The Role of The Judge:

NEITHER FORCE nor WILL, but MERELY JUDGMENT?

A Guide for Students and Teachers
The Judgement of Solomon, as recounted in the Hebrew Bible, has become an archetypal example of a judge displaying wisdom in making a ruling. Two young women who both lived in the same house and both had infant sons appealed to King Solomon of Israel for a judgement. One of the women claimed that the other woman had exchanged her dead son, who was accidentally smothered while sleeping, with the appealing woman’s living son. After deliberating, King Solomon called for a sword and declared that the fair solution was to cut the baby in two and let each mother have half. The lying mother was in support of this plan, but the true mother asked Solomon to just give the baby to the lying mother in order to save her son’s life. King Solomon then knew who the real mother was, the mother that wanted to save the child’s life, and gave the baby to her. How did King Solomon’s ruling show wisdom?
Why do historians read and interpret ancient code of laws? In other words, why should we care? We should care because every set of ancient laws has influenced, for good or ill, the structure of our laws today. The framers of the U.S. Constitution and the U.S. laws studied, read, and analyzed these same ancient texts as they drafted the first laws of this nation.

How does a historian read, interpret and understand ancient laws as texts? Ancient codes of law tell us something about the values of the societies that preceded us. These texts explain the ideals and values of the leaders of those early civilizations. In societies where authoritarian rulers, such as Hammurabi or Napoleon, mandated the code, the texts indicate the values of that individual man and possibly his close advisors. Laws established in more representative republics, such as the Roman Republic or in the British Parliament, represent the majority opinion of elected or appointed representatives in those legislative bodies. We will explore primary source texts from several of these historic sets of laws and analyze their influence on the modern American Judiciary. As you read, focus on the essential question of what was the role of the judge in each civilization?
Going To The Source: How to Analyze a Code of Laws

When reading a code of laws, it is important to view the text two ways. First, we must answer questions about authorship by first seeking answers to the following:

• Who authored this code of laws?
• What year was the code produced?
• What are the historical circumstances that caused this author or these authors to declare or pass these laws?
• What is the intended audience for these laws? In other words, who was expected to read them?
• What alternatives, or apposing viewpoints, existed at the time these laws were constructed?

Second, we must read the code of laws for content. We must ask the following:

• What kind of behavior did these leaders value?
• What were the expected roles of men, women, and children in this society?
• How were conflicts avoided?
• When conflicts happened, how were they settled?
• Do the codes of law expect clearly defined hierarchies? Were some people given greater advantages under the law than others? How?
• What was the role of judges in administering and interpreting the laws?
What is Codified Law?

Codified Law is a written and organized set of laws that is created by a leader or group of leaders. It is also known as statutory law.

The Code of Hammurabi

King Hammurabi’s Code of Laws enforced Babylonian rule in Mesopotamia from 1792 BCE until 1600 BCE. King Hammurabi lived in Babylon but controlled the outer reaches of his empire through centralized government, taxation, and his deputies stationed in each region of his realm. His code, written on a tablet and mounted in a public place for all to see, was the most extensive and most complete Mesopotamian law code. The code contains four thousand lines of text and establishes standards of behavior and extreme punishments for violators. It is most famous for its reliance on the law of retaliation, also known as an “eye for an eye.” However, punishments varied according to one’s social rank and gender. For example, if a noble destroyed the eye of another noble, he would lose his own eyes in turn. If he destroyed the eye of a commoner, he was required to pay a fine in silver.

Use the hyperlinked Code of Hammurabi to determine how one of Hammurabi’s judges should rule.

Question 1 of 4
What should be done to the carpenter who builds a house that falls and kills the owner?

- A. Require the carpenter to compensate the man’s family for the house and funeral expenses
- B. Put the carpenter to death
- C. Imprison the carpenter and place a lien on his property
- D. Revoke the carpenter’s license
In ancient Babylon, King Hammurabi appointed local judges to administer his code of laws. Litigants appeared at the local court to declare their grievances, and judges used the code to guide their decisions. Sometimes local citizens would sit in to assist the judge. These assemblies served as informal juries. Hammurabi strictly supervised his judges and he allowed appeals. All disputes would abide by “the decision of the king.” Hammurabi sent many cases of appeal back to the judge with orders to overturn the original ruling. Judges who blundered his laws lost their judgeships and paid heavy fines.

Going to the Source:
The Code of Hammurabi

[177] If a widow, whose children are not grown, wishes to enter another house (remarry), she shall not enter it without the knowledge of the judge. If she enter another house the judge shall examine the state of the house of her first husband. Then the house of her first husband shall be entrusted to the second husband and the woman herself as managers. And a record must be made thereof. She shall keep the house in order, bring up the children, and not sell the household utensils. He who buys the utensils of the children of a widow shall lose his money, and the goods shall return to their owners.

In Code #177, Hammurabi provides direction for when a widow wishes to remarry.

• What is the role of a judge in this situation?
• Whose rights and interests does the code require the judge to protect?
• How is he supposed to protect those rights?
• How does this compare to the role that a judge plays in such disputes today?
The Napoleonic Code

The Napoleonic Code, written by four eminent judges in 1803-1804, united France under a set of laws. Previously, feudalism had encouraged nobles to adopt ill-defined, individual sets of laws that sometimes contradicted those in other provinces. The French Revolution, a violent eleven-year conflict (1783-1804) between Republicans and the monarchy, ended in the reign of a military commander, Napoleon Bonaparte (Napoleon I). Napoleon desired to implement some reforms of the French Revolution while at the same time to maintain a heavy handed rule over all of France. He enlisted four eminent jurists to write a French Civil Code, the Napoleonic Code, in 1803. The Napoleonic Code took a dim view of the role of judges. Napoleon desired to negate the power of judges, especially in provinces far from Paris, his capital, where traditional aristocrats of the old regime still might possess influence.

Use the hyperlinked Napoleonic Code to determine how one of Napoleon’s judges should rule.

Question 1 of 4
By the law “Of Persons: Of Absent Persons,” what should a judge do with the custody of children (minors) whose father has disappeared?

A. Appoint a guardian for the minor
B. Apprentice the minor to an artisan with instruction to learn a trade
C. Declare the mother as superintendent of the minor
D. Assign the children to a remote province within the empire

Correct answer: C.
Going to the Source: The Napoleonic Code

The lengthy Napoleonic Code begins with a very short introduction, consisting of six “Articles” that, in short, establish the jurisdiction and reach of the code and limit the power of judges. Read the Articles listed below and answer the following questions.

1. The laws are executory throughout the whole French territory, by virtue of the promulgation thereof made by the first consul. They shall be executed in every part of the republic, from the moment at which their promulgation can have been known. The promulgation made by the first consul shall be taken to be known in the department which shall be the seat of government, one day after the promulgation; and in each of the other departments, after the expiration of the same interval augmented by one day for every ten myriameters (about twenty ancient leagues) between the town in which the promulgation shall have been made, and the chief place of each department.

2. The law ordains for the future only; it has no retrospective operation.

3. The laws of police and public security bind all the inhabitants of the territory. Immoveable property, although in the possession of foreigners, is governed by the French law. The laws relating to the condition and privileges of persons govern Frenchmen, although residing in a foreign country.

4. The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice.

5. The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them.

6. Private agreements must not contravene the laws which concern public order and good morals.

• How did Napoleon enforce his power through his code?
• What geographic expanse did he expect to control?
• Who did he see as his greatest threat in enforcing his code? How did his code seek to negate the power of those threats?
• How did he view police and judicial powers? Who is the intended audience?
Judges, known as magistrates, of the early Roman Republic (509 BCE to 46 BCE) held enormous power and immunity from criminal prosecution. While the Roman Republic lasted 500 years, this discussion rests on the history of the early Roman Republic (509 BCE to 450 BCE). In this first sixty years, magistrates sometimes served as judge, lawmaker, and executive all at once. Roman citizens elected their magistrates to serve for one year. The highest magistrate positions were shared by two Consuls, who took turns every month presiding over the entirety of the Republic. Other magistrates served in the capacity of modern mayors, governors, and military officials. They passed laws and also presided over the courts in their district or in accordance to their special function, such as a military court. Once a magistrate concluded his one-year term, he earned a seat in the Senate. Senators were powerful landholders who served by inheritance or appointment for life. The Senate did not pass laws but served as a powerful advisory committee to the two chief magistrates, the Consuls. Because the Consuls ruled only for one year, and expected to later join the Senate, they often obeyed the Senate’s advice.

In addition to their other duties, magistrates presided over courts as judges. Some magistrates served as executive and judge, while others appointed friends to serve as temporary judges. They wielded enormous power. Their powers included the authority to command an army, to summon the people and the Senate, to declare law, to issue edicts, to appoint private judges, to solve disputes between citizens, to enforce decrees and laws, to promote the public police, to
seize property, to imprison, to flog, and to execute or exile offenders of the law. Also, they enjoyed immunity, that is protection from criminal prosecution or civil lawsuits, during their one-year tenure. Only a higher level magistrate could remove a misbehaving magistrate of a lower rank.

These privileges frustrated the ordinary Roman people, known as plebeians. Roman magistrates and Senate officials constituted the patrician, or wealthy land-owning elite, and enjoyed uncontested rule in the early Roman Republic. The ordinary people, the plebeians, demanded more representation and a written code of law. In 450 BCE, magistrates responded with the Twelve Tables, a series of laws that created uniform rules and punishments that magistrates were expected to follow. The Twelve Tables codified the expected rules of the court; such as ordering that all parties appear in court and requiring judges to summon, by threat of force, any witness who dies not appear. The Twelve Tables provided rights to defendants, assigned counsel to the poor, and required judges to render decisions by the “setting of the sun.” Some of the laws in the Twelve Tables attach specific punishments to crimes. For example, if any freeman committed a theft during the day, the court would bind him as a slave to the person against whom the theft was committed. A slave who committed a theft, “shall be beaten with rods and hurled from the Tarpeian Rock.” Other laws resolved conflicts between citizens by specific instruction to the judges. For example, anyone who secretly cut down trees belonging to another must pay, “twenty-five asses (Roman coin) for each tree cut.”
What did Roman plebeians think of the Roman magistrates who ruled their courts?

Roman magistrates enjoyed enormous immunity in the Roman Republic, but these privileges eroded as the Republic matured and plebeians gained limited rights of representation in the assemblies and courts. In 160 BCE the plebeian scholar Titius denounced judges:

“They are devoted to gambling and spend their time at it drenched in scent and surrounded by a crowd of harlots. At the tenth hour they summon a slave to go to the place of assembly and inquire what business has been transacted in the Forum, who have spoken for and who against a bill, and how many tribes have supported and how many have opposed it. After that they make their way to the place of assembly in time to escape a charge of absence from duty, and being gorged with wine they fill all the urinals in the alleys as they go. On arrival at the place of assembly they gloomily bid proceedings begin. The parties state their case, the judge calls the witnesses and retires himself to make water. When he comes back, he says that he has heard everything, calls for the documentary evidence, and glances at what is written, although he can hardly keep his eyes open for the wine he has drunk. They retire to consider a verdict, and then say to one another: ‘Why should I be bothered with these silly people? Why are we not better employed in drinking mead mixed with Greek wine and eating a fat thrush and a fine fish- a genuine pike caught between the two bridges?’”

Trans. by Percival Vaughn Davies, Macrobius: The Saturnalia Columbia University Press, 1969
What is Common Law?

Governments that value common law, also known as case law or precedent law, ordain their jurists both interpretative and law making power. The idea behind the common law is to allow courts the power to create legal principles that, in turn become law. These laws are not written as codes of laws, (also known as civil law or statutory law), in the manner of monarchical rulers or legislative assemblies. Rather, case law is written and reinforced in the large body of judicial opinions produced in courts. The legal principles that justices write in their decisions serve as precedent and must govern all other decisions made in cases of similar nature within that jurisdiction. Courts must follow the precedent of past cases, a process known as *stare decisis*. A court that violates precedent may see its decision overturned by a higher court.

English Common Law

Some governments encourage a blend of common law and civil law. The British system is one good example where hundreds of years of case law has established precedents.

This accumulated knowledge of hundreds of years of case law and civic law is collectively known as “The British Constitution.” This blend of case and civil law is evident in the crime of murder. Murder is a common law crime, defined by the courts. Though it rests in case law, Parliament has based an act that murder causes a mandatory life sentence, rather than the death penalty, the original punishment set by the courts.
Sir Edmond Coke, an influential jurist of the 17th century, famously defined the common law definition of murder:

“Murder [mens rea] is when a man of sound memory and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in rerum natura under the King’s peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day of the same.” [3 Co. Inst. 47]

Coke established several principles, including “malice aforethought” and the King’s Peace. These principles still stand, but in 1996 Parliament abolished the year and a day rule. Coke’s famous definition appears in a treatise, *Institutes of the Laws of England* (1628-1644). Treatises are multi-volume works written by one or more eminent jurists that interpret the whole body of English Common Law to that point of publication. Coke’s *Institutes* is thus cited by judges as much as, if not more so, than other precedent-setting cases. Generally, these texts are unofficial, but because of their authorship and citation of case law and precedent, they remain authoritative. Even the U.S. Supreme Court has cited *Institutes* in famous decisions including *Roe v. Wade* (1973). Other famous English jurists who have contributed to English Common Law by their massive treatises include Halsbury’s *laws of England* (1907-1917) and *Commentaries on the Laws of England* by Sir William Blackstone.

Watch the video to see how the British use case law precedent in modern court cases. Consider the following questions as you watch the video:

1. Why did early judges write down their case opinions?
2. How is legislative/statutory law different from precedent?
3. What is the danger of applying precedent too strictly?
Going to the Source: English Common Law

Read carefully these two quotations by William Ewart Gladstone, who served as the British Prime Minister four separate terms. Then choose the correct answer that best explains the significance of the two quotes.

1878
“As the British Constitution is the most subtle organism which has proceeded from the womb and long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man.”

1879
“More it [the British Constitution] must be admitted, than any other, it leaves open doors which lead into blind alleys, for it presumes more boldly than any other the good sense and the good faith of those who work it.”

William E. Gladstone suggests that
A. The American Constitution is a wiser document than the British Constitution.
B. Judges in England must take care not to leave open doors and walk into blind alleys.
C. The British Constitution, unlike its written American counterpart, is a complex evolution of case and statutory law that requires judges of good character to interpret and shape it.
D. The British Constitution reflects a long history of conflict only recently resolved by men of good sense and good faith.
REVIEW ACTIVITIES

• Define the term STARE DECISIS. Explain its origins in the historic development of the judiciary. Contrast STARE DECISIS with a principle of law from another historic era. Briefly make an argument for the more effective principle of the two.

• Which historic legal system assigned the most power to its judges? Imagine that you are a governmental head of state. Would you prefer to rule in a legal system that vests more power in a code of laws or in the courts? Explain.

• Which legal system seems most fair to you as an ORDINARY CITIZEN? Would your answer differ if you are male or female? Rich or poor? Explain.

• Visit the URL NYTimes.com. In the search window of this major American newspaper, type in the word "precedent." What are the top 5 hits for this search? How have your lessons on the historic role of the judiciary provided you with insights as to how we use this word today?

Concluding Activity

You are a judge in a courtroom anywhere in the United States. The bailiff escorts a well-dressed woman into your courtroom. She is charged with felony theft. Counsel for the state argues that she is one of several members in a ring of thieves who hacked into the security system of a giant retail corporation, stole credit and debit card numbers and other personal information from 100 million customers, and sold the data on the underground market to identity theft criminals. These identity theft criminals operate by posing as the original customer and stealing money from their bank accounts. The counsel for the defense, that is, the woman's attorney, argues that she is wrongfully accused. The state, she says, has unfairly targeted her because she is a computer security expert at a local accounting firm.

ROUND 1: Groups are assigned as judges in a historic courtroom and must adjudicate the case according to the FUNCTION OF THE JUDICIARY in that historic era: 1) Hammurabi 2) Napoleon 3) Roman Republic 4) English Common Law.

Each group must: 1) draft a judgment and 2) explain HOW the group arrived at that solution and 3) explain WHY the group arrived at that solution.

ROUND 2: Each group must draft questions to ask the representing attorneys about the case.

1) What questions will you ask of the prosecution (the attorney for the state)?
2) What questions will you ask the defense (the woman's attorney)?
The British Museum [www.mesopotamia.co.uk/geography/explore/exp_set.html]


[www.come-and-hear.com/supplement/hammurabi/html]

The Napoleonic Code (AKA the French Civil Code) [www.files.libertyfund.org/files/2355]


[www.thelatinlibrary.com/law/12tables.html]

The Twelve Tables [www.constitution.org/sps/sps01_1.htm]

Twelve Tables [www.archive.org/stream/thetwelvetables14783gut/14783.txt]

In October of 2010, the Supreme Court heard the controversial case of *Snyder v. Phelps*. The case began when the family of deceased Marine Lance Cpl. Matthew Snyder filed a lawsuit against members of the Westboro Baptist Church who picketed at his funeral. Members of the Westboro Baptist Church held up signs that said, “Thank God for dead soldiers,” “You’re going to hell,” and “God hates you” outside the funeral. Snyder’s family claimed that this was defamation, invasion of privacy, and intentional infliction of emotional distress. The major question in the case was does the First Amendment protect protestors at a funeral from liability for intentionally inflicting emotional distress on the family of the deceased? If you were a Supreme Court Justice how would you have ruled in the case? Why? To learn more about the case and find out the court’s ruling click on the hyperlinked case name above.
Now that we have looked at some of the earlier systems of law in Chapter 1, we will now turn our attention to the American Judicial system. Under the Articles of Confederation, the first written constitution for the United States, there was no federal judiciary. Each state had their own judicial system, but there was no way for the national government to resolve disputes between states. Furthermore, there were no courts that were responsible for upholding and interpreting national laws, as each state was allowed to interpret and administer federal laws as they saw fit. This led to many inconsistencies and an overall ineffectiveness of national laws. These problems, as well as several other major weaknesses in the Articles of Confederation, led to a call to revise the existing government in the spring of 1787.

In May of 1787, delegates from 12 of the 13 states met in Philadelphia, Pennsylvania for what we now know as the Constitutional Convention. What started out as a meeting to revise the Articles of Confederation soon became a meeting to frame an entirely new system of government in a new United States Constitution. Article III of this new Constitution lays out the framework for a new national judicial system. This chapter will explore this framework that was established in Article III and look at how the courts have evolved over time. As you read, focus on the essential questions of how did early systems of law influence the American Judicial system and what is the appropriate role of a Supreme Court Justice in modern America?

Introduction
In the summer of 1787, our founding fathers met and established a framework for our government that we now know as the United States Constitution. After many debates and drafts, ultimately a document with seven different Articles, or sections, was sent to the states for ratification, or approval. This new Constitution created a federal system, where power would be shared between a strong national government and strong state governments, creating a better balance of power than what had been established by the Articles of Confederation. It also created three distinct and separate branches of the national government, a legislative branch, an executive branch, and a judicial branch, that would each have checks over the other branches of government.

**Article III**

Article III of the United States Constitution sets up the Judicial Branch of the national government, but this article is much shorter and less detailed than Article I, which sets up the Legislative Branch, and Article II, which sets up the judicial branch. Article III establishes that there will be one Supreme Court, the highest court for our nation, and gives Congress the power to create all inferior courts, or courts that are lower in status.

While Article III provides a basic framework, many of the details for how the branch would actually function had to be figured out over time by Congress and the courts themselves. Questions that had to be answered included: How would judges be chosen? How long would they serve? How would the inferior courts be structured? What checks would the judicial branch have over the other branches of government?
Going to the Source: Article III, Sections 1 and 2, of the U.S. Constitution

SECTION 1.
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 2.
The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--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;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Using the excerpt from Article III, answer the following questions:

• What specific information about the judicial branch is included in Article III? What important information is left out?
• Why do you think the framers left this information out of Article III?
• Do you think the framers should have been more specific when setting up the judicial branch? Why or why not?
Although many questions about how the federal judicial system would operate were not answered by Article III of the Constitution, most of those questions have been answered by both Congress and the courts themselves over the past 200 years.

**Powers of the Court**

According to the separation of powers established by the Constitution, the primary responsibility of the Supreme Court should be to interpret the U.S. Constitution and other federal laws. This should be done primarily by reviewing cases that have been decided in inferior courts to make sure those decisions were in line with the Constitution and existing federal law. The Supreme Court was given the authority to hear cases arising under Statutory Law, or laws passed by legislative bodies, and Common Law, or judge-made law based on precedent.

One of the most important powers that the Supreme Court has is the power of judicial review. Judicial review is the power of the Supreme Court to review laws passed by Congress and acts of the executive branch and declare them void and unenforceable if they are judged to be in violation of the Constitution. The power of judicial review allows the judicial branch to have a significant check over the legislative and executive branches of our federal government. Although, the power of judicial review is not specifically mentioned in the Constitution, Alexander Hamilton suggests that it was indeed intended for the federal courts to have this power in Federalist 78. The power of judicial review was officially given to the Supreme Court by the precedent set in the landmark case Marbury v. Madison in 1803.

After watching this video about the Marbury v. Madison case, explain in your own words HOW this case established judicial review.
The Federalist No. 78

The Judiciary Department

Independent Journal
Saturday, June 14, 1788
[Alexander Hamilton]

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which

Going to the Source: Federalist 78

Federalist No. 78 was written by Alexander Hamilton, although he signed it with the pseudonym Publius, in order to explain and justify the structure of the judicial branch under the newly proposed Constitution. Read Federalist 78 in the scrolling side bar to the left and then respond to the following questions using the widget below. Be sure to email your responses to your teacher.

1. Why does Hamilton argue that the judiciary is naturally the weakest branch of government?
2. What does Hamilton say can improve this weakness?
3. How did Hamilton feel about judicial review?
4. Why did Hamilton argue that judges should have life tenure?
Jurisdiction of the Courts

Jurisdiction refers to the authority of the courts to hear a particular type of case. According to the Constitution, the Supreme Court has original jurisdiction, or the authority to hear a case before any other court has heard the case, in only two circumstances: cases involving disputes between two or more states and cases involving foreign diplomats. These two types of cases are rare, so most of the Supreme Court’s caseload is its appellate jurisdiction, or cases the Supreme Court hears on appeal from a lower court. With appellate cases, the Supreme Court reviews what happened in the lower court and can reverse, uphold, or modify the lower court’s decisions. Appeals to the Supreme Court can be either substantive, where the validity or constitutionality of a particular law is challenged, or procedural, where the legal process that was followed in a particular case is challenged. The Supreme Court has appellate jurisdiction in the following types of cases:

- Cases arising under the Constitution
- Cases dealing with the laws of the United States
- Cases dealing with treaties made with foreign nations
- Cases of admiralty and maritime jurisdiction
- Controversies to which the United States is a party
- Controversies between a state and citizens of another state
- Controversies between citizens of different states

Structure of the Federal Courts

As stated in the previous section, Article III of the Constitution only creates the Supreme Court and gives Congress the power to create all inferior courts. Over time, Congress has created two levels of inferior courts, district courts and courts of appeals.
Federal district courts are the lowest level of the federal court system, and they have original jurisdiction in most cases. There are 94 federal district courts, and each state has at least one district court. Jury trials are held in district court.

Federal Courts of Appeals are the middle level of the federal court system, and they have appellate jurisdiction in most cases. There are 13 judicial circuits in the United States, and each circuit has its own court of appeals. Appeals courts do not have jury trials, but a panel of judges reviews cases that have been appealed from the district courts.

The United States Supreme Court is the highest court in our federal court system. All decisions made here are final and cannot be appealed. The Supreme Court is made up of nine total justices, one Chief Justice and eight Associate Justices.

**Procedures for Selection of Judges**

Judges and Justices that serve in all three levels of the federal court system are appointed, not elected, and serve life tenure. In order to be a judge in a federal district, appeals, or Supreme Court, an individual must be appointed by the President of the United States and approved by the United States Senate. There are no minimum qualifications listed in the Constitution, so the President can pick anyone, as long as they are also approved by the Senate. Presidents generally consider factors such as a potential nominees’ party affiliation, political ideology, judicial philosophy, regional background, experience, interest group connections, gender, and race when making a decision about who to nominate. Deciding who to nominate to the Supreme Court when an opening arises is one of the most important decisions a President makes because if confirmed by the Senate, that justice will shape policy for much longer than the president’s term.

Because Supreme Court Justices serve for life and have the significant power of judicial review, Senate hearings to confirm presidential nominees are often long and controversial. The Senate Judicial Committee often

Watch this video about the controversial Senate confirmation hearing of Justice Clarence Thomas in 1991.
administers a litmus test of the nominee through their questions in order to determine the political ideology and judicial philosophy of the nominee and predict the way the nominee would rule on controversial cases if confirmed. If a nominee makes it through the Senate confirmation process, then they will serve life tenure, which means they can only be removed from the Supreme Court if they die, choose to resign, or are impeached.

**Supreme Court Operating Procedures**

A Supreme Court session begins in October of each year and ends in July. Most months the justices spend the first two weeks hearing arguments in cases and the last two weeks conferencing, writing opinions, and reading briefs and appeals. One of the most important decisions justices must make is what cases they are going to review. Each year the Supreme Court receives about 10,000 requests to review a case from a lower court, most of these called a writ or certiorari, but they only hear about 200 cases each year. When deciding what cases to put on the docket, the court calendar, the justices use the Rule of 4, the unwritten rule that if at least 4 of the 9 justices think the case is important enough to review then they schedule it on the docket. Usually the justices will select the cases that address some important constitutional question. Once a case is put on the docket, the following procedures are followed:

1. Written Arguments called briefs are filed by each side
2. Each side gets 30 minutes to make their oral argument in front of the justices
3. The justices conference and vote on the case
4. Opinions are written by the justices
5. The decision is announced in court

The official decision of the court is called the majority opinion, and these opinions set precedent that carries the force of law. Justices also have the option of writing a concurring opinion, when they agree with the majority decision but for different legal reasons, or a dissenting opinion, where they disagree with the majority decision.

**Judicial Activism and Restraint**

We now understand the powers that the Supreme Court has and how justices are selected, but how do they make decisions on the important cases that they hear? Justices take an oath to uphold the United States Constitution, so they should look first to the Constitution when deciding cases. Justices should also look at existing federal law and case precedent. Justices should follow the principle of Stare Decisis, or uphold precedent unless there is a compelling reason to overturn the precedent. Although the Supreme Court is somewhat shielded from public influence, public opinion and social conditions do sometimes influence the decisions that justices make. A justices’ personal judicial philosophy also influences the way they approach a case and the decisions that they make.
Label each justice with the appropriate label

- Judicial Activist
- Strict Constructionist
- Chief Justice
- Often the “Swing Vote”
- Judicial Activist
- Strict Constructionist
- Chief Justice
- Often the “Swing Vote”

Click to Check Answer
The two most common judicial philosophies are Judicial Restraint and Judicial Activism. Judicial Restraint is also referred to as a strict-constructionist approach. This approach involves justices deciding cases based strictly on the language of the laws and the Constitution. Proponents of judicial restraint believe that justices should not consider public opinion, social conditions, or their own personal beliefs when making judicial decisions. Judicial Activism is the approach that involves justices discerning general principles underlying laws or the Constitution and applying them to modern circumstances. Proponents of judicial activism argue that public opinion and evolving social conditions should factor into judicial decision-making.
REVIEW ACTIVITIES

• Article III of the Constitution is one of the shortest articles. Do you think this was intentional or an oversight on the part of the framers? Be prepared to defend your answer.

• Do you think the founding fathers intended for Supreme Court justices to have the power of judicial review? Why or why not?

• Why is Marbury v. Madison considered one of the most important Supreme Court cases in all of history? How would the court function differently without the precedent set in this case?

• If you were the President, what factors would you consider when nominating a Supreme Court justice?

• Research the current Supreme Court justices. Which one is the most activist? Defend your answer.

Moot Court Activity

Now that you have studied the way the modern American Supreme Court functions, you will have the opportunity to experience it for yourself through a moot court simulation. Use the links below to prepare for your own Supreme Court experience.
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