JUDICIAL POLICY MAKING AND IMPLEMENTATION

AS ILLUSTRATED in the opening vignette, all judges, whether they recognize it or not, make policy. The primary way federal judges, and the U.S. Supreme Court, in particular, make policy is through interpreting statutes or the Constitution. This occurs in a variety of ways. Judges can interpret a provision of a statute to cover matters previously not understood to be covered by the law, or they can discover new rights, such as that of privacy, from their reading of the Constitution. They also have literal power over life and death when they decide death penalty cases.

This power of the courts to make policy presents difficult questions for democratic theory, as noted by Justice Antonin Scalia in *Webster* v. *Reproductive Health Services* (1989), because democratic theorists believe that the power to make law resides only in the people or their elected representatives. Yet, court rulings, especially Supreme Court decisions, routinely affect policy far beyond the interests of the immediate parties.

Policy Making

One measure of the power of the courts and their ability to make policy is that more than one hundred federal laws have been declared unconstitutional. Although many of these laws have not been particularly significant, others have. For example, in *Ashcroft* v. *Free Speech Coalition* (2002), the Court ruled that the Child Online Protection Act, designed to prevent minors from viewing pornography over the Internet, was unconstitutional.[67]

Another measure of the policy-making power of the Supreme Court is its ability to overrule itself. Although the Court generally abides by the informal rule of *stare decisis,* by one count, it has overruled itself in more than 200 cases.[68] *Brown* v. *Board of Education* (1954), for example, overruled *Plessy* v. *Ferguson* (1896), thereby reversing years of constitutional interpretation concluding that racial segregation was not a violation of the Constitution. Moreover, in the past few years, the Court has repeatedly reversed earlier decisions in the areas of criminal defendants' rights, women's rights, and the establishment of religion, thus revealing its powerful role in determining national policy.

A measure of the growing power of the federal courts is the degree to which they now handle issues that had been considered political questions more appropriately left to the other branches of government to decide. Prior to 1962, for example, the Court refused to hear cases questioning the size (and population) of congressional districts, no matter how unequal they were.[69] The boundary of a legislative district was considered a political question. Then, in 1962, writing for the Court, Justice William Brennan, Jr. concluded that

simply because a case involved a political issue, it did not necessarily involve a political question. This opened up the floodgates to cases involving a variety of issues that the Court formerly had declined to address.[70]

Implementing Court Decisions

President Andrew Jackson, annoyed about a particular decision handed down by the Marshall Court, is alleged to have said, "John Marshall has made his decision; now let him enforce it." Jackson's statement raises a question: how do Supreme Court rulings translate into public policy? In fact, although judicial decisions carry legal and even moral authority, all courts must rely on other units of government to carry out their directives. If the president or members of Congress, for example, don't like a particular Supreme Court ruling, they can underfund programs needed to implement a decision or seek only lax enforcement. **Judicial implementation** refers to how and whether judicial decisions are translated into actual public policies affecting more than the immediate parties to the lawsuit.

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How well a decision is implemented often depends on how well crafted or popular it is. Hostile reaction in the South to *Brown* v. *Board of Education* (1954) and the absence of precise guidelines to implement the decision meant that the ruling went largely unenforced for years. The *Brown* experience also highlights how much the Supreme Court needs the support of both federal and state courts as well as other governmental agencies to carry out its judgments. For example, you probably graduated from high school after 1992, when the Supreme Court ruled that public middle school and high school graduations could not include a prayer, yet your own commencement ceremony may have included one.

The implementation of judicial decisions involves what political scientists call an implementing population and a consumer population.[71] The implementing population consists of those people responsible for carrying out a decision. It varies, depending on the policy and issues in question, but can include lawyers, judges, public officials, police officers and police departments, hospital administrators, government agencies, and corporations. In the case of school prayer, the implementing population could include teachers, school administrators, or school boards. The consumer population consists of those people who might be directly affected by a decision, that is, in this case, students and parents.

For effective implementation of a judicial decision, the first requirement is that the members of the implementing population must act to show that they understand the original decision. For example, the Supreme Court ruled in *Reynolds* v. *Sims* (1964) that

Photo courtesy: Joe Raedle/Newsmakers/Getty Images

■ This photo, taken in September 2000, illustrates the difficulty in implementing judicial decisions. Although the Supreme Court ruled in June 2000 that pre-game prayers at public high schools were unconstitutional, prayers continued at many public school sporting events across the country.

every person should have an equally weighted vote in electing governmental representatives.[72] This "one person, one vote" decision might seem simple enough at first glance, but in practice it can be very difficult to understand. The implementing population in this case consists chiefly of state legislatures and local governments, which determine voting districts for federal, state, and local offices (see chapter 13). If a state legislature draws districts in such a way that African American voters are spread thinly across a number of separate constituencies, the chances are slim that any particular district will elect a representative who is especially sensitive to blacks' concerns. Does that violate "equal representation"? (In practice, through the early 1990s, courts and the Department of Justice intervened in many cases to ensure that elected officials would include minority representation, only ultimately to be overruled by the Supreme Court.)[73]

The second requirement is that the implementing population actually must follow Court policy. Thus, when the Court ruled that men could not be denied admission to a state-sponsored nursing school, the implementing population—in this case, university administrators and the state board of regents governing the nursing school—had to enroll qualified male students.[74]

Judicial decisions are most likely to be implemented smoothly if responsibility for implementation is concentrated in the hands of a few highly visible public officials, such as the president or a governor. By the same token, these officials also can thwart or impede judicial intentions. Recall from chapter 6, for example, the effect of Governor Orval Faubus's initial refusal to allow black children to attend all-white public schools in Little Rock, Arkansas.

The third requirement for implementation is that the consumer population must be aware of the rights that a decision grants or denies them. Teenagers seeking an abortion, for example, are consumers of the Supreme Court's decisions on abortion. They need to know that most states require them to inform their parents of their intention to have an abortion or to get parental permission to do so. Similarly, criminal defendants and their lawyers are consumers of Court decisions and need to know, for instance, the implications of recent Court decisions for evidence presented at trial.

SUMMARY

THE JUDICIARY AND THE LEGAL PROCESS—on both the national and state levels—are complex and play a far more important role in the setting of policy than the Framers ever envisioned. To explain the judicial process and its evolution, we have made the following points:

1. **The Constitution and the Creation of the Federal Judiciary**
   Many of the Framers viewed the judicial branch of government as little more than a minor check on the other two branches, ignoring Anti-Federalist concerns about an unelected judiciary and its potential for tyranny.
   The Judiciary Act of 1789 established the basic federal court system we have today. It was the Marshall Court (1801–1835), however, that interpreted the Constitution to include the Court's major power, that of judicial review.
2. **The American Legal System**
   Ours is a dual judicial system consisting of the federal court system and the separate judicial systems of the fifty states. In each system there are two basic types of courts: trial courts and appellate courts. Each type deals with cases involving criminal and civil law. Original jurisdiction refers to a court's ability to hear a case as a trial court; appellate jurisdiction refers to a court's ability to review cases already decided by a trial court.
3. **The Federal Court System**
   The federal court system is made up of constitutional and legislative courts. Federal district courts, courts of appeals, and the Supreme Court are constitutional courts.
4. **How Federal Court Judges Are Selected**
   District court and court of appeals judges are nominated by the president and subject to Senate confirmation. Supreme Court justices are nominated by the president and must also win Senate confirmation. Presidents use different criteria for selection, but important factors include competence, standards, ideology, rewards, pursuit of political support, religion, race, ethnicity, and gender.
5. **The Supreme Court Today**
   Several factors go into the Court's decision to hear a case. Not only must the Court have jurisdiction, but at least four justices must vote to hear the case, and cases with certain characteristics are most likely to be heard. Once a case is set for review, briefs and *amicus curiae* briefs are filed and oral argument scheduled. The justices meet after oral argument to discuss the case, votes are taken, and opinions are written, circulated, and then announced.

6. **Judicial Philosophy and Decision Making**
Judges' philosophy and ideology have an extraordinary impact on how they decide cases. Political scientists consider these factors in identifying several models for how judges make decisions, including the behavioral, attitudinal, and strategic models.

7. **Judicial Policy Making and Implementation**
The Supreme Court is an important participant in the policy-making process. The process of judicial interpretation gives the Court powers never envisioned by the Framers.

KEY TERMS

amicus curiae, p. 371
appellate courts, p. 353
appellate jurisdiction, p. 353
brief, p. 357
civil law, p. 353
constitutional courts, p. 354
criminal law, p. 353
judicial activism, p. 377
judicial implementation, p. 381
judicial restraint, p. 377
judicial review, p. 346
Judiciary Act of 1789, p. 347
jurisdiction, p. 353
legislative courts, p. 354
Marbury v. *Madison* (1803), p. 350
original jurisdiction, p. 353
precedent, p. 357
Rule of Four, p. 370
senatorial courtesy, p. 359
solicitor general, p. 371
stare decisis, p. 357
strict constructionist, p. 362
trial courts, p. 353
writ of *certiorari,* p. 369

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WEB EXPLORATIONS

To learn more about the workings of the U.S. justice system, see
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