congress and positioned themselves against the Democratic President Bill Clinton. A dispute between the President and Congress over federal funding in 1995 led to a brief shut-down of government agencies. The Senate also opposed many of Clinton’s more liberal judicial nominees and appointments to key governmental positions. When a special prosecutor brought charges that Clinton had lied to a grand jury about his inappropriate relationship with a White House intern almost all the Republicans in the House of Representatives voted to impeach the President, while almost all the Democrats voted against impeachment. The Senate held a trial, where the vote fell far short of the two-thirds needed to convict the President and remove him from office.

During the Presidency of George W. Bush, a conservative Republican, liberal Democrats filibustered to block the confirmation of a number of his judicial nominees. Republicans in the Senate protested that the Constitution required only a majority vote for nominations and that all nominees deserved an “up or down” vote, that is, a vote in favor or against without obstruction. The intensity of the struggle testified to how seriously the executive and legislative branches take lifetime appointments to the independent judiciary, which has the final word in interpreting our Constitution.

Source: Justice Learning's Guide to the Constitution
http://www.justicelearning.org/justice_timeline/articles.aspx?id=8

Article III

Section 1

Section 1 - The Text

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 Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 1 - The Meaning

Article III establishes the federal court system. The first section creates the U.S. Supreme Court as the federal system's highest court. The Supreme Court has final say on matters of federal law that come before it. Today, the U.S. Supreme Court has nine justices who are appointed by the president with the approval of the Senate.

Congress has the power to create and organize the lower federal courts. Today, there are lower federal courts in every state. A case is filed and tried in the federal district courts and in some specialty courts, such as admiralty or bankruptcy courts. The trial courts look at the facts of the case and decide guilt or innocence or which side is right in an argument or dispute. The courts of appeal hear appeals of the losing parties. The appellate courts look at whether the trial was fair, whether the process followed the rules, and whether the law was correctly applied.

To ensure that they are insulated from political influence, federal judges are appointed for life as long as they are on "good behavior." This generally means for as long as they want the job or until they are impeached for committing a serious crime. In addition, the Constitution specifies that Congress cannot cut a judge's pay. This prevents members of Congress from punishing a judge when they do not like one of his or her decisions.

Judicial Independence

The judicial component of government is independent in order to insulate its members from punitive or coercive actions by the legislative and executive departments of the government. If the judiciary is independent, then it can make fair decisions that uphold the rule of law, an essential element of any genuine constitutional democracy.

The U.S. Constitution, for example, protects judicial independence in two ways. First, Article 3 says that federal judges may hold their positions “during good Behavior.” In effect, they have lifetime appointments as long as they satisfy the ethical and legal standards of their judicial office. Second, Article 3 says that the legislative and executive branches may not combine to punish judges by decreasing payments for their services. The constitutions of some democratic countries provide appointments to the judges for a specific period of time, but invariably they protect their independence of action during their terms of office.

Alexander Hamilton, a framer of the U.S. Constitution, offered justification for an independent judiciary in the 78th paper of *The Federalist*. He wrote, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” Hamilton claimed that only an independent judicial branch of government would be able to impartially check an excessive exercise of power by the other branches of government. Thus, the judiciary guards the rule of law in a constitutional democracy.

SEE ALSO Constitutionalism; Government, Constitutional and Limited; Judicial Review; Rule of Law; Separation of Powers

Source: American Bar Association
<http://www.abanet.org/judind/downloads/jidef4-9-02.pdf>

JUDICIAL INDEPENDENCE SELECTED DEFINITIONS AND WRITINGS

“Judicial Independence – Freedom from direction, control, or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government.”

-Excerpt from: *Legal Words Dictionary*, Reed International Books.

<http://www.butterworths.com.au/legalwords/html/000801.htm>

“A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that receives an adequate appropriation from Congress; and that is not compromised by politically inspired attempts to undermine its impartiality.... Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security.”

- Excerpt from: *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence*. Chicago: American Bar Association, 1997 (pp. ii-iii).

“Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures.”

-Excerpt from: *Brennan Center for Justice Resources: Questions and Answers about Judicial Independence*.

http://www.brennancenter.org/resources/resources_jiqanda.html 2001.

“Judicial independence is the freedom that a judge should have to decide a case in front of her based on the facts and law, free from outside pressures or special interests.”

-Excerpt from: *League of Women Voters: Creating A Just Society: Judicial Independence*. <http://www.lwv.org/join/judicial/> 2001.

“Judicial independence is widely considered to be a foundation for the rule of law. . . . [M]ost agree that a truly independent judiciary has three characteristics. First, it is impartial. Judicial decisions are not influenced by a judge’s personal interest in the outcome of the case. . . . Second, judicial decisions, once rendered, are respected. . . . The third characteristic of judicial independence is that the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge’s decision.”

-Excerpt from: *The World Bank Group – Legal Institutions of the Market Economy*. Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs. <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> 2001.

“Judicial independence is a concept that expresses the ideal state of the judicial branch of government. The concept encompasses the idea that individual judges and the judicial branch as a whole should work free of ideological influence.”

-Excerpt from: American Judicature Society: Center for Judicial Independence. *What is Judicial Independence?* <http://www.ajs.org/cjiJI.html> 2001.

“The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without and restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

-Excerpt from: United Nations Office of the High Commissioner for Human Rights. *Basic Principles on the Independence of the Judiciary*. (Endorsed by UN General Assembly 1985.) http://www.unhchr.ch/html/menu3/b/h_comp50.htm

“Judicial independence refers to the insulation of the judiciary from the influence of other political institutions, interest groups, and the general public.”

-Excerpt from: G. Alan Tarr. “Judicial Independence and State Judiciaries,” in *Judicial Independence: Essays, Bibliography, and Discussion Guide* (Teaching Resource Bulletin #6). Chicago: American Bar Association Division for Public Education, 1999.

“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”

-Excerpt from: James Madison. *The Federalist No. 78*, at 469.

“We must keep in mind that judicial independence is a means toward a strong judicial institution. The strong judicial institution is a means toward securing the basic goals of people: human liberty and a reasonable level of prosperity.”

-Excerpt from: Honorable Stephen G. Breyer. “Comment: Liberty, Prosperity, and a Strong Judicial Institution,” in *Judicial Independence and Accountability, Law and Contemporary Problems*, Volume 61, Number 3 (Summer 1998).

“Judicial Independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proven superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.”

Bruce Fein and Burt Neuborne, “Why Should We Care About Independent and Accountable Judges,” *Judicature*, Volume 84, No. 2 (Sept-Oct 2000).

“The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.”

-Excerpt from: Honorable Anthony M. Kennedy. Address to American Bar Association symposium, *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, held December 4-5, 1998, Philadelphia, Pennsylvania.

“The independence of all those who try causes between man and man, and between man and his government, can be maintained only by the tenure of their office. I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.”

- Excerpt from: John Marshall, address to the Virginia State Convention of 1829-30. Proceedings and Debates of the Virginia State Convention of 1829-30 at 616 (1830).

“Chief Justice Rehnquist has stated that the independent judiciary is one of the ‘crown jewels’ of the nation’s system of government. Certainly, judicial independence is an essential ingredient of the protection of individual liberty and equality in our constitutional system. Moreover, the independent judiciary checks the legislative and executive branches of the federal government, thereby helping to maintain our constitutional commitments both to separation of powers at the national level and to federalism in nation-state relations.”

-Excerpt from: “Report of the Task Force on Federal Judicial Selection,” in *Uncertain Justice: Politics and America’s Courts*. Reports of the Task Forces of Citizens for Independent Courts. New York: The Century Foundation Press, 2000 (p. 13).

“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”

-Mistretta v. United States, 488 U.S. 361, 407 (1989)

AT LAW

The Threat to Judicial Independence

A ballot initiative is the latest attempt to intimidate judges.

BY SANDRA DAY O'CONNOR

Sunday, October 1, 2006 12:01 a.m.

In November, South Dakotans will vote on a state constitutional amendment being advocated by a national group called "JAIL 4 Judges." If the amendment passes, it would eliminate judicial immunity and enable a special grand jury to censure judges for their official legal determinations. Although the amendment's supporters claim they seek a "judicial accountability initiative law" (JAIL), they aspire to something far more sinister--judicial intimidation. Indeed, the national Web site of JAIL 4 Judges boasts with striking candor that the organization "has that intimidation factor flowing through the judicial system."

It is tempting to dismiss this proposed amendment as merely an isolated bout of anti-judge angst. But while the JAIL 4 Judges initiative is unusually venomous, it is far from alone in expressing skepticism of the judiciary. In addition to South Dakota, this election cycle has witnessed efforts in at least three other states that are designed to rein in judges who have supposedly "run amok."

Not to be completely outdone, Congress also has engaged in recent efforts to police the judiciary. Seeking to constrain the legal sources that are available to judges, some members of Congress have advocated measures that would forbid judges from citing foreign law when they are interpreting the Constitution. In addition, bills have been introduced in both houses of Congress supporting the creation of an inspector general to investigate and monitor the federal bench. Finally, the House of Representatives passed legislation over the summer that would prohibit the Supreme Court from considering whether the Pledge of Allegiance's inclusion of the words "under God" violates the First Amendment.



Directing anger toward judges enjoys a long--if not exactly venerable--tradition in our nation. President Thomas Jefferson, for instance, was a particularly spirited antagonist of judges appointed by the Federalists. Moreover, President Franklin D. Roosevelt sought to increase the number of Supreme Court justices because the court invalidated several pieces of New Deal legislation. And I can distinctly remember seeing lawns and highways across the country that featured signs demanding the impeachment of Chief Justice Earl Warren.



But while scorn for certain judges is not an altogether new phenomenon, the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history. The ubiquitous "activist judges" who "legislate from the bench" have become central villains on today's

domestic political landscape. Elected officials routinely score cheap points by railing against the "elitist judges," who are purported to be of touch with ordinary citizens and their values. Several jeremiads are published every year warning of the dangers of judicial supremacy and judicial tyranny. Though these attacks generally emit more heat than light, using judges as punching bags presents a grave threat to the independent judiciary.

Troublingly, attacks on the judiciary are now being launched by judges themselves. Earlier this year, Alabama Supreme Court Justice Tom Parker excoriated his colleagues for faithfully applying the Supreme Court's precedent in *Roper v. Simmons*, which prohibited imposition of the death penalty for crimes committed by minors. Offering a bold reinterpretation of the Constitution's supremacy clause, Justice Parker advised state judges to avoid following Supreme Court opinions "simply because they are 'precedents.'" Justice Parker supported his criticism of "activist federal judges" by asserting that "the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state."

It should come as no surprise that the increased scapegoating of the judiciary has coincided with an increase in anger directed toward individual judges. In the last decade, threats and inappropriate communications directed toward the federal bench have more than quadrupled. According to the U.S. Marshals Service, complaints about such behavior were being logged at a record-setting pace this year. And while it is encouraging that Congress recently set aside funds for federal judges to have home security systems installed, it is deeply dispiriting that the demand for the systems among the judges was so high. Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit was quite right when he observed, "Judges must be free to make judicial decisions without the fear of physical harm to themselves or to members of their families."

Given the escalating criticism that is leveled at judges, it seems appropriate to bear in mind the reasons that the Framers initially established an independent judicial branch. In Federalist No. 78, Alexander Hamilton explained why, in our constitutional system, "the complete independence of the courts of justice is peculiarly essential." Hamilton contended that the judiciary needed to be distinct from the legislative and executive branches because that was the best way to guarantee "a steady, upright, and impartial administration of the laws." Hamilton also believed that judicial independence was necessary in order to safeguard against "injury of the private rights of particular classes of citizens, by unjust and partial laws." It is well worth remembering that, far more often than not in modern times, the judiciary has admirably performed these two vital tasks: checking the other two branches and protecting minority rights.



An independent judiciary does not mean, of course, that it is somehow improper to criticize judicial decisions. To the contrary, it is a healthy sign for democracy that the public is engaged with the workings of the judicial system. Judges can--and do--sometimes render erroneous decisions, but that is why appeals are allowed to higher courts. Moreover, judges can be--and are--subjected to discipline for legitimate reasons. Members of the judiciary cannot sincerely believe that they should be regarded as above the very laws that they are charged with interpreting. Ours is, after all, a nation of laws, not men--or even women.

Nonetheless, we must be more vigilant in making sure that criticism does not cross over into intimidation. Judges and lawyers certainly play essential roles in opposing attacks on the judiciary. Indeed, last week, I--along with Justice Stephen Breyer--co-chaired a conference on judicial independence at Georgetown University Law Center. But the legal community needs help from other sectors of society to ensure that the current mood of cynicism does not end up compromising the rule of law. This includes members of the business community. Adam Smith, writing in "The Wealth of Nations," well understood the importance of an independent judiciary: "Upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security." Without judicial independence, Smith warned, "it is scarce[ly] possible that

justice should not frequently be sacrificed to what is vulgarly called politics."

More broadly, of course, all of society has a keen interest in countering threats to judicial independence. Judges who are afraid--whether they fear for their jobs or fear for their lives--cannot adequately fulfill the considerable responsibilities that the position demands. In these challenging and difficult times, we must recommit ourselves to maintaining the independent judiciary that the Framers sought to establish.

Justice O'Connor is a retired associate justice of the U.S. Supreme Court.

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washingtonpost.com

The Attack Ads Will Come to Order

By Ruth Marcus
Wednesday, May 30, 2007; A13

Sue Bell Cobb's first campaign, in 1982, cost \$5,000. Last year's price tag was \$2.6 million -- and Cobb, a Democrat, wasn't the big spender. Her opponent, Republican Drayton Nabers, raised nearly \$5 million for the primary and general elections.

"A conservative leader, fighting for our values. A family man and the author of a book on the importance of biblical character," one of Nabers's television ads proclaimed. Not all the commercials were so uplifting. Nabers's primary challenger labeled him soft on crime in an ad that featured an ominous photo of a hand holding a knife.

The general election was equally slashing: Nabers's [ads](#) accused Cobb of being "bankrolled by liberal personal injury trial lawyers and casino interests." Cobb, who won, [said](#) that Nabers had been "caught taking tens of thousands from PACs controlled by Exxon's lobbyists."

Modern-day politics as usual? Sadly, yes -- except that the campaign was for chief justice of the Alabama Supreme Court. And while the race was particularly noisy -- almost 18,000 television ads, more than in the three previous elections combined -- it wasn't particularly surprising. Judicial elections have taken on the trappings of ordinary political campaigns, complete with consultants, slick mailings and big media buys. A 2006 Georgia Supreme Court race featured robo-calls by former attorney general John Ashcroft.

Things are getting worse by the election cycle. Television ads ran in 10 of 11 states with contested Supreme Court races, compared with four of 18 states in 2000, according to a [report](#) by Justice at Stake, the Brennan Center for Justice and the National Institute on Money in State Politics.

Time was that judicial candidates left the really nasty stuff to outside groups and political parties. In 2006, judicial candidates ran 60 percent of the negative ads, compared with 10 percent two years earlier. At a conference last week by [FactCheck.org](#), campaign consultants reported with satisfaction that their once diffident clients had realized they couldn't hide behind their robes.

"Elections for the judiciary have become like all other elections," said Allan Crow, who helped Georgia Supreme Court Justice Carol Hunstein win reelection. "You either allow the opposition to win by running their negative ads or you fight back."

"Negative" is too pallid to capture the nasty tone of some ads. They pluck out and twist individual rulings, some dictated by precedent, to smear candidates. In the Kentucky Supreme Court race, one candidate [said](#) Circuit Judge Bill Cunningham "tried to make six rapists eligible for parole. One had been out on parole for only 12 hours when he raped a 14-year-old and made her mother watch." The ad made it appear that Cunningham was responsible for the rape, when that crime had occurred years

earlier. This is Willie Horton Goes to Court.

Not that the positive spots are especially comforting. They trot out qualities that ought to be irrelevant -- does it matter that Cobb [plays piano](#) for her church? -- and make assertions problematic for those pledged to not prejudge cases. "I'm pro-life," Nabers assured Alabama voters. "Abortion on demand is a tragedy, and the liberal judicial opinions that support it are wrong."

You might hope that spending by business groups and trial lawyers would at least cancel each other out. But business groups, particularly the U.S. Chamber of Commerce and the National Association of Manufacturers, have become outsize players in judicial campaigns. In 2006, business interests contributed 44 percent of the money raised by state Supreme Court candidates.

The paradox of judicial elections is that voters simultaneously demand this system and distrust it. The Annenberg Public Policy Center [found](#) that nearly two in three preferred to elect judges rather than have a merit system in which governors choose from a list developed by a nonpartisan committee. Yet seven in 10 believed that the need to raise campaign funds would affect a judge's rulings. Even without the impact of campaign cash, it's easy to see how judges facing reelection might think twice before issuing a decision that could be fodder for a 30-second spot.

There are some hopeful signs amid the sludge. Judicial candidates raising more money won 68 percent of the time in 2006, down from 85 percent in 2004. Last month, New Mexico followed North Carolina's lead in adopting public financing for judicial campaigns.

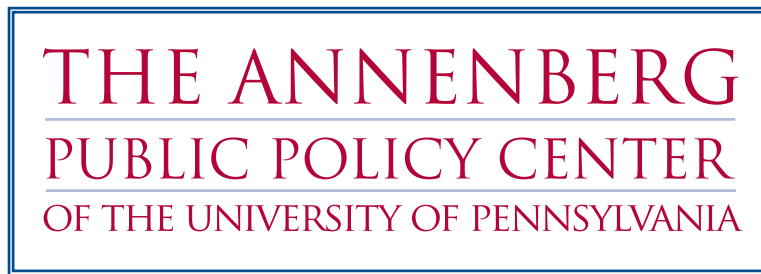
Yet the judicial arms race is creeping further down the ballot. Illinois last year saw a \$3.3 million campaign for a seat on the state's intermediate appeals court, and a \$500,000 trial court race. "Judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead

of the law and the Constitution," warns former U.S. Supreme Court justice Sandra Day O'Connor.

Prizefight is right -- except in these brawls, the legal system ends up with the black eye.

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<http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=13>



AMERICANS TRUST COURTS BUT ALSO BELIEVE THEM BIASED, SURVEYS FIND

Many Americans Lack Basic Understanding of the Judiciary

Washington (Sept. 28, 2006) – Americans consistently rank the Supreme Court as the most trusted branch of government and hold a similar level of trust in state courts. But many also believe that the nation’s courts favor the wealthy and politically connected, that judges are motivated by political and personal biases, and are influenced by campaign fundraising.

The often conflicting views of the nation’s judiciary were measured in two national surveys released here today by Kathleen Hall Jamieson, director of the Annenberg Public Policy Center of the University of Pennsylvania.

Jamieson described the surveys of what the public knows and thinks about the U.S. courts at a two-day conference at the Georgetown University Law Center. Supreme Court Justices Sandra Day O’Connor and Stephen Breyer are co-chairing the conference, “Fair and Independent Courts: A Conference on the State of the Judiciary.” Attending are leaders from business, the media, government and the non-profit sector.

“While public trust in the courts in the U.S. remains high,” Jamieson told the conference, “public doubts that the courts are actually impartial, public concern about the role of money in the election of state judges, and public ignorance about basic constitutional functions served by the Supreme Court are worrisome.”

The surveys, which polled random national samples, were conducted in the summers of 2005 and 2006 by Princeton Survey Research Associates International for the Annenberg Public Policy Center. (See Appendix for survey details. For survey questions, visit www.annenbergpublicpolicycenter.org)

Many Americans are ignorant of basic civics. When asked if they knew any of the three branches of government, two-thirds (68%) of Americans said yes. One-third could correctly name all three; one-third could not name any.

They also don't understand checks and balances, Jamieson said. She cited as an example a finding from the 2006 poll: Over one-third (38 percent) of adults think it is okay for the president to ignore a Supreme Court ruling if the president believes the ruling will prevent him from protecting the country against terrorist attacks.

“The big surprise in this survey,” said Jamieson, “is the minimal level of support for the notion that in a clash between the president and the Supreme Court, the president should accede to the Court.” Only fifty eight percent (58%) believes that if the president disagrees with a Supreme Court ruling, he should follow the Supreme Court's ruling rather than do what he thinks is in the country's best interest. A bare majority (53%) holds that a president must follow a Supreme Court ruling regardless of circumstances and even if he believes that the ruling will prevent him from protecting the country from terrorist attack.

Other findings from the surveys:

- 22% of the public believes the Supreme Court cannot declare an act of Congress unconstitutional. 23% doesn't know. 55% says the Supreme Court can declare an act of Congress unconstitutional.
- 35% thinks that it was the intention of the founding fathers for each branch of government to have a lot of power but for the president to have the final say; 57% says the founders intended that the president, Congress, and the Supreme Court have different but equal powers.
- Less than half of Americans (47%) believe that a 5-4 decision by the Supreme Court carries the same legal weight as a 9-0 ruling. When the court divides so closely, one in four Americans (23%) believes the decision is referred to Congress for resolution; 16% think it needs to be sent back to the lower courts.
- 53% of the public says that Supreme Court Justices usually give written reasons for their decisions, while nearly as many (47%) say the Justices usually do not give written reasons (18%) or they don't know (29%).
- Nearly two-thirds of Americans (63%) don't know if their state constitution protects judges from the threat of being removed from office if the judge makes a ruling that the governor or legislature disagrees with.
- Nearly half (48%) say it is essential or very important to be able to impeach or remove a judge from office if the judge makes an unpopular ruling.

“The notion that judges should be impeached for making unpopular rulings is alarming,” noted Jamieson.

Seventy-five percent of the public agrees or strongly agrees that the Supreme Court can usually be trusted to make decisions that are right for the country as a whole. Nearly two-thirds (64%) of those surveyed said they trusted state courts to make rulings that are right for the state as a whole.

Despite the high regard for the judiciary, Americans express a degree of cynicism about integrity, according to Jamieson. Three-quarters of the public believes a judge's ruling is influenced by his or her personal political views to a great or moderate extent. Nearly three in 10 (29%) say it is very or somewhat appropriate for a judge's ruling to be influenced by his or her personal political views. And nearly two out of three (62%) say that courts favor the wealthy or those with political influence.

Firsthand experience with the court system does little to lessen the public's skepticism about impartiality. Americans with a high level of court experience (43%) as a result of jury service within the past five years, or of having a family member in court in the past five years, are much more likely than those with no (32%) or slight exposure (31%) to say they strongly agree that the courts favor the wealthy or the connected.

By a two-thirds (65%) majority, Americans favor electing their state judges despite acknowledging the fact that campaign fundraising and political biases may taint the impartiality of those seeking and holding office.

Many Americans believe a judge's professional ambitions color decisions. Three-fourths say that a judge's desire to be promoted to a higher court would affect his or her ability to be impartial or fair. And nearly seven out of ten (67%) say fear of not being reappointed or reelected would affect a judge's ruling.

APPENDIX

NOTES about the surveys:

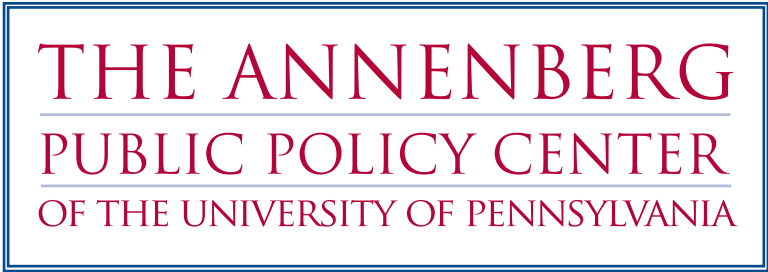
*"Annenberg Supreme Court Survey: Lawyers and the Public, 2005"**

Conducted by Princeton Survey Research Associates International for the Annenberg Public Policy Center. The survey polled 1,500 adults aged 18 years and older and was conducted between March 16 and April 18, 2005. The margin of error = +/- 3 percentage points.

*"Judicial Independence" Final Report September 2006***

Conducted by Princeton Survey Research Associates International for the Annenberg Public Policy Center. The survey polled 1,002 adults 18 and over between August 3 and 16, 2006; margin of error = +/-3 percentage points.

Visit Annenberg Public Policy Center: www.annenbergpublicpolicycenter.org.



**Fair and Independent Courts: A Conference on the State of the
Judiciary, Georgetown University Law Center, Washington, D.C.
September 28-29, 2006**

Summary of findings:

“Public Understanding, Media, and Education”

Kathleen Hall Jamieson, Professor, Annenberg School for Communication,
University of Pennsylvania and Director, Annenberg Public Policy Center

Summary of Survey Results/ The Public and the Courts

Public Knowledge:

How knowledgeable is the American public about its government?

- *Only one-third can name all three branches of government; one-third can't name any.*¹

How knowledgeable is the American public about the courts?

- *22% believes the Supreme Court cannot declare an act of Congress unconstitutional. 23% doesn't know. 55% says the US Supreme Court can declare an act of Congress unconstitutional.*²
- *35% thinks that it was the intention of the founding fathers to have each branch have a lot of power but the president have the final say; 57% says the founders*

¹ Annenberg Judicial Independence Survey, September 2006 (2006 Survey)

² Annenberg Supreme Court Survey: Lawyers and the Public, June 2005 (2005 Survey)

*intended that the president, Congress, and the Supreme Court have different but equal powers.*³

- *Less than half (47%) believes that a 5-4 decision by the Supreme Court carries the same legal weight as a 9-0 ruling. When the court divides so closely, one in four Americans (23%) believes the decision is referred to Congress for resolution; 16% thinks it needs to be sent back to the lower courts.*⁴
- *53% of Americans say that Supreme Court Justices usually give written reasons for their decisions, while nearly as many (47%) say the Justices do not usually give written reasons (18%) or don't know (29%).*⁵
- *63% of the public says it doesn't know if its state constitution protects judges from the threat of being removed from the bench if the judge makes a ruling that the governor or legislature disagrees with.*⁶

Public Trust:

How does the American public regard the nation's courts?

- *Americans consistently rank the Supreme Court as the most trusted branch of government. 64% of the public says it trusts the Supreme Court a great deal or a fair amount.*⁷ (That represents a decline for the court from 75% in 2005.)⁸
- *Trust in state courts is virtually the same (64%).*⁹
- *75% agrees or strongly agrees that the Supreme Court can usually be trusted to make decisions that are right for the country as a whole.*¹⁰
- *Trust increases with education and decreases with age; there is no difference by gender.*¹¹
- *75% of the public disagrees or strongly disagrees that "If the Supreme Court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the Court altogether." 21% agrees or strongly agrees.*¹²

³ 2005 Survey

⁴ 2005 Survey

⁵ 2006 Survey

⁶ 2006 Survey

⁷ 2006 Survey

⁸ 2005 Survey

⁹ 2006 Survey

¹⁰ 2005 Survey

¹¹ 2006 Survey

¹² 2005 Survey

- *Nearly half (48%) says it is essential or very important to be able to impeach or remove a judge from office if the judge makes an unpopular ruling.*¹³

Perceptions of the Judiciary:

How does the public perceive the impartiality of the judiciary?

- *75% says a judge's ruling is influenced by his or her personal political views to a great or moderate extent.*¹⁴
- *29% says it is very or somewhat appropriate for a judge's ruling to be influenced by his or her personal political views.*¹⁵
- *Among Americans who say they have had a high level of exposure to the court system – through jury service or a personal or family member with a matter before the courts in the past five years – 41% believes political views influence a judge's ruling.*¹⁶
- *62% of the public says that courts favor the wealthy or those with political influence.*¹⁷
- *Six in 10 Americans (62%) say the courts in their state are legislating from the bench rather than interpreting the law.*¹⁸
- *75% of the public says that a judge's desire to be promoted to a higher court would affect his or her ability to be impartial and fair.*¹⁹
- *67% thinks that fear of not being reappointed or reelected would affect a judge's ruling.*²⁰

What shapes public perceptions of judges and the courts?

Personal contact:

- *Americans who have a high level of court experience (43%) either as a result of jury service within the past five years, or of having a family member in court in*

¹³ 2006 Survey

¹⁴ 2006 Survey

¹⁵ 2006 Survey

¹⁶ 2006 Survey

¹⁷ 2006 Survey

¹⁸ 2006 Survey

¹⁹ 2006 Survey

²⁰ 2006 Survey

*the past five years, are much more likely than those with no (32%) or slight exposure (31%) to say they strongly agree that the courts favor the wealthy or the connected.*²¹

Information sources:

- *Americans whose major source of information is newspapers follow the Supreme Court more closely and are more confident about their understanding of the court than those who rely upon television for their news. Newspaper readers also see the court's main mission as interpreting the constitution to a greater degree (65%) than those who obtain their news from television (41%).*²²

Education:

- *Education also is a predictor of perceptions. 40% of college graduates regard the Supreme Court's decisions as fair and objective. Among those with less education, only 30 percent says the court's decisions are fair and objective.*²³

Elect or appoint?

- *30% of the public favors governors nominating judges from a list of names prepared by an independent committee made up of Democrats, Republicans and Independents; 65% thinks it's better to have judges run for election with the people voting on candidates.*²⁴
- *70% of the public thinks raising money for their election affects a judge's rulings to a moderate or great extent.*²⁵

NOTES about the surveys:

"Annenberg Supreme Court Survey: Lawyers and the Public, 2005"

Conducted by Princeton Survey Research Associates International for the Annenberg Public Policy Center. The survey polled 1,500 adults aged 18 years and older and was conducted between March 16 and April 18, 2005. The margin of error = +/- 3 percentage points.

"Judicial Independence" Final Report September 2006"

²¹ 2006 Survey

²² 2005 Survey

²³ 2005 Survey

²⁴ 2006 Survey

²⁵ 2006 Survey

Conducted by Princeton Survey Research Associates International for the Annenberg Public Policy Center. The survey polled 1,002 adults 18 and over between August 3 and 16, 2006; margin of error = +/-3 percentage points.

QUESTION WORDING:

Do you happen to know any of the three branches of government?***

Yes	68%
No	26%
Don't know	5%
Refused	*

Would you mind naming any of them? (Based on respondents who said they know any of the three branches of government)**

Executive branch, the president, presidency, the White House	28%
Legislative branch, Congress, people in Congress, Congressmen, Congress people	35%
Judicial branch, the courts, Supreme Court	33%
Republicans, Democrats, Independents, political parties	1%
Local, state, and federal government	2%
Other (SPECIFY)	1%
Don't know	1%
Refused	*

Some people think it is okay for the president to ignore a Supreme Court ruling if the president believes the ruling will prevent him from protecting the country against terrorist attacks. Others think the president must follow a Supreme Court ruling no matter what the circumstances. Which position is closer to your opinion?***

Okay to ignore Supreme Court ruling	38%
Must follow Supreme Court ruling	53%
Don't know	8%
Refused	1%

If the Supreme Court issues a ruling that the president disagrees with, should the president do what he thinks is in the best interests of the country or should the president follow the Supreme Court's ruling?***

Do what he thinks is in the best interests of the country	36%
Follow the Supreme Court's ruling	58%
Don't know	6%
Refused	1%

Can the US Supreme Court declare an act of Congress unconstitutional or not?*

Can declare an act unconstitutional	55%
Cannot declare an act unconstitutional	22%
Don't know	23%
Refused	*

Do you know if it was the intention of the “founding fathers” to have the president, Congress, and the Supreme Court have different but equal powers, or was it that the founding fathers intended each branch to have a lot of power, but the president to have the final say?*

Each branch has different powers	57%
President to have final say	35%
Don't know	7%
Refused	1%

If the Supreme Court rules on a decision 5 to 4, does this mean (READ)...*

The decision is final	47%
The decision is too close and needs to be sent to Congress	23%
The decision is too close and needs to be sent back to the lower courts	16%
Don't know	14%
Refused	1%

To the best of your knowledge, do Supreme Court justices usually give written reasons behind their rulings or do they NOT usually give written reasons?***

Give written reasons	53%
Do not give written reasons	18%
Don't know	29%
Refused	*

How important do you think it is to be able to impeach or remove a judge from office if the judge makes an unpopular ruling—essential, very important but not essential, somewhat important, or not too important?***

Essential	18%
Very important but not essential	30%
Somewhat important	21%
Not too important	25%
Don't know	5%
Refused	1%

Does the constitution in [state respondent lives in] protect judges from the threat of being removed from office if the judge makes a ruling that the governor or the legislature disagrees with?***

Yes	22%
No	15%
Don't know	63%
Refused	*

Generally speaking, how much do you trust the Supreme Court to operate in the best interests of the American people—a great deal, a fair amount, not too much or not at all?*

A great deal	17%
A fair amount	47%
Not too much	19%
Not at all	10%
Don't know	6%
Refused	1%

Turning to the court system in [state respondent lives in]. Please tell me if you strongly agree, somewhat agree, somewhat disagree or strongly disagree with the following statement: The courts can usually be trusted to make rulings that are right for the state as a whole.**

Strongly agree	13%
Somewhat agree	51%
Somewhat disagree	17%
Strongly disagree	12%
Don't know	6%
Refused	1%

In your opinion, to what extent do you think a judge's ruling is influenced by his or her personal political views—to a great extent, moderate extent, small extent, or not at all?*

Great extent	33%
Moderate extent	42%
Small extent	16%
Not at all	5%
Don't know	3%
Refused	*

And how appropriate would it be for a judge's ruling to be influenced by his or her personal political views—very appropriate, somewhat appropriate, not too appropriate or not appropriate at all?*

Very appropriate	7%
Somewhat appropriate	22%
Not too appropriate	18%
Not appropriate at all	50%
Don't know	2%
Refused	*

Turning to the court system in [state respondent lives in]. Please tell me if you strongly agree, somewhat agree, somewhat disagree or strongly disagree with the following statement: The courts do not favor the wealthy or those with political influence.**

Strongly agree	10%
Somewhat agree	21%
Somewhat disagree	26%
Strongly disagree	36%
Don't know	6%
Refused	1%

How important do you think it is to be able to impeach or remove a judge from office if the judge makes an unpopular ruling—essential, very important but not essential, somewhat important, or not too important?***

Essential	18%
Very important but not essential	30%
Somewhat important	21%
Not too important	25%
Don't know	5%
Refused	1%

Which of the following do you think is better?***

Governors nominate judges from a list of names prepared by an independent committee made up of Democrats, Republicans and Independents	30%
Judges run for election and the people vote on the candidates	65%
Both/It depends (VOLUNTEERED)	1%
Don't know	4%
Refused	*

In general, to what extent do you think a desire to be promoted to the next higher court would affect a judge's ability to be fair and impartial when deciding a case—to a great extent, moderate extent, small extent, or not at all?***

Great extent	35%
Moderate extent	40%
Small extent	9%
Not at all	13%
Don't know	3%
Refused	1%

In general, to what extent do you think a fear of not being reappointed or reelected would affect a judge's ability to be fair and impartial when deciding a case—to a great extent, moderate extent, small extent, or not at all?***

Great extent	32%
Moderate extent	35%
Small extent	13%
Not at all	15%
Don't know	4%
Refused	1%

<http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=219>



Judicial Campaigns: Money, Mudslinging and an Erosion of Public Trust

Thirty-nine states elect their judges in some fashion. What once were “sleepy little affairs,” judicial campaigns have become high-stakes races, drawing in big money and increasingly negative advertising campaigns. In 2006, an estimated \$16 million was spent on advertising in supreme court races in 10 states, a record. If predictions hold true, contests in 2008 promise to be more expensive -- and nasty.

But big money and mudslinging are undermining public trust in the judiciary and the ability of judges to act independently and impartially.

To call attention to this trend and its consequences, the Annenberg Public Policy Center’s FactCheck.org (www.factcheck.org) convened judges, political consultants, good-government watchdogs and journalists for a conference Wednesday in Washington.

“This is an under-reported issue,” said Viveca Novak, FactCheck’s deputy director, who organized the event.

Direct election of judges is extremely popular with Americans. “The public isn’t going to give up on the notion that they should be able to elect judges,” said Kathleen Hall Jamieson, director of the Annenberg Public Policy Center. Nearly 65 percent of Americans want to elect those who sit on the bench, according to a national survey by the Policy Center.

Even so, said Jamieson, seven of 10 of those polled in the Center’s 2006 survey said they believe the necessity to raise campaign funds will affect a judge’s rulings once in office. Sixty-three percent believe that pressures from past contributors would affect a judge’s fairness and impartiality to a great or moderate extent. Click [here](#) to read more findings.

“Money has a series of pernicious effects,” Jamieson told the conference. “The survey data suggest that once you destabilize the perception of impartiality and fairness, you begin to erode trust in the judiciary and confidence that judges work for the well-being of the public good.”

In 2006, television advertising was utilized in 10 of the 11 states with supreme court races. And in five of those races, negative ads were used. “Judicial races are now being run like any other race,” media consultant Allen Crow told the audience.

That creates a problem. Unlike other political contests, where candidates win votes by saying exactly how they will act once elected, judges are expected *not* to hold pre-conceived opinions. “The very nature of being a good judge means you will be unpredictable,” said Crow. Therefore, judges should not be staking out positions on issues. But that is exactly what much campaign advertising is about.

Crow, of Atlanta, developed ad campaigns for two Georgia Supreme Court justices. He has a simple message for his clients: “We stress to our candidates it very important that you define the race before your opponent does it for you.”

That message was echoed by David Browne, a Washington political consultant, who has handled a number of judicial campaigns around the country, including the 2006 election of Sue Bell Cobb to become Chief Justice of the Alabama Supreme Court.

Justice Cobb joined her consultant at the conference. She played a campaign ad Browne created to counter her opponent’s claims that Cobb was a “liberal” and out of touch with the values of Alabama voters. The ad featured Cobb playing the piano while her young daughter sang “This Little Light of Mine.”

“I wanted to define me before they maligned me,” said Cobb, who spent \$2.6 million compared to almost \$5 million spent by her opponent. Supreme Court candidates in Alabama raised a total of \$13.4 million, making it the second most expensive high court race in history.

The rise in judicial campaign advertising can put those seeking a seat on the bench in an awkward position.

“To beat an incumbent, you have to go negative,” said Browne. “You have to give a reason to fire him. You make a negative ad to tear someone down.”

Judicial ads share a trait with others in the political realm, noted Browne. “There’s always a skinny bit of truth and a whole lot of baloney.”

That is worrisome, said FactCheck’s Novak. “You’d think judges, of all people, would have a healthy respect for the facts, but that doesn’t always seem to be the case.” What will suffer as a result, she said, “is the public’s respect for the judiciary.”

Since 2006, FactCheck.org has been monitoring judicial ads for accuracy, just as it does political ads for other offices. That monitoring effort will be expanded during the 2008 election season.

Judicial races also attract the interest of third-party groups willing to pour money into a race to affect the outcome. Pro-business groups were responsible for more than 90 percent of all spending on special interest television advertisements in 2006, according to a [new study](#) by Justice at Stake, a nationwide, nonpartisan partnership of more than 30 judicial, legal and citizen organizations, including the American Bar Association, American Judicature Society, the League of Women Voters and the Brennan Center for Justice at New York University.

One of the most closely watched races that drew strong third-party interest was the 2004 race for a seat on the West Virginia Supreme Court of Appeals. In that race, challenger Brent Benjamin, a Republican, unseated Justice Warren McGraw, a Democrat, with millions of dollars in support from the CEO of a major coal company in the state, Massey Energy.

Justice Benjamin, who addressed the conference, said the role of third-party organizations in a campaign can confuse the voters. “How well does the public distinguish between what the candidate is doing and what an independent outside group is doing?” he asked.

Solutions to the rise in campaign spending and illegitimate attack advertising are elusive, panel members agreed. After listening to presentations by judges and media consultants, Spencer Noe, who headed the Kentucky Judicial Campaign Conduct Commission in 2006, observed, “I can say that Kentucky is truly a garden spot for judicial campaigning. All we talk about is cleaning up dockets.”

Because 100 of Kentucky’s statewide judicial races were contested in 2006, the commission was created to monitor campaigns. It was comprised of lawyers, journalists, educators and civic leaders, and operated with a \$25,000 budget. Candidates were asked to sign a pledge to eschew negative advertising. Although the commission had no legal authority, it used its influence to single out violations in local newspapers and elsewhere. Overall, said Noe, the effort was a success.

Bert Brandenburg, executive director of Justice at Stake, which was created six years ago, told the conference, “There is no excuse for not moving forward with reforms. The status quo has become completely untenable.... We have to do something.”

Key to bringing about change, said Brandenburg, is voter education. “It’s unsexy, but it’s effective.”

A video recording and transcript of the conference will be posted on www.FactCheck.org and www.annenbergpublicpolicycenter.org as soon as they become available.

Student Materials

- Class Prep: Assignment Sheet
- Jigsaw Activity: Judicial Independence
- Follow-Up Activity
- Tips for Writing an Op-Ed Piece
- How to Write a Letter-to-the-Editor

Class Prep: Assignment Sheet

This assignment sheet identifies resources and provides activities and questions to help prepare you for the study on judicial independence. Coming to class with the background knowledge provided by this material will help prepare you for your role in the cooperative learning activity.

Bring all work with you to class.

Activity 1: Define the terms.

bias	judicial independence	limited government
branches of government	judicial review	politics
coordinate branches	judicial sovereignty	prejudice
freedom	judiciary	rule of law
independence	justice	separation of powers

Activity 2: Build background knowledge.

As you review the resources listed below, take notes related to the study topic you are working on in your “expert” group.

1. **Operational differences:** Concepts and practices unique to judges and the judicial branch.
2. **Essential functions:** Essential government functions of an independent judiciary.
3. **Limited Powers:** Ways in which judicial powers are limited and strengthened.
4. **Controversial issues:** Historical and contemporary controversies involving the judiciary.

Internet Resources (Included with this lesson)

- Understanding Democracy: Judicial Independence (pg. 45)
http://www.annenbergclassroom.org/Files/Documents/Books/Understanding%20Democracy/Understanding_Democracy.pdf
- Judicial Independence: Selected Definitions and Writings
- From The Pursuit of Justice by Kermit Hall and John Patrick: “Introduction: The Supreme Court as a Mirror of America”
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_Intro.pdf
- From Our Constitution by Donald A. Ritchie: “Chapter 5: How is the Constitution Interpreted?”
http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/Chapter%205_Our%20Constitution.pdf
- **U.S. Constitution: Article III**

Activity 3: Write a short answer for each of the video questions listed above.

Judicial Independence: Essential, Limited, Controversial

A jigsaw is a cooperative learning activity in which each student specializes in one part of a study then communicates his/her learning to others. Like a puzzle, each part is essential for the completion and understanding of the “whole picture.”

Goal: Students will learn about the way an independent judiciary operates in the U.S. and its importance for all Americans.

Instructions to Student:

1. Participate as a responsible member of a learning team in which you will serve as an “expert” on one study area.
2. Specialize by preparing individually through research and study.
3. Collaborate with other students who are working on the same material to become a group of “experts.”
4. Assist your “expert” group in the planning and preparation of a presentation that members will use to teach the topic to their learning teams.
5. Return to your learning team and take turns teaching the other team members.
6. Take notes and record information as other “experts” are teaching.

Note: In order to develop an expertise, it is recommended that resources listed in other columns be reviewed, if time allows, as several topics may be covered in a single resource.

Study #1	Study #2	Study #3	Study #4
<p>Operational Differences Concepts and practices unique to judges and the judicial branch.</p> <p>I. Explore these topics.</p> <ul style="list-style-type: none"> • Federal judges • Way the court works • Checks on the court • Constitutional protections • Other: <p>II. Answer these questions.</p> <ol style="list-style-type: none"> 1. How is the business of the court and the work of the judges different from what goes on in the other branches of government? 2. How are independent judges also accountable? 3. What qualifications do you believe are most important in a judge? Explain. 4. Can justices truly be neutral? Explain. 	<p>Essential Functions Essential government functions of an independent judiciary.</p> <p>I. Explore these topics.</p> <ul style="list-style-type: none"> • Checks and balances • Protection of right's • Constitutional obligations • Rule of law • Other: <p>II. Answer these questions.</p> <ol style="list-style-type: none"> 1. Explain how judicial independence enhances the quality of life for all Americans. 2. How does judicial independence protect and strengthen a constitutional democracy? 3. How does the judiciary keep the other branches in check? 4. Why is an independent judiciary so important? 	<p>Limited Powers Ways in which judicial powers are limited and strengthened.</p> <p>I. Explore these topics.</p> <ul style="list-style-type: none"> • Scope of independence • Separation of powers • Constitutional authority • Checks on the judiciary • Other: <p>II. Answer these questions.</p> <ol style="list-style-type: none"> 1. Why does the court need the support of the coordinate branches to maintain its strength and independence and fulfill its constitutional role? 2. How are judicial powers expanded and limited by the executive and legislative branch? 3. Discuss the pros and cons associated with placing limits on judicial powers. 4. What are the constitutional boundaries for the judiciary? 	<p>Controversial Issues Historical and contemporary controversies involving the judiciary.</p> <p>I. Explore these topics.</p> <ul style="list-style-type: none"> • Conflicts over power • Unpopular decisions • Threats to independence • Responsibilities of citizens • Other: <p>II. Answer these questions.</p> <ol style="list-style-type: none"> 1. Identify political pressures that jeopardize the independence of the court. 2. Explain how a knowledgeable citizenry is essential for the survival of an independent judiciary. 3. Give examples of the tension that exists between the public and the court. 4. Discuss the controversies and concerns over the election of judges.

Judicial Independence: Essential, Limited, Controversial

Study #1 Operational Differences Concepts and practices unique to judges and the judicial branch. III. Watch these videos.	Study #2 Essential Functions Essential government functions of an independent judiciary. III. Watch these videos.	Study #3 Limited Powers Ways in which judicial powers are limited and strengthened. III. Watch these videos.	Study #4 Controversial Issues Historical and contemporary controversies involving the judiciary. III. Watch these videos.
<p>Judges and judicial business</p> <ul style="list-style-type: none"> Do Justices change their minds while deciding a case? (1.25 min) http://www.annenberglclassroom.org/Asset.aspx?id=1282 Why do justices write opinions (2.2 min) http://www.annenberglclassroom.org/Asset.aspx?id=1283 Misconceptions about the courts. (2 min) http://www.annenberglclassroom.org/Asset.aspx?id=1289 What are the special responsibilities of a chief Justice? (1.5 min) http://www.annenberglclassroom.org/Asset.aspx?id=1285 What Judges do. (3 min.) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1086 Protecting Judicial Independence (2.5 min) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1084 Checks on the Judiciary (1.5 min) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1083 	<p>Checks on power</p> <ul style="list-style-type: none"> Who was the greatest Supreme Court Justice? (3.5 min) http://www.annenberglclassroom.org/Asset.aspx?id=1284 Segment 3: Checks and Balances (Start Time 41:52) From "Key Constitutional Concepts" http://www.annenberglclassroom.org/Asset.aspx?id=12 <p>Protector of rights</p> <ul style="list-style-type: none"> A Conversation on the Constitution with Justice Ruth Bader Ginsburg on the Fourteenth Amendment (42 min.) http://www.annenberglclassroom.org/Asset.aspx?id=1255 Start: 17:38 to the end. (24 min) <p>Making the Constitution work</p> <ul style="list-style-type: none"> Making the Constitution Work (1.5 min.) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1085 	<p>Powers limited and strengthened</p> <ul style="list-style-type: none"> The Constitution Project: An Independent Judiciary (34 min.) http://www.annenberglclassroom.org/Asset.aspx?id=1256 "How the President Reacts to Court Decisions" (2 min) http://www.annenberglclassroom.org/Asset.aspx?id=1088 Supreme Court and the Boundaries of the Democratic Process (1.5 min) http://www.annenberglclassroom.org/Asset.aspx?id=1077 Separation of Powers (2.5 min) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1047 	<p>Unpopular Decisions</p> <ul style="list-style-type: none"> Making Unpopular Decisions (1.5 min) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1082 Protecting the rights of the minority (1.5 min.) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1080 <p>Threats to independence</p> <ul style="list-style-type: none"> Threats to Judicial Independence (2.5) http://www.annenberglclassroom.org/AssetDetail.aspx?myID=1091 On the threats of reprisals against judges http://www.annenberglclassroom.org/Asset.aspx?id=1093 Justice at Stake (FactChecked.org) http://www.factchecked.org/Sfts_Policy_WorksDetails.aspx?myId=41

Jigsaw Activity

Judicial Independence: Essential, Limited, Controversial

Study #1	Study #2	Study #3	Study #4
<p>Operational Differences Concepts and practices unique to judges and the judicial branch.</p> <p>IV. Review these resources.</p> <ul style="list-style-type: none"> • <i>Understanding Democracy: A Hip Pocket Guide</i>, page 45 http://www.annenberglclassroom.org/Downloads/ACBooks/Understanding%20Democracy/Understanding%20Democracy.pdf • U.S. Constitution, Article III http://www.justicelearning.org/justice-timeline/Articles.aspx?id=4 • Pages 1-8 from the "2007 Year End Report on the Federal Judiciary (Chief Justice's Year End Reports on the Federal Judiciary)" http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf • A History of Judicial Independence http://www.uscourts.gov/outreach/resources/judicialindependence/history.html • <i>The Pursuit of Justice</i>, Epilogue: "We are All Slaves of the Law" http://sunnylandsclassroom.org/Downloads/ACBooks/Pursuit%20of%20Justice/Chapters/200-203_Epilogue.pdf • Chief Justice Praises Judicial Independence http://www.uscourts.gov/newsroom/judicialindependence.html 	<p>Essential Functions Essential government functions of an independent judiciary.</p> <p>IV. Review these resources.</p> <ul style="list-style-type: none"> • <i>The Pursuit of Justice</i>, Chapter 1: The Rise of Judicial Review http://sunnylandsclassroom.org/Downloads/ACBooks/Pursuit%20of%20Justice/Chapters/12-21_Ch.1.pdf • <i>Understanding Democracy: A Hip Pocket Guide</i>, pages 42-43, 45-51, 88-93 http://www.annenberglclassroom.org/Downloads/ACBooks/Understanding%20Democracy.pdf • U.S. Constitution, Article III http://www.justicelearning.org/justice-timeline/Articles.aspx?id=4 • Courts and the division of powers http://www.annenberglclassroom.org/Assets.aspx?id=1323 • Americans Trust Courts but also Believe them Biased, Surveys Find http://www.annenberglclassroom.org/NewsDetails.aspx?myId=13 • An Independent Judiciary http://www.crf-usa.org/bria/bria14_2.html#an 	<p>Limited Powers Ways in which judicial powers are limited and strengthened.</p> <p>IV. Review these resources.</p> <ul style="list-style-type: none"> • <i>Understanding Democracy: A Hip Pocket Guide</i>, pages 42-43, 45-51, 88-93 http://www.annenberglclassroom.org/Downloads/ACBooks/Understanding%20Democracy.pdf • <i>Our Constitution</i>, Chapter 2: What Kind of Government Did the Constitution Create? http://www.annenberglclassroom.org/Downloads/ACBooks/Our%20Constitution/Chapters/Chapter%202_Our%20Constitution.pdf • The Role of the Courts in our System of Checks and Balances http://www.uscourts.gov/outreach/resources/judicialindependence/checksandbalances.html • U.S. Constitution, Article III http://www.justicelearning.org/justice-timeline/Articles.aspx?id=4 	<p>Controversial Issues Historical and contemporary controversies involving the judiciary.</p> <p>IV. Review these resources.</p> <ul style="list-style-type: none"> • <i>Our Constitution</i>, Chapter 5: How is the Constitution Interpreted? http://www.annenberglclassroom.org/Downloads/ACBooks/Our%20Constitution/Chapters/Chapter%205_Our%20Constitution.pdf • Pages 1-8 from the "2006 Year End Report on the Federal Judiciary" (Chief Justice's Year End Reports on the Federal Judiciary) written by Chief Justice John Marshall http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf • Commentary by Sandra Day O'Connor in the Wall Street Journal "The Threat to Judicial Independence" http://www.opinionjournal.com/extra/?id=110009019 • Justice for Sale Frontline Interview: Justices Stephen Breyer & Anthony Kennedy http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html • 2006 survey conducted for the Annenberg Public Policy Center on the election of judges http://www.annenberglclassroom.org/NewsDetails.aspx?myId=218 • 1998 survey conducted for American Bar Association: Perceptions of the U.S. Justice System http://www.abanet.org/media/perception/perceptions.pdf

Judicial Independence: Essential, Limited, Controversial

Study #1	Study #2	Study #3	Study #4
<p>Operational Differences Concepts and practices unique to judges and the judicial branch.</p> <p>V. Words to remember, consider, or ponder: Capture a relevant quote. Include formal citation.</p>	<p>Essential Functions Essential government functions of an independent judiciary.</p> <p>V. Words to remember, consider, or ponder: Capture a relevant quote. Include formal citation.</p>	<p>Limited Powers Ways in which judicial powers are limited and strengthened.</p> <p>V. Words to remember, consider, or ponder: Capture a relevant quote. Include formal citation.</p>	<p>Controversial Issues Historical and contemporary controversies involving the judiciary.</p> <p>V. Words to remember, consider, or ponder: Capture a relevant quote. Include formal citation.</p>
<p>VI. Match Court decisions or legislation.* (Select from list at the end or add others; include reason)</p> <p><u>Judges:</u></p> <p><u>Judicial business:</u></p>	<p>VI. Match Court decisions or legislation.* (Select from list at the end or add others; include reason)</p> <p><u>Checks on powers:</u></p> <p><u>Protector of rights:</u></p>	<p>VI. Match Court decisions or legislation.* (Select from list at the end or add others; include reason)</p> <p><u>Powers limited</u></p> <p><u>Powers strengthened</u></p>	<p>VI. Match Court decisions or legislation.* (Select from list at the end or add others; include reason)</p> <p><u>Unpopular decisions:</u></p> <p><u>Threat to independence:</u></p>

***IMPORTANT** – As you study and run across a case or legislation, check to see if it appears on the following list. If it is appropriate for your study, add it to the column. After listening to the presentations in your learning team, all will be distributed across the columns.

- | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> 1. Marbury v. Madison (1803) 2. City of Boerne v. Flores (1997) 3. Brown v. Education (1954) 4. Baker v. Carr (1962) 5. Gideon v. Wainwright (1963) 6. U.S. v. Nixon (1974) 7. Texas v. Johnson (1989) 8. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1972) | <ol style="list-style-type: none"> 9. Impeachment trial of Justice Samuel Chase (1804) 10. Cherokee Nation v. Georgia (1831) 11. Aaron v. Cooper (1958) 12. Court Reform Bill proposed by Franklin Roosevelt in 1937 13. Weinberger v. Wiesenfeld (1975) 14. Judicial Conduct and Disability Act of 1980 15. Article III of the U.S. Constitution 16. Mistretta v. United States (1989) |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Follow-Up Activity

Judicial Independence Makes the News: What's Your Opinion?

1. Read these articles: (Hard copies are also available from the Teacher)

- "The Threat to Judicial Independence"
A Commentary by Sandra Day O'Connor, Wall Street Journal, October 1, 2006
<http://www.opinionjournal.com/extra/?id=110009019>
- "The Attack Ads will Come to Order" by Ruth Marcus, Washington Post, May 30, 2007
<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052901638.html>
- May 23, 2007 Press Release (with survey): The Annenberg Public Policy Center of the University of Pennsylvania
http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_KHJ_JudicialCampaignFunds20070523/jamieson_judiciaelectionsurvey_factcheckconfFINALFINAL.pdf

2. Select one of the following questions/statements or substitute one your own. Be sure it relates to a topic or issue that came up during your study.

- Should judges be elected or appointed?
 - The courts are becoming too powerful.
 - Should Congress police the Supreme Court?
 - Should judges be impeached for making unpopular rulings?
 - Without an independent judiciary, the survival of democracy is at risk.
 - If we don't protect judicial independence, the courts can't protect us or preserve our system of government.
-
-

3. Write an opinion piece that conveys a point of view about the topic or issue selected in #2. It may convey support, opposition, concern, question, praise, or criticism. Use one of the following formats:

- Op-Ed (See Teacher for guidelines)
- Letter-to-the-Editor (See Teacher for guidelines)
- Political cartoon
Refer to following resource for tips and suggestions.
A Student Voices Reader (2008)
 - Articles, Data Sets and Information Sheets #26 Drawing a Cartoon – Final Product and Draft Sketches
 - Learning Activities and Worksheets #60. The Work of a Cartoonist
<http://www.annenbergclassroom.org/Downloads/StudentVoices/Curriculum/tuden%20Voices%20Reader.pdf>

4. What's wrong with this "picture?" Share your thoughts.

"Roughly 80% of the public prefers to select its judges by election and does so. Roughly 80% of the electorate does not vote in judicial elections. Roughly 80% of the electorate cannot identify the candidates for judicial office, and roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive."—Charles Geyh, director of the American Judicature Society's Center for Judicial Independence as quoted in the May 23, 2007 news release from The Annenberg Public Policy Center



Tips for Writing an Op-Ed

“Op-eds” are opinion essays that get their name from being placed in a newspaper “opposite” the editorials, which state the newspaper’s position on an issue. They give people who are NOT on the staff of the newspaper a chance to have their say about something that concerns them. To write an effective op-ed, try to:

- Make your op-ed about one thing and one thing only.
- Make a point that you think others have ignored.
- Use your perspective as a high school student to make your point.
- Make it timely—about something happening NOW.
- Keep it between 500 and 700 words.

Try using the format below to write your op-ed:

1. **HEADLINE:** Write a headline for your op-ed using SIX to EIGHT words

2. **GRAB THEIR ATTENTION:** Tell a story about the issue that concerns you — something that happened or that you witnessed RECENTLY.

3. **STATE YOUR POINT:** (In one sentence state the issue and where you stand.)

4. **SUPPORT YOUR POSITION** (with statistics, quotes from experts, results of a study).

5. **HAMMER IT HOME** (Briefly summarize your point).



Tips for Writing an Op-Ed (SAMPLE)

1. HEADLINE

Young people are losing recreation options

2. GRAB THEIR ATTENTION

“What do you want to do?” My friends and I were asking each other that question all summer. Should we go swimming? Oh yeah, the city closed our neighborhood’s pool and the rec center attached to it. What about the library? Our local branch was also shut down and we would have had to either catch a bus or get a ride to get to the nearest one. Go downtown or the mall? Sure, if we want to spend money on junk food, video games, clothes or other stuff we really don’t need. It’s a lot easier to find something to do during school since we have plenty of after school activities there or we can stop at the library on the way home. But what are teenagers like my friends and me supposed to do during the summer?

3. STATE YOUR POINT

With all the talk in the news about children and obesity or kids and drugs, our elected officials need to work on bringing back the pool, the rec center and the other recreation options that have been taken away from our community’s young people over the years.

4. SUPPORT YOUR POSITION

Last year, San Diego State University researchers found that a lack of physical activity was the most significant obesity risk factor contributing to obesity in 11- to 15-year-olds. I think that if the pool and the recreation center we had in our neighborhood were still there, there would be a lot more kids swimming and being active in my community. But don’t take my word for it. “Daily activities such as walking to school, physical education classes, after-school activities, chores and general playing have been replaced with a sedentary lifestyle in front of the TV, computer or video games,” said Ken Germano, president of the American Council on Exercise. “This study highlights the need for effective physical activity programs targeted at young people. It is important for us to teach our kids to lead healthy and active lives now so they can avoid serious health problems in the future.”

But obesity is not the only health issue that should push our local leaders to act. According to the National Center on Addiction and Substance Abuse at Columbia University, teens who are often bored are 50 percent likelier than teens who are not often bored to smoke, drink, get drunk and use illegal drugs. Those illegal activities not only lead to addiction and bad health, they are also often the cause of other issues, such as dropping out of school or teen pregnancy. According to the National Campaign to Prevent Teen Pregnancy, teens 15 and older who use drugs are 5 times more likely to have sex than are those teens who do not use drugs.

5. HAMMER IT HOME

I think our community’s elected leaders need to see that cutting programs and recreational opportunities for young people is not just a financial issue. The lack of programs can lead to health issues as well as social problems. They should realize that they can make a difference in the lives of many young people and help the community at the same time. So, “What do you want to do?”



How to Write a Letter-to-the-Editor

Letters-to-the-editor are usually written in response to a news article, opinion piece, cartoon, and/or editorial in the newspaper. The letter-to-the-editor might praise, question or criticize something read or viewed in the newspaper.

To write an effective letter-to-the-editor, try to:

- Focus on one topic or issue.
- Write in response to something you read or viewed in the newspaper. (If the newspaper isn't covering something you think should be covered, tie your letter to something that was covered and why you want something else or more coverage.)
- Write why you support, oppose or are questioning what was in the newspaper or the perspective in the newspaper.
- Connect your experience as a high school student to the topic.
- Keep it brief and to the point – two paragraphs are usually enough.
- Include your name, address and phone number. You may include your email address.

Sample Format:

Dear Editor:

On (date), in the article/opinion piece/editorial/cartoon (cite the headline or title and page), the author (may be an editor, news writer, guest writer of an opinion piece or cartoonist) (write a summary of the main idea that you want to address).

Indicate why you are writing: (you agree or disagree with the main point, you want more coverage, you find the piece too slanted, etc.).

Your idea or proposal (type of coverage, future coverage, range of opinions, another perspective, etc.).

Sincerely,

Your name
Address
Phone number
(email is optional)