Courts and the Judicial Process

I. Courts as public policy makers.
   A. Activism as restraint, 1890-1930s
   B. Activism as initiative, post-World War II

II. Post-war changes in the legal landscape.
   A. The law explosion
   B. Growth in number of lawyers
   C. Caseload growth in federal courts
   D. Growth in number of courts and judges

III. The new legalism.
   A. Reinvention of court doctrines
   B. Easier access to court for potential litigants
   C. Courts’ growing roles in public policy making

IV. Impacts and problems.
The Federal Court Structure

The United States Federal Courts

**SUPREME COURT**

**UNITED STATES SUPREME COURT**

**APPELLATE COURTS**

**U.S. Courts of Appeals**
- 12 Regional Circuit Courts of Appeals
- 1 U.S. Court of Appeals for the Federal Circuit

**TRIAL COURTS**

**U.S. District Courts**
- 94 judicial districts
- U.S. Bankruptcy Courts
- U.S. Court of International Trade
- U.S. Court of Federal Claims

**FEDERAL COURTS AND OTHER ENTITIES OUTSIDE THE JUDICIAL BRANCH**

**Military Courts (Trial and Appellate)**
- Court of Veterans Appeals
- U.S. Tax Court
- Federal administrative agencies and boards
The Federal District and Appeals Courts
How Cases Get to the Supreme Court

Almost 30% come from state courts.

Decisions can be appealed if they raise a constitutional question.

Over 65% come from federal courts.

Rulings can be appealed.

12 Circuit Courts of Appeals and Court of Appeals for the Federal Circuit.

Appeals of rulings by district courts and decisions by independent regulatory commissions and administrative agencies.

94 District Courts (in all states and the District of Columbia).

Cases involving federal law are tried in federal district court.

Federal Route

State Route

State Trial Courts

Defendant loses and appeals

Intermediate Appellate Courts

Further appeal for ruling by highest court in state

50 State Supreme Courts

Almost 30% come from state courts.

About 5%

Original Jurisdiction
Cases involving ambassadors and diplomats; cases in which a state is a party.
The Supreme Court Gets Active, 1900-1939

- Laws Overturned
- Years: 1860-1899, 1900-1939
- Federal Laws vs. State Laws

- 1860-1899:
  - Federal Laws: 20
  - State Laws: 145

- 1900-1939:
  - Federal Laws: 43
  - State Laws: 390
Growth in Number of Lawyers After World War II

- **1940**: 180,000 lawyers in a population of 132 million (Ratio: 1 lawyer for every 733 people)
  - Compare to 1890; ratio was 1 lawyer for every 739 people.

- **GI Bill (1944)**

- **Growth in number of law students**
  - 1940: 37,000 law students
  - 2007: 149,000 law students

- **Changes in women’s lives**
  - 1940: 690 women attending accredited law schools
  - 1980: 41,000 women in accredited law schools
  - 2007: 66,000 female law students (44% of total)

- **By 2007:**
  - Law schools producing 44,000 new lawyers each year
  - Number of lawyers exceeds 1,000,000
  - Lawyers per 100,000 people (1990):
    - U. S.: 281
    - England: 82
    - Germany: 111
    - Japan: 11
The Supreme Court Caseload, 1950-2005

SOURCE: U.S. Courts (http://www.uscourts.gov/caseloadstatistics.html); Statistical Abstracts

Visit 03/31/2011
Appeals Court Cases Filed, 1940-2005

SOURCE: U.S. Courts (http://www.uscourts.gov/caseloadstatistics.html); Statistical Abstracts
District Court Cases Filed, 1940-2005

Cases Filed

Year

Civil Cases

Criminal Cases

SOURCE: U.S. Courts
(http://www.uscourts.gov/caseloadstatistics.html); Statistical Abstracts

Visited 03/31/2011
Why the growth in cases in federal court?

• Increase in crime is not the explanation

• Growing personal wealth permitted more people to hire lawyers and sue

• Change in the court doctrine of “justiciability”

• New legislation creating new rights, and new opportunities to sue for court protection of those rights.
  – Civil rights cases:
    • 1960: 200 cases
    • 1980: 25,341 cases
Growth in Number of Federal Judges, 1790-2000

SOURCE: Statistical Abstract of the United States; Historical Statistics of the United States
Changing Patterns of Judicial Selection

- **Senatorial Courtesy**
  - District Court judges chosen by senators of the president’s party
  - Selection of appeals court judges rotated among senators of president’s party
  - Confirmation was routine; Senate deferred to president’s nominees

- **Centralized White House Selection**
  - President controls most selections with advice from the Office of Legal Counsel in the Justice Department
  - Growing partisan battles over confirmation
Judicial Confirmation Battles

Abe Fortas, 1968

Robert Bork, 1987

Clarence Thomas, 1991

Bush Nominees, 2002

Harriet Miers, 2005
Changing Backgrounds of Supreme Court Justices

Of the 87 Justices appointed before 1950:
- 7 served in the Continental Congress
- 16 served in the House of Representatives
- 14 served in the Senate
- 27 served in the Cabinet
- 5 were state governors
- 1 had been president of the United States

Changes after 1950:
- Last justice to have served in the House was Fred Vinson who died in 1953
- Last former Senator to serve on the Court was Hugo Black who retired in 1971
- Last member of a president’s cabinet to serve on the Court was Tom Clark who retired in 1966
- Last justice to have been a governor was Earl Warren who retired in 1969.

So, not since 1971 has there been a justice who was ever a member of Congress, a governor, or a cabinet secretary.
## Supreme Court Membership, 1954

<table>
<thead>
<tr>
<th>Justice</th>
<th>Background</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hugo Black</strong></td>
<td>U.S. Senator</td>
</tr>
<tr>
<td><strong>Harold H. Burton</strong></td>
<td>State legislator; Mayor of Cleveland; U.S. Senator</td>
</tr>
<tr>
<td><strong>Tom Clark</strong></td>
<td>U.S. Attorney General</td>
</tr>
<tr>
<td><strong>William O. Douglas</strong></td>
<td>Chairman, Securities and Exchange Commission</td>
</tr>
<tr>
<td><strong>Felix Frankfurter</strong></td>
<td>Professor, Harvard Law School; Assistant U.S. Attorney; Labor “trouble shooter” for Woodrow Wilson</td>
</tr>
<tr>
<td><strong>Robert Jackson</strong></td>
<td>Counsel, IRS; Special Counsel, SEC; Assistant Attorney General; Solicitor General; U.S. Attorney General</td>
</tr>
<tr>
<td><strong>Sherman Minton</strong></td>
<td>U.S. Senator</td>
</tr>
<tr>
<td><strong>Stanley Reed</strong></td>
<td>State legislator; Counsel to the Federal Farm Board; General Counsel, Reconstruction Finance Corporation; U.S. Solicitor General</td>
</tr>
<tr>
<td><strong>Earl Warren</strong></td>
<td>Governor, California; 1948 Republican candidate for Vice President; State attorney general and prosecutor</td>
</tr>
</tbody>
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# Supreme Court Membership, 2008

<table>
<thead>
<tr>
<th>Justice</th>
<th>Background</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Stephen Breyer</strong></td>
<td>Federal judge, U.S. Court of Appeals; congressional staff member</td>
</tr>
<tr>
<td><strong>Ruth Bader Ginsburg</strong></td>
<td>Federal judge, U.S. Court of Appeals</td>
</tr>
<tr>
<td><strong>Anthony Kennedy</strong></td>
<td>Federal judge, U.S. Court of Appeals</td>
</tr>
<tr>
<td><strong>Samuel Alito</strong></td>
<td>Federal judge, U.S. Court of Appeals</td>
</tr>
<tr>
<td><strong>John Roberts</strong></td>
<td>Federal judge, U.S. Court of Appeals; Associate Counsel to Ronald Reagan</td>
</tr>
<tr>
<td><strong>Antonin Scalia</strong></td>
<td>Federal judge, U.S. Court of Appeals; Chair, Administrative Conference of U.S.; Office of Legal Counsel, U.S. Justice Department</td>
</tr>
<tr>
<td><strong>David Souter</strong></td>
<td>Federal judge, U.S. Court of Appeals; Attorney General of New Hampshire</td>
</tr>
<tr>
<td><strong>John P. Stevens</strong></td>
<td>Federal judge, U.S. Court of Appeals</td>
</tr>
<tr>
<td><strong>Clarence Thomas</strong></td>
<td>Federal judge, U.S. Court of Appeals; Assistant Secretary, U.S. Department of Education; Chair, EEOC</td>
</tr>
</tbody>
</table>

**SOURCE:** *Congressional Quarterly Weekly Reports.*
Supreme Court Decision Making

Federal courts
Approximately 150,000 cases

Cases questioning federal laws, treaties, or the Constitution

Requests for Supreme Court review
(Approximately 8,000 requests)

Discuss list in conference

Rule of four

The docket
(Approximately 85 cases)

Review denied in 99% of all requests

Decision-making process

Briefs

Oral argument

Conference

Opinion
(Approximately 75 signed opinions)

Traditional Limits on Access to Federal Courts

- Courts would only hear genuine cases in law and equity (no hypotheticals or advisory opinions)
  - With litigants who had standing to sue
  - On matters that clearly fell within a court’s jurisdiction
  - Where courts could provide genuine remedies (justiciability)
- Courts would not hear cases that were moot
- Courts would not deal with “political questions”
- Federal courts would not hear cases involving state law that had not yet been resolved in state courts (“ripeness”)
The Warren Court
Courts and Environmental Policy

- National Environmental Policy Act (1969)
  - Environmental Impact Statements

- Endangered Species Act (1973)
Courts as Policy Makers: Some Concerns

- Court decisions often contravene public opinion.
- Policy making by courts raises questions about accountability and responsibility.
- The expanding court role in policy making contributes to irresponsibility among elected officials.
- Courts provide little basis or support for collective action.
- Judicial policy making diminishes the energy that goes into popular mobilization.
- Policies grow more complex, but most judges are generalists not specialists.