

# 10

---

## The Judiciary

### I. Reviewing the Chapter

---

#### Chapter Focus

The purpose of this chapter is to describe the policy-making role of the federal judiciary, in particular that of the Supreme Court. To appreciate the significance of this role, students need basic knowledge about the history of the Supreme Court, the structure and procedures of the federal courts, the nature of controversy over the courts, and the restraints on judicial policy making. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Discuss the meaning and significance of judicial review and its relationship to *Marbury v. Madison*.
2. List and comment on the three eras of varying Supreme Court influences on national policy from the days of slavery to the present.
3. Describe the partisan influences on federal judicial appointments.
4. Describe how the nature of federalism affects the jurisdiction of federal and state courts.
5. Discuss the ways in which cases can get to the Supreme Court.
6. Describe the financial and non-financial obstacles of getting into federal court.
7. Explain how political scientists classify justices as liberal or conservative and why they do so.
8. Enumerate four measures of judicial power and describe how judicial power can be restrained by Congress and by public opinion.
9. Develop arguments for and against an activist Supreme Court.
10. Explain the relationship between public and the courts.

#### Study Outline

- I. Introduction
  - A. Courts in the United States play a major role in policy making
    1. Due to judicial review: right to declare acts and laws unconstitutional
    2. Since 1789, Supreme Court has ruled over 100 laws unconstitutional
    3. In Great Britain, no judicial review in American sense, but parliamentary supremacy

- B. Controversy is over method of judicial review
  1. Strict constructionist (conservative philosophy today)
  2. Activist approach (liberal philosophy today)
- II. The Development of the Federal Courts
  - A. Introduction
    1. Founders did not expect a major policy role for the federal courts
    2. Traditional view: judges find and apply existing law
    3. Evolution of courts shaped by political, economic, and ideological forces
  - B. National supremacy and slavery (1789–1865)
    1. *Marbury v. Madison*—established doctrine of judicial review (see CHAPTER BOX)
    2. *McCulloch v. Maryland*: federal law declared supreme over state law
    3. *Dred Scott v. Sandford*: blacks were not, and could not become, free
    4. Interstate commerce clause is placed under the authority of federal law
  - C. Government and the economy (1865–1937)
    1. Dominant issue of the period: whether the economy could be regulated by state and federal governments
    2. Private property held to be protected by the Fourteenth Amendment
    3. Courts unsure of how to draw line between “reasonable” and “unreasonable” regulation
    4. The Court interpreted the Fourteenth and Fifteenth Amendments narrowly as applied to blacks
  - D. The protection of political liberty and economic regulation (1937–present)
    1. Supreme Court gave regulatory powers to legislatures
    2. Voided congressional acts that violate personal liberties
    3. Court-packing plan shifts interpretation
- III. The Structure of the Federal Courts
  - A. Only federal court mandated by Constitution is Supreme Court
    1. Congress has created constitutional courts—district Courts (94), courts of appeals (12), plus other specialized courts (e.g., Court of International Trade)
    2. Legislative courts—specialized purpose, fixed office terms for judges (e.g., Court of Military Appeals and other territorial courts)
  - B. Supreme Court appointments are partisan
    1. Nominated by president, confirmed by Senate (only five rejected during the 20<sup>th</sup> century)
    2. Presidents cannot be sure how a judge will behave after appointment
    3. Presidents can tilt Court ideologically
  - C. Lower federal courts
    1. “Senatorial courtesy” checks presidential control in district court nominations
    2. Comparison of Carter and Reagan appointments: number of women and blacks
    3. Democratic and Republican judges differ in voting, but ideology usually does not influence decisions
- IV. The Jurisdiction of the Federal Courts (see CHAPTER BOX)
  - A. Dual court system
    1. Federal jurisdiction: Article III and the Eleventh Amendment—involve “federal question” cases, diversity of citizenship cases
    2. Federal District Court handles federal criminal laws

3. Appeal from a federal regulatory agency goes to U.S. Court of Appeal
4. Only Supreme Court handles disputes between two state governments
5. Vast majority of all federal cases begin in district courts
6. *Gideon* case illustrates how lower court's appeal can be influential
- B. Appeals to the Supreme Court
  1. Certiorari—main route involving substantial federal questions
  2. Courts of appeal usually last word
- V. Getting to Court
  - A. Deterrents
    1. The Court rejects 95 percent of applications for certiorari
    2. High costs of appeal (pauper writs)
  - B. Fee shifting
    1. Each party must pay cost of lawsuit
    2. Fee shifting allows plaintiff to collect costs from defendant
    3. Flood of Section 1983 lawsuits
  - C. Standing
    1. Must be controversy between adversaries
    2. Personal harm must be demonstrated
    3. Being taxpayer not entitlement for suit
    4. Sovereign immunity, but government can waive
  - D. Class-action suits
    1. Brought on behalf of all similarly situated—*Brown v. Board of Education*
    2. Financial incentives to bring suit; Congress not addressing issues; profitable for lawyers
    3. Need to notify all members of the class since 1974
- VI. The Supreme Court in Action
  - A. Oral arguments by lawyers
    1. Questions by justices
    2. Role of solicitor general
    3. Amicus curiae briefs influence as well as legal periodicals
  - B. Conference procedures
    1. Role of chief justice
    2. Selection of opinion writer
    3. Opinions—per curiam, unanimous, majority, concurring, or dissenting
  - C. Voting behavior
    1. Blocs on Court are predictable
    2. Three blocs: liberal, conservative, and swing
- VII. The Power of the Courts (see CHAPTER BOX)
  - A. The power to make policy
    1. By interpretation
    2. Importance of stare decisis or precedent, but court will change mind
    3. Court's willingness to deal with "political questions"
    4. Judicial "remedies"—may affect thousands or even millions of people
  - B. Views of judicial activism
    1. Courts are last resort and correct injustices
    2. Courts lack expertise in particular
    3. Court is not accountable to the people; judges not elected
  - C. The causes of activism
    1. U.S. has more lawyers, but a symptom not a cause
    2. American adversary culture

3. Easier for people to get into court
  4. Vague congressional language requires judicial interpretation
  5. Reviewing regulatory agency decisions
  6. Belief of many judges/law professors that courts should make policy
- VIII. Checks on Judicial Power
- A. Court decisions can be resisted, since courts cannot enforce
  - B. Congress and the courts
    1. Alter the composition of the judiciary
    2. Confirmation and impeachment proceedings
    3. Changing the number of judges
    4. Revising legislation declared unconstitutional
    5. Altering jurisdiction of the courts
    6. Constitutional amendment
  - C. Public opinion and the courts
    1. Opinion can both restrain and energize the courts
    2. Supreme Court most powerful when parties have been weak or divided
    3. Opinion may object to decisions but not to court as institution
    4. Opinion of courts vary with support of government as a whole

### Key Terms Match

Match the following terms and descriptions.

#### Set 1

- |                           |         |   |
|---------------------------|---------|---|
| a. activist               | 1. ____ | The practice, authorized by statutes, under which the plaintiff is enabled to collect costs from the defendant if the latter loses.                           |
| b. amicus curiae brief    | 2. ____ | A means by which one who has an interest in a case, but is not a litigant, can present views.   |
| c. briefs                 | 3. ____ | A means by which one who has been injured can bring action on behalf of all similarly situated.   |
| d. class-action suit      | 4. ____ | The power of the courts to determine the constitutionality of legislative and executive acts.   |
| e. concurring opinion     | 5. ____ | Litigation in which a citizen of one state sues a citizen of another state and the amount of money in dispute is more than \$50,000.                          |
| f. constitutional courts  | 6. ____ | A court established under Article III of the Constitution.  |
| g. courts of appeal       | 7. ____ | An approach to judicial review which holds that judges should discover the general principles underlying the Constitution.                                    |
| h. dissenting opinion     | 8. ____ | Jurisdiction conferred by the Constitution of federal courts to hear all cases "arising under the Constitution, the laws of the United States, and treaties." |
| i. district courts        |         |   |
| j. diversity case         |         |   |
| k. federal-question cases |         |   |

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>l. fee shifting</li> <li>m. in forma pauperis</li> <li>n. judicial review</li> <li>o. legislative courts</li> <li>p. <i>Marbury v. Madison</i></li> <li>q. <i>McCulloch v. Maryland</i></li> </ul> | <ul style="list-style-type: none"> <li>9. ____ Intermediate appellate courts of the federal judiciary which have been classified “constitutional courts” by Congress.</li> <li>10. ____ Lower federal courts created by Congress for specialized purposes.</li> <li>11. ____ A petition filed with the U.S. Supreme Court by a pauper.</li> <li>12. ____ The trial courts of the federal judiciary which have been classified “constitutional courts” by Congress.</li> <li>13. ____ Legal documents submitted by lawyers which set forth the facts of a case.</li> <li>14. ____ A decision of the Supreme Court which interpreted the Constitution to give the Supreme Court the power to declare an act of Congress unconstitutional.</li> <li>15. ____ A decision of the Supreme Court which held that the power of the federal government flows from the people and that federal law is supreme over state law.</li> <li>16. ____ This is an opinion of one or more justices of the Supreme Court who agree with the majority conclusion but for different reasons.</li> <li>17. ____ This is an opinion of one or more justices of the Supreme Court on the losing side.</li> </ul> |
|---|--|

**Set 2**

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>a. Opinion of the Court</li> <li>b. per curiam opinion</li> <li>c. political-question doctrine</li> <li>d. remedy</li> <li>e. senatorial courtesy</li> <li>f. solicitor general</li> <li>g. sovereign immunity</li> <li>h. standing</li> <li>i. stare decisis</li> </ul> | <ul style="list-style-type: none"> <li>1. ____ An individual who represents the federal government before the Supreme Court.</li> <li>2. ____ A matter that the Constitution leaves to another branch of government.</li> <li>3. ____ A requirement that must be satisfied before a plaintiff can have a case heard on its merits.</li> <li>4. ____ A tradition under which the Senate will defer to the judgment of a senator of the president’s party when determining the suitability of candidates for federal judgeships from the senator’s state.</li> <li>5. ____ A decision that permits a case to be heard by the Supreme Court when four justices approve.</li> <li>6. ____ The rule of precedent.</li> <li>7. ____ Groups of justices on the Supreme Court who tend to take consistent positions on issues.</li> <li>8. ____ This is a judicial order setting forth what must be done to correct a situation a judge believes to be wrong.</li> </ul> |
|---|--|

- |                           |          |   |
|---------------------------|----------|---|
| j. strict constructionism | 9. ____  | An approach to judicial review which holds that judges should confine themselves to applying those rules that are stated in or clearly implied by the language of the Constitution. |
| k. voting blocs           |          |   |
| l. writ of certiorari     | 10. ____ | The doctrine that a citizen cannot sue the government without its consent.  |
|                           | 11. ____ | This is a brief, unsigned opinion of the Supreme Court.   |
|                           | 12. ____ | This is the written opinion of the Supreme Court's majority.  |

### Did You Think That...?

A number of misconceptions are listed below. You should be able to refute each statement in the space provided, referring to information or argumentation contained in this chapter. Sample answers appear at the end of the *Study Guide*.

1. "The Framers expected the Supreme Court to play the large role that it subsequently has played."

---



---



---

2. "When the Supreme Court makes a decision, it resolves that issue as far as national politics is concerned."

---



---



---

3. "Judges merely apply the law. Therefore it does not matter what individuals are appointed to the courts so long as they are skilled lawyers."

---



---



---

4. "One good thing about the judiciary is that no interest groups are involved."

---



---



---

- 5. "The Supreme Court's discretion over its appellate docket has little to do with its role in policy making."

---

---

---

- 6. "The Supreme Court's workload has decreased the influence of their law clerks."

---

---

---

Data Check

**Box: How Partisanship Affects Judicial Attitudes**

- 1. Is a Republican or a Democratic judge more likely to take a strict-constructionist approach to the Constitution?

---

- 2. Give an example of how a strict-constructionist philosophy is reflected in the percentages cited in this survey.

---

- 3. On what issue(s) are liberal and conservative judges most widely separated in policy position?

---

**II. Practicing for Exams**

---

**True/False.** Read each statement carefully. Mark true statements *T*. If any part of the statement is false, mark it *F*, and write in the space provided a concise explanation of why the statement is false.

- \_\_\_\_\_ 1. The chief judicial weapon in the government's system of checks and balances is judicial activism.

---

- \_\_\_\_\_ 2. Chief Justice John Marshall was a strong supporter of states' rights.

---

- \_\_\_\_\_ 3. The reaction of early presidents to such Supreme Court rulings as *Marbury v. Madison* and *McCulloch v. Maryland* can best be described as highly negative.
- 
- \_\_\_\_\_ 4. The *Dred Scott* case involved the right of the national government to charter a bank.
- 
- \_\_\_\_\_ 5. From the Civil War to the 1930s, the Supreme Court was primarily occupied with civil rights of former slaves.
- 
- \_\_\_\_\_ 6. The period in Supreme Court history from 1936 to the present has been marked by a concern for states' rights.
- 
- \_\_\_\_\_ 7. "Court-packing" refers to the practice of appointing only justices who agree with Congress's political philosophy.
- 
- \_\_\_\_\_ 8. The Supreme Court's acceptance of New Deal principles probably avoided an assault on the court by the other branches.
- 
- \_\_\_\_\_ 9. As of 1998, the number of Supreme Court nominees rejected by the Senate in the 20<sup>th</sup> century was fewer than ten.
- 
- \_\_\_\_\_ 10. In most cases, ideological differences among judges probably do not affect the outcomes of cases.
- 
- \_\_\_\_\_ 11. The "dual" court system of the United States refers to separate criminal and civil courts.
- 
- \_\_\_\_\_ 12. A diversity case is one involving the jurisdiction of more than one appellate court.
- 
- \_\_\_\_\_ 13. The majority of cases heard by federal courts begin in district courts.
-

- \_\_\_\_\_ 14. A writ of certiorari is issued by the defendant in a federal case.  
\_\_\_\_\_
- \_\_\_\_\_ 15. Clarence Gideon managed to have his case heard before the Supreme Court by filing as a pauper.  
\_\_\_\_\_
- \_\_\_\_\_ 16. Fee shifting refers to the practice of dividing attorneys' fees among all participants in a class-action suit.  
\_\_\_\_\_
- \_\_\_\_\_ 17. Under the doctrine of sovereign immunity, a public official cannot be arrested.  
\_\_\_\_\_
- \_\_\_\_\_ 18. *Brown v. Board of Education* is an example of a class-action suit.  
\_\_\_\_\_
- \_\_\_\_\_ 19. The major reason class-action suits became more common in recent years was that they were financially attractive to lawyers.  
\_\_\_\_\_
- \_\_\_\_\_ 20. The text argues that getting into court depends most strongly on having standing and resources.  
\_\_\_\_\_
- \_\_\_\_\_ 21. Unlike the legislative process, the judicial process is not affected by interest groups.  
\_\_\_\_\_
- \_\_\_\_\_ 22. The strongest type of Supreme Court opinion is a majority opinion.  
\_\_\_\_\_
- \_\_\_\_\_ 23. The number of federal laws that have actually been overturned by the Supreme Court is well over 100.  
\_\_\_\_\_
- \_\_\_\_\_ 24. Justices who believe the Supreme Court should change the direction of legislative policy are advocating strict constructionism.  
\_\_\_\_\_

- \_\_\_\_\_ 25. Cases that come before the courts usually originate from ambitious lawyers.
- 
- \_\_\_\_\_ 26. One constraint under which the federal courts operate is that their decisions can sometimes be ignored.
- 
- \_\_\_\_\_ 27. The Fourteenth Amendment overturned *Brown v. Board of Education*.
- 
- \_\_\_\_\_ 28. One effective tool that Congress has at its disposal for controlling the federal courts is the power to impeach judges who back policies opposed by Congress.
- 
- \_\_\_\_\_ 29. Periods of partisan alignment often have the effect on the courts of energizing them.
- 
- \_\_\_\_\_ 30. Public confidence in the Supreme Court since 1966 has decreased steadily as a result of several unpopular rulings.
- 

**Multiple Choice.** Circle the letter of the response that best answers the question or completes the statement.

1. The intense struggle over the nomination of Robert Bork to the Supreme Court could have occurred only in the United States, because:
  - a. judges play so large a role in making public policy.
  - b. there is a judicial nomination process.
  - c. there is such intense division between political parties.
  - d. one party can control the executive and the other the legislative branch.
2. Strict-constructionist judges differ from activist judges in that they are more likely to:
  - a. adopt a liberal viewpoint on such issues as states' rights and birth control.
  - b. apply rules that are clearly stated in the Constitution.
  - c. believe in the application of judicial review to criminal matters.
  - d. look for and apply the general principles underlying the Constitution.
3. The Founders expected that judicial review would be relatively passive (versus active or policy setting) because:
  - a. judges would merely find and apply the existing law.
  - b. judges would be constrained by the legislature.
  - c. cases would involve only direct disputes between individuals.
  - d. judges would be empowered to award money damages only.

4. Rulings by the Supreme Court in *Marbury v. Madison* and *McCulloch v. Maryland* established all of the following principles *except*:
  - a. the Supreme Court could rule an act of Congress unconstitutional.
  - b. the federal government has the power to regulate commerce among the states.
  - c. the federal government is permitted to pass any laws “necessary and proper” to the attainment of constitutional ends.
  - d. federal law is supreme over state law.
5. In the period following the Civil War, the Fourteenth Amendment was consistently interpreted by the Supreme Court to protect:
  - a. interstate commerce.
  - b. state regulations.
  - c. states’ rights.
  - d. the government’s right to tax.
6. After 1936, the Supreme Court stopped imposing regulations on the power of the government to regulate the economy. In its previous rulings in this areas, the Court found itself:
  - a. favoring the cause of labor against business.
  - b. making judgments it was not competent to make.
  - c. allowing state legislatures too much control over the national economy.
  - d. limiting the protection of private property to enable business to expand.
7. One basic difference between a constitutional court and a legislative court is that:
  - a. constitutional court judges handle cases that need not be decided by the Supreme Court.
  - b. constitutional court judges cannot be fired.
  - c. legislative court judges handle cases that need not be decided by the Supreme Court.
  - d. legislative court judges cannot be fired.
8. The judicial behavior of Supreme Court Justices Frankfurter, Holmes, and Burger suggests that:
  - a. presidents have difficulty in predicting the actions of their judicial appointees.
  - b. the Supreme Court “follows the election returns.”
  - c. the president clearly controls the courts through his appointments.
  - d. dissenters on the Court have more influence than the majority.
9. It has been suggested that senators actually appoint district judges, and presidents confirm them, through the practice of:
  - a. senatorial courtesy.
  - b. advice and consent.
  - c. legislative vetoes.
  - d. requiring a two-thirds majority for confirmation.
10. Assume that California is suing Arizona over the use of the Colorado River. This case will be heard by:
  - a. a federal court.
  - b. either a federal or state court.
  - c. a state court.
  - d. the Supreme Court.

11. What is the relationship between an appeal and a certiorari?
  - a. Judges must hear all appeals but only some certiorari.
  - b. A case granted certiorari may be heard in either state or federal court.
  - c. Appeals are paid for by plaintiffs, certiorari by defendants.
  - d. Only some appeals are granted certiorari.
12. Assume that the highest state court in Iowa has ruled that the federal Endangered Species Act is illegal because it runs counter to the state constitution. The case could be brought to the U.S. Supreme Court by means of:
  - a. certiorari.
  - b. a diversity ruling.
  - c. original jurisdiction.
  - d. none of these; it could not be taken to the U.S. Supreme Court.
13. The rules regarding standing to bring a case to federal court involve all of the following *except*:
  - a. the existence of a controversy between adversaries.
  - b. the probability of reaching a satisfactory solution.
  - c. evidence that actual harm has occurred.
  - d. a stake in the outcome beyond that of being a taxpayer.
14. A president's helicopter lands in your rose garden and causes thousands of dollars' worth of damage to your prized roses. Can you sue the government for damages?
  - a. Yes, without qualification.
  - b. Yes, but only if the government gives its consent under the sovereign immunity doctrine.
  - c. No, because the government can be sued only when personal injury is involved.
  - d. No, because the sovereign immunity doctrine protects the government from all lawsuits.
15. Class-action suits are more advantageous than single-party suits in that they allow:
  - a. extremely controversial issues to be adjudicated.
  - b. the government to protect itself from frivolous suits.
  - c. lawyers to practice without receiving fees.
  - d. large groups of people to receive relief.
16. The text argues that getting into court depends *most* strongly on having:
  - a. just cause and standing.
  - b. standing and resources.
  - c. resources and an opponent.
  - d. an opponent and a just cause.
17. In most cases presented to the Supreme Court, the bulk of the argumentation presented by either side will be found in the:
  - a. brief.
  - b. certiorari petition.
  - c. oral argument.
  - d. per curiam decision.

18. The function of the solicitor general is to:
  - a. approve every case the federal government presents to the Supreme Court.
  - b. enforce the decisions of the Supreme Court.
  - c. serve as the principal legal adviser, or counsel, to members of the Supreme Court.
  - d. maintain order in the Supreme Court's courtroom.
19. An interest group such as the ACLU or the NAACP is *most* likely to attempt to influence the Supreme Court by:
  - a. appealing a decision directly to the president.
  - b. consulting in the nomination process of a new Supreme Court justice.
  - c. writing an amicus curiae brief.
  - d. raising a political question with the solicitor general.
20. What happens if a vote by the Supreme Court ends in a tie?
  - a. The chief justice breaks the tie.
  - b. A majority of both houses of Congress decides the case.
  - c. The lower court decision is left standing.
  - d. A vote cannot end in a tie because all nine justices must participate in every vote.
21. Justice Thomas, for example, votes on the side of a majority of Supreme Court justices on a particular case, even though his reasoning differs from the others. He may choose to express his reason(s) in a(n):
  - a. dissenting opinion.
  - b. concurring opinion.
  - c. opinion of the Court.
  - d. per curiam opinion.
22. The liberal justices that sat on the Supreme Court in 1989—Brennan and Marshall—would be *most* accurately classified as:
  - a. activists.
  - b. strict constructionists.
  - c. swing voters.
  - d. the dominant voting bloc.
23. An important reason federal courts follow precedent is that:
  - a. lower court judges have less expertise than do members of the Supreme Court.
  - b. the Fourteenth Amendment requires following precedent to avoid conflict with state courts.
  - c. the practice of stare decisis makes judicial decision-making chaotic.
  - d. equal justice requires similar cases to be decided the same way.
24. The power of federal courts to make policy derives from all of the following *except*:
  - a. interpretation of existing laws.
  - b. extension of the reach of existing laws.
  - c. designing of imposed remedies.
  - d. enactment of new laws.

25. When a federal judge orders the reorganization of a state prison system in a case brought by a single convict, the judge is issuing a:
  - a. partisan decision.
  - b. stare decisis.
  - c. writ of certiorari.
  - d. policy-making remedy.
26. Common criticisms of judicial activism include all of the following *except*:
  - a. judicial activism only works when laws are devoid of ambiguous language.
  - b. judges are not elected and are therefore immune to popular control.
  - c. judicial activism often fails to account for the costs of implementing activist rulings.
  - d. judges usually have no expertise in designing and managing complex institutions.
27. Between 1961 and 1980, the largest percentage increase in court cases occurred in the area of:
  - a. civil rights.
  - b. prisoner petitions.
  - c. Social Security.
  - d. economic regulation.
28. An increase in cases is not the sole reason for the sweeping remedies imposed by courts. A second factor contributing to this trend is:
  - a. the rise in the number of courts in the United States.
  - b. the increasingly liberal ideology of federal court judges.
  - c. laws that contain vague language.
  - d. public distrust of Congress.
29. A study of appellate court reviews of decisions made by regulatory agencies found that the agencies' positions were supported by the courts:
  - a. in almost every case.
  - b. around two-thirds as often as they were reversed.
  - c. about as often as they were reversed.
  - d. in a distinct minority of the cases.
30. Congress can check the power of the federal judiciary in all of the following ways *except*:
  - a. confirming or not confirming nominees.
  - b. changing the number of judges.
  - c. initiating amendments to the Constitution.
  - d. interpreting laws themselves.
31. One practicable way that Congress can get around an unfavorable Supreme Court ruling on a law is to:
  - a. remove the judges who voted against the law.
  - b. overturn the Supreme Court ruling.
  - c. re-pass the law in a slightly altered form.
  - d. strip the Court of its enforcement authority.

32. Congress has the power to decide the jurisdiction of lower federal courts. This means that:
  - a. Congress can determine the number of judges who sit on each court.
  - b. Congress can decide what types of cases these courts hear.
  - c. Congress can veto decisions of lower courts, unlike those of the Supreme Court.
  - d. lower courts cannot declare an act of Congress unconstitutional.
33. The Supreme Court is protected, to a considerable extent, from frontal attacks by the president and Congress through:
  - a. the logic of its decisions.
  - b. the logic of its opinions.
  - c. its own bureaucracy.
  - d. its prestige in the nation.
34. Historically, the Supreme Court has been especially activist when:
  - a. Congress was in transition from control by one party to control by the other.
  - b. the political system was undergoing considerable change.
  - c. the president was weak and indecisive.
  - d. Congress was weak and the president was strong.
35. Public confidence in the Supreme Court at any given time is *most* closely related to:
  - a. the appointment of a new justice to the Court.
  - b. decisions that reflect either a clearly liberal or a clearly conservative outlook.
  - c. the popularity of government as a whole.
  - d. the performance of the economy, especially with regard to inflation.

**Essay.** Practice writing extended answers to the following questions. These test your ability to integrate and express the ideas that you have been studying in this chapter.

1. What were the important constitutional and judicial issues raised in *Marbury v. Madison*? What two roles did John Marshall play in the case? What was his ruling? What were the results of the ruling?
2. Do you think that the Founders expected the Supreme Court to play the role that it has played in recent years? Why or why not?
3. Write an essay in which you compare and contrast the way in which the Supreme Court makes policy with the way in which the legislature makes policy.
4. What are some of the constraints that operate to keep judicial power in check? What keeps Congress from simply taking jurisdiction away from the lower courts and the appellate jurisdiction of the Supreme Court?

## IV. Research and Resources

---

### Suggested Readings

- Abraham, Henry J. *The Judicial Process*, 6th ed. New York: Oxford University Press, 1993. An excellent, comprehensive survey of how the federal courts are organized and function.
- Bork, Robert H. *The Tempting of America*. New York: Free Press, 1990. A defense of judicial restraint and the doctrine of original intent.
- Cardozo, Benjamin J. *The Nature of the Judicial Process*. New Haven, Conn.: Yale University Press, 1921. Important statement of how judges make decisions, by a former Supreme Court justice.
- Carp, Robert A., and Robert Stidham. *The Federal Courts*. Washington, D.C.: Congressional Quarterly Press, 1985. Explains the workings of the lower federal courts.
- Hall, Kermit L., ed. *Oxford Companion to the Supreme Court*. New York: Oxford University Press, 1992. An encyclopedia of everything you ever wanted to know about the Supreme Court.
- Lasser, William. *The Limits of Judicial Power*. Chapel Hill, N.C.: University of North Carolina Press, 1988. Explains why the Supreme Court has been able to make controversial decisions without suffering crippling political attacks.
- Lazarus, Edward. *Closed Chambers*. New York: Times Books, 1998. An eyewitness account of how the Supreme Court operates, written by a former law clerk. It is filled with both the author's biases and his special knowledge.
- McCloskey, Robert G. *The American Supreme Court*, 2nd ed. Chicago: University of Chicago Press, 1994. Superb brief history of the Court and its role in American politics and thought, recently revised by Sanford Levinson.
- Melnick, R. Shep. *Regulation and the Courts*. Washington, D.C.: Brookings Institution, 1983. Careful study of how activist courts have shaped environmental regulations.
- Rabkin, Jeremy. *Judicial Compulsions: How Public Law Distorts Public Policy*. New York: Basic Books, 1989. An argument against broad judicial review of administrative decisions.

### Resources on the World Wide Web

- Federal Judicial Center: [www.fjc.gov](http://www.fjc.gov)
- Federal courts: [www.uscourts.gov](http://www.uscourts.gov)
- Supreme Court decisions: [www.law.cornell.edu](http://www.law.cornell.edu)
- Finding laws and reports: [www.findlaw.com](http://www.findlaw.com)