



The Judiciary

Wilson Chapter 14

Klein Oak High School

Introduction 1

- Only in the United States do judges play so large a role in policy-making.
 - Judicial review: the right of the federal courts to rule on the constitutionality of laws and executive acts
 - Chief judicial weapon in the checks and balances system
 - Few other countries have such a power.
 - In Britain, parliament is the supreme law maker.
 - Judicial review, with some notable exceptions, is not determinative in other countries.

Introduction 2

- Debate is over how the Constitution should be interpreted.
 - Strict constructionism: judges are bound by wording of Constitution
 - Activist: judges should look to underlying principles of Constitution
 - Not a matter of liberal versus conservative
 - A judge can be both conservative and activist, or liberal and strict constructionist.
 - Today: most activists tend to be liberal, most strict constructionists tend to be conservative.

Development of the Federal Courts (overview)

- Founders view
- National supremacy and slavery: 1789 – 1861
- Government and the economy: 1865 – 1936
- Government and political liberty: 1936 to the present
- The revival of state sovereignty

Founders' View

- Most Founders probably expected judicial review but did not expect federal court to play such a large role in policy-making.
- Traditional view: judges find and apply existing law
- Activist judges would later respond that judges make law.
- Traditional view made it easy for Founders to predict courts would be neutral and passive in public affairs.
- Hamilton: courts are the least dangerous branch; their authority only limits the legislature
- But federal judiciary evolved toward judicial activism, shaped by political, economic, ideological forces of three historical eras.

National Supremacy and Slavery: 1789—1861

- *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819)
 - Supreme Court could declare a congressional act unconstitutional.
 - Power granted to federal government should be construed broadly.
 - Federal law is supreme over state law.
- Interstate commerce clause is placed under the authority of federal law; state law conflicting with federal law was declared void.
- *Dred Scott v. Sandford* (1857): Blacks were not, and could not become, free citizens of the U.S.; federal law (Missouri Compromise) prohibiting slavery in northern territories was unconstitutional

Government and the Economy: 1865 to 1936

- Dominant issue of the period: under what circumstances could the economy be regulated by the state governments? by the federal government?
- Private property held to be protected by the Fourteenth Amendment.
- Judicial activism—Supreme Court assessing the constitutionality of governmental regulation of business or labor
- Supreme Court was supportive of private property, and could not develop a principle distinguishing between reasonable and unreasonable regulation.
- The Court interpreted the Fourteenth and Fifteenth amendments narrowly as applied to blacks—upheld segregation, excluded blacks from voting in many states.

Government and Political Liberty: 1936 to the present

- Court establishes tradition of deferring to the legislature in economic regulation cases.
- Court shifts attention to personal liberties and is active in defining rights.
- Court-packing plan (FDR)
- Warren Court provided a liberal protection of rights and liberties against government trespass.

Revival of State Sovereignty

- Beginning in 1992, the Supreme Court began to rule that the states have the right to resist some federal action.



Structure of the Federal Courts (overview)

- Supreme Court (created by Constitution)
- Constitutional Courts (created by Congress)
- Legislative Courts (created by Congress)
- Two kinds of federal courts were created by Congress to handle cases that the Supreme Court does not need to decide.

Constitutional Courts

- Exercise judicial powers found in Article III
- Judges serve during good behavior
- Salaries not reduced while in office
- Examples:
 - District Courts (94)
 - Courts of Appeals (12)

Legislative Courts

- Created by Congress for specialized purposes
- Judges have fixed terms.
- Judges can be removed.
- No salary protection
- Example: Court of Military Appeals

Selecting Judges 1

- All constitutional court judges are nominated by president and confirmed by the Senate
- Party background has some effect on judicial behavior, but rulings are also shaped by other factors such as the facts of the case, precedent, lawyers' arguments.
- Senatorial courtesy: appointees for federal courts are reviewed by senators for that state, if the senators are of the president's party (particularly for U.S. district courts)

Selecting Judges 2

- The litmus test
 - Presidents seek judicial appointees who share their political ideologies.
 - Has caused different circuits to come to different rulings about similar cases
 - Raises concerns that ideological tests are too dominant, and has caused delays in securing Senate confirmations
 - Greatest impact on Supreme Court—no tradition of senatorial courtesy



Jurisdiction of the Federal Courts (overview)

- Dual court system
- Route to the Supreme Court

Dual Court System 1

- One state, one federal
- Federal cases listed in Article III and Eleventh Amendment of Constitution
- Federal question cases: involving
 - U.S. Constitution
 - federal law
 - Treaties
- Diversity cases: involving
 - different states, or
 - citizens of different states

Dual Court System 2

- Some cases can be tried in either federal or state court.
 - Example: if both federal and state laws have been broken (dual sovereignty)
 - Jurisdiction: each government has right to enact laws and neither can block prosecution out of sympathy for the accused
- State cases sometimes can be appealed to Supreme Court.

Route to the Supreme Court

- Most federal cases begin in district courts.
 - Most are straightforward, do not lead to new public policy.
- Supreme Court picks the cases it wants to hear on appeal.
 - Requires agreement of four justices to hear case - to issue a writ of *certiorari*
 - Usually deals with..
 - Significant federal or constitutional question
 - Conflicting decisions by circuit courts
 - Constitutional interpretation by one of the highest state courts, about state or federal law
 - Only about 100 appeals are granted *certiorari*
 - Limited number of cases heard results in diversity of constitutional interpretation among appeals courts

Getting to Court (overview)

- Deterrents to the courts acting as democratic institutions
- Fee shifting
- Standing: who is entitled to bring a case
- Class action suits

Deterrents to Courts Acting as Democratic Institutions

- Supreme Court rejects all but a few of the applications for certiorari.
- Costs of appeal are high
 - But these can sometimes be lowered...
 - *In forma pauperis*: plaintiff indigent, with costs paid by government
 - Indigent defendant in a criminal trial: legal counsel provided by government at no charge
 - Payment by interest groups (e.g., American Civil Liberties Union)

Fee Shifting

- Usually, each party must pay their own legal expenses.
- However, the losing defendant pays the plaintiff's expenses (fee shifting) in certain cases.

Standing: Who is Entitled to Bring a Case

- There must be a real controversy between adversaries.
- Personal harm must be demonstrated.
- Being a taxpayer does not ordinarily constitute entitlement to challenge federal government action; this requirement is relaxed when the First Amendment is involved.
- Sovereign immunity: government must consent to being sued

Class Action Suits

- Brought on behalf of all similarly situated persons
- Number of class action suits increased because there were financial incentives to bring suit and because Congress was not meeting new concerns.
- In 1974, Supreme Court tightened rules on these suits for federal courts, though many state courts remain accessible.

The Supreme Court in Action 1

- Oral arguments by lawyers after briefs submitted
 - Each side has one half-hour, but justices can interrupt with questions.
 - Solicitor general
 - Decides what cases the government will appeal from lower courts
 - Approves every case presented to the Supreme Court
 - *Amicus curiae* (i.e. “friend of the Court”) briefs submitted if both parties agree or Supreme Court grants permission.
 - Other influences on the justices include law journals.

The Supreme Court in Action 2

- Conference procedures
 - Role of chief justice: speaking first, voting last
 - Selection of opinion writer
 - Chief if on majority
 - Four kinds of court opinions
 - *Per curiam*: brief and unsigned
 - Opinion of the court: majority opinion
 - Concurring opinion: agree with the ruling of the majority opinion, but modify the supportive reasoning
 - Dissenting opinion: minority opinion

The background of the slide is a photograph of the United States Supreme Court building. The building is a large, white, neoclassical structure with a prominent portico supported by tall columns. In the foreground, there is a large, mature cherry blossom tree with pink and white flowers. The sky is blue with scattered white clouds. The text is overlaid on a semi-transparent white box.

The Power of the Federal Courts (overview)

- Power to make policy
- Measures of power
- Views of judicial activism
- Legislation and the courts

Power to Make Policy

- By interpretation of the Constitution or law
- By extending the reach of existing law
- By designing remedies that involve judges acting in administrative or legal ways

Measures of Power

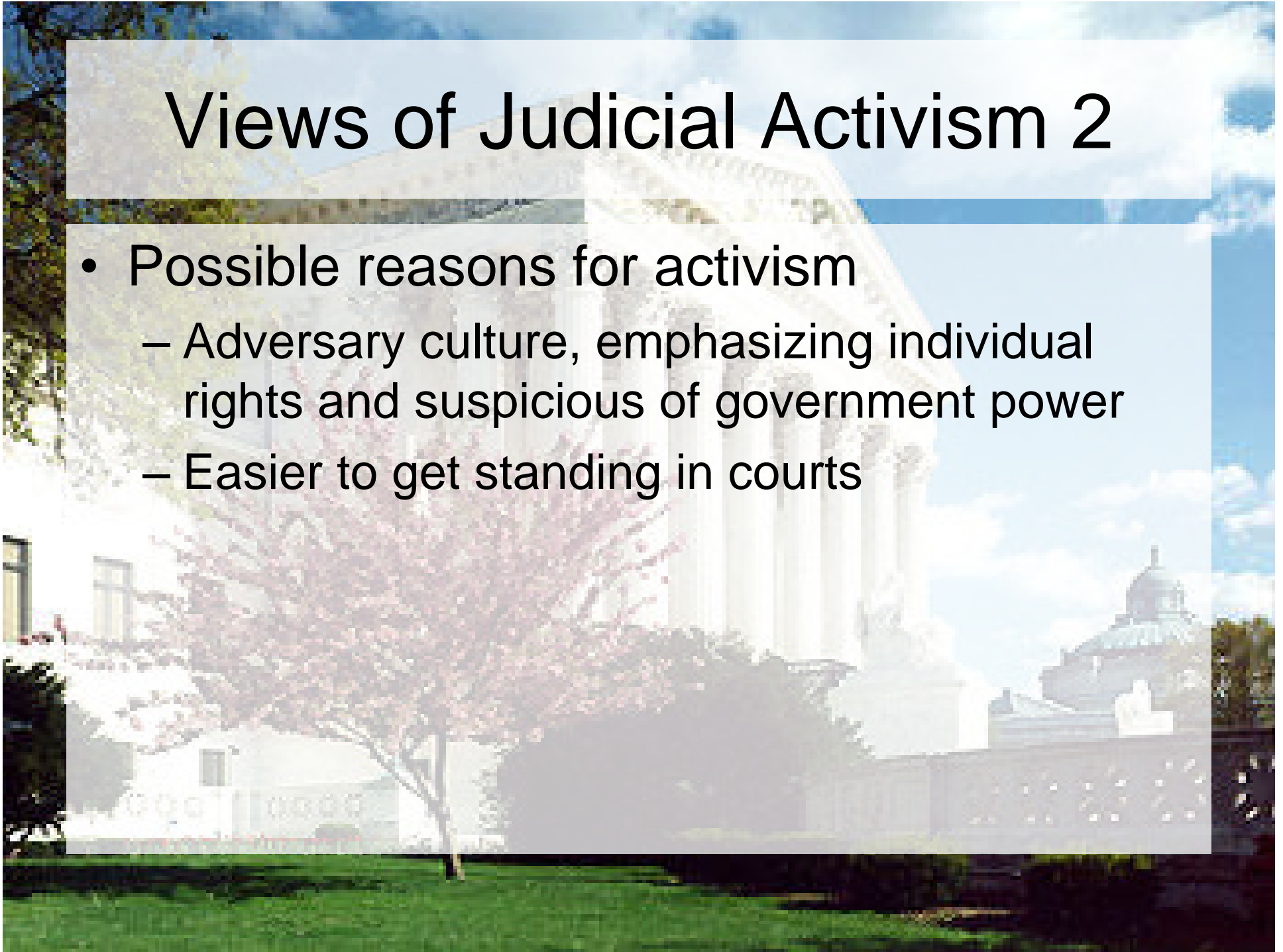
- Number of laws declared unconstitutional (over 130)
- Number of prior cases overturned; not following *stare decisis* (over 260 cases since 1810)
- Extent to which judges will handle cases once left to the legislature (“political questions”)
- Kinds of remedies imposed; judges may go beyond what is narrowly required
- Basis for sweeping orders can come either from the Constitution or from court interpretation of federal laws.

Views of Judicial Activism 1

- Supporters
 - Courts should correct injustices when other branches or state governments refuse to do so.
 - Courts are the last resort for those without the power or influence to gain new laws.
- Critics
 - Judges lack expertise in designing and managing complex institutions.
 - Initiatives require balancing policy priorities and allocating public revenues.
 - Courts are not accountable because judges are not elected.

Views of Judicial Activism 2

- Possible reasons for activism
 - Adversary culture, emphasizing individual rights and suspicious of government power
 - Easier to get standing in courts



Legislation and the Courts

- Laws and the Constitution are filled with vague language, giving courts opportunities to design remedies.
- Federal government is increasingly on the defensive in court cases; laws induce court challenges.
- Attitudes of federal judges affect their decisions when the law- gives them latitude.



Checks on Judicial Power (overview)

- Reliance on others
- Congress and the courts
- Public opinion and the courts
- Reasons for increased activism

Reliance on Others

- Courts rely on others to implement their decisions
 - “Mr. Marshall has made his decision, now let him enforce it.”
 - President Jackson’s reaction to Supreme Court decision favoring the Seminole Indians.
 - The “trail of tears” proceeded.
- If the decision is not highly visible, some may choose to ignore it.

Congress and the Courts

- Confirmation and impeachment proceedings gradually alter composition of courts, though impeachment is an extraordinary and unusual event.
- Changing the number of judges, giving president more or less appointment opportunities
- Supreme Court decisions can be undone by
 - Revising legislation
 - Amending the Constitution
 - Altering jurisdiction of the Court
 - Restricting Court remedies

Public Opinion and the Courts

- Defying public opinion frontally may be dangerous to the legitimacy of the Supreme Court, especially elite opinion.
- Opinion in realigning eras may energize court.
- Public confidence in the Supreme Court since 1966 has varied with popular support for the government, generally.

Reasons for Increased Judicial Activism

- Government does more and courts interpret the laws.
- Activist ethos of judges is now more widely accepted.



The End!

