The Federal Courts

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To my remarkable and much-loved grandparents: my maternal grandmother, Mrs. Florence Schmidt, and my paternal grandfather, Mr. Arthur Carp.

R.A.C.

To four very important people in my life: my wife, Laquita, and sons Tony, Todd, and Sam.

R.S.

Preface

We have sought to prepare a readable, comprehensive textbook about the federal judiciary and its impact on our daily lives. It is designed primarily for students in courses in judicial process and behavior, constitutional law, American government, and law and society. We have written the book with minimal resort to the jargon and theoretical vocabulary of political science and the law. While at times it is necessary and useful to use some technical terms and evoke some theoretical concepts in our look at U.S. courts, we address the basic questions on a level that is meaningful to an educated layperson. For those who may desire more specialized explanations or who wish to explore more deeply some of the issues we touch on, the footnotes and selected bibliography contain ample resources for such quests. Readers will find the contributions of historians, political scientists, legal scholars, court administrators, journalists, and psychologists in the pages that follow. Those interested in behavioralism will find much material of interest to them and so will those who favor a more traditional approach to studying the federal judiciary.

Throughout the text we are constantly mindful of the interrelation between the courts and public policy. We have worked with the premise that significant portions of our lives—as individuals and as a nation—are affected by what our federal judges choose to do and refrain from doing. We reject the often-held assumption that only liberals make public policy while conservatives practice restraint; rather, we believe that to some degree all judges engage in this normal and inevitable activity. Liberals on the bench may well hand down rulings that advance the policy goals of their particular interests (civil rights or environmental protection, for example), and conservatives can be expected to act in ways consistent with their policy interests, such as a tough stand on law-and-order or advancing the cause of states' rights. The question then, as we see it, is not whether U.S. courts make policy but rather which direction the policy

decisions will take. In the chapters that follow we shall explain why this has come to be, how it works, and what the consequences are for America today.

Chapter 1 provides a brief sketch of the organizational structure of the federal judiciary, placed in historical perspective. As we shall see, much of the reason why our judges have the powers they do is a function of historical quirks, pragmatic compromises made during now-forgotten political duels, and haphazard factors quite unintended by the founders of the Republic. Our federal judicial system did not appear one day out of whole cloth but is the product of two centuries of evolution, trial and error, and a pinch of serendipity. The distinction between routine norm enforcement and policy making by federal judges is first addressed in this chapter.

The second chapter outlines the jurisdiction of the three levels of the U.S. courts and provides current data about the workload of these tribunals. Besides a discussion of what judges are authorized to do in the federal system, there is an in-depth look at judicial self-restraint. We believe that a full understanding of how judges affect our daily lives also requires us to outline those many substantive areas into which the federal jurists may *not* roam and where they are not free to make public policy.

Chapter 3 underscores the theme that "judging" is more and more a team effort. This chapter describes the duties and contributions of the staff and administrative agencies that support the federal courts today, such as law clerks, magistrates, and the Administrative Office of the U.S. Courts.

In Chapter 4 we take a close look at the men and women who wear the black robe in the United States. What are their background characteristics and their qualifications for office? What are their values and how do these values manifest themselves in the subsequent behavior of the judges and justices? In this chapter we also explore the process of judicial selection and who the major participants are. We strongly emphasize that there is a discernible policy link between the values of a majority of voters in a presidential election, the values of the appointing president, and the subsequent policy content of decisions made by judges nominated by the chief executive.

Chapter 5 is the first of two on judicial decision making. Here we outline those aspects of the decision-making process that are characteristic of *all* judges, and we do this in the context of the "legal subculture" and the "democratic subculture." Under the former we emphasize the importance of the traditional legal reasoning model for explaining judges' decisions—a model that still accounts for the lion's share of most routine, norm enforcement decision making. Using the lens of the democratic subculture, we look at a number of extralegal factors that appear to be associated with judges' policy decisions: political party affiliation, local

customs and traditions, environmental influences such as public opinion, and pressures from Congress and the president. We also take a look at role theory.

The sixth chapter examines the special case of decision making in collegial, appellate courts. We explore the assumptions and contributions of small-group theory, attitude and bloc analysis, and the fact pattern approach to our understanding of the behavior of multijudge tribunals.

Chapter 7 explores the policy impact of federal court decisions and discusses the process by which judicial rulings are implemented—or why some are *not* implemented. We look at the conditions that must prevail if court decisions are to be carried out efficiently and meaningfully, and we also examine the various individuals and institutions that play such a vital role in this process.

In the final chapter we discuss some factors that determine whether judges will engage in policy making and that also predict the substantive direction of policy decisions.

Many people contributed to the writing of this book, and to all of them we offer our sincere thanks. Charles Johnson of Texas A & M University read the entire manuscript and provided us with many useful criticisms and suggestions. Lawrence Baum of Ohio State University, Beverly Cook of the University of Wisconsin, and David Neubauer of the University of New Orleans also offered helpful criticisms and suggestions. For any errors that may remain, we assume responsibility.

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History, Function, and Organization of the Federal Judiciary

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Because a knowledge of the historical events that helped shape the national court system can shed light on the present judicial structure, our study of the federal judiciary begins with a description of the court system as it has evolved over nearly 200 years. We will examine the three levels of the federal court system in the order in which they were established: the Supreme Court, the courts of appeals, and the district courts. The emphasis in our discussion of each level will be on historical development, policy-making roles, and decision-making procedures.

In a brief look at other federal courts we will focus on the distinction between constitutional and legislative courts, using the example of bankruptcy courts to illustrate a major difference in the two types. Our overview discussion will conclude with an examination of the role of the federal courts in the American political system. We will be particularly interested in comparing the courts' role in public policy making with that of the president and the Congress.

The Historical Context

Prior to the adoption of the Constitution, the country was governed by the Articles of Confederation. Under the Articles, practically all functions of government were vested in a single-chamber legislature called a Congress. There was no separation of executive and legislative powers.

The absence of a national judiciary was considered a major weakness of the Articles of Confederation. Both James Madison and Alexander Hamilton, for example, saw a need for a separate judicial branch.

Consequently, the delegates gathered at the Constitutional Convention in Philadelphia in 1787 expressed widespread agreement that a national judiciary should be established. There was a good deal of disagreement, however, on the specific form that the judicial branch should take.

The Constitutional Convention and Article III

The first proposal presented to the Constitutional Convention was the Randolph, or Virginia, Plan, which would have set up both a Supreme Court and inferior federal courts. Opponents of the Virginia Plan responded with the Paterson, or New Jersey, Plan, which called for the creation of a single federal supreme tribunal. Supporters of the New Jersey Plan were especially disturbed by the idea of lower federal courts. They argued that the state courts could hear all cases in the first instance and that a right of appeal to the Supreme Court would be sufficient to protect national rights and provide uniform judgments throughout the country.

The conflict between the states' rights advocates and the nationalists was resolved by one of the many compromises that characterized the Constitutional Convention. The compromise is found in Article III of the Constitution which states, in part, "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." Thus the conflict would be postponed until the new government was in operation.

The Judiciary Act of 1789

Once the Constitution was ratified, action on the federal judiciary came quickly. When the new Congress convened in 1789, its first major concern was judicial organization. Discussions of Senate Bill Number One involved many of the same participants and arguments that were involved in the Constitutional Convention's debates on the judiciary. Once again, the question was whether lower federal courts should be created at all or whether federal claims should first be heard in state courts. Attempts to resolve this controversy split Congress into two distinct groups.

One group, which believed that federal law should be adjudicated first in the state courts and by the United States Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states. Other legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts. The law that emerged from this debate, the Judiciary Act of 1789, set up a judicial system

composed of a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each comprising two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. The power to create inferior federal courts, then, was immediately exercised. In fact, Congress created not one but two sets of lower courts. The next three sections will be devoted to the Supreme Court and the two lower-court systems.

The U.S. Supreme Court

A First Look

A famous jurist once said, "The Supreme Court of the United States is distinctly American in conception and function, and owes little to prior judicial institutions." [1] To understand what the framers of the Constitution envisioned for the Court, we must consider another American concept: the federal form of government. The founders provided for both a national government and state governments. Article VI states, in part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." In other words, the framers established a system whereby state courts were to be bound by federal laws. However, final interpretation of federal laws simply could not be left to a state court, and certainly not to several state tribunals, whose judgments might disagree. Thus, the Supreme Court must interpret federal legislation. Another of the founders' intentions was for the federal government to act directly upon individual citizens as well as upon the states. The Supreme Court's function in the federal system may be summarized as follows:

> In the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.[2]

Given the High Court's importance to our system of government, it was perhaps inevitable that the Court would evoke great controversy. A leading student of the Supreme Court says:

> Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the

> Constitution has sustained more continuous attack or reached its present position after more vigorous opposition.[3]

The Court's First Decade

George Washington, in appointing the first Supreme Court justices, established two important traditions. First, he began the practice of naming to the Court those with whom he was politically compatible. Washington, the only president ever to have an opportunity to appoint the entire federal judiciary, did a good job of filling federal judgeships with party bedfellows. Without exception, the federal judgeships went to faithful Federalists.

The second tradition established by Washington was that of roughly equal geographic representation on the federal courts. His first six appointees to the Supreme Court included three northerners and three southerners. On the basis of ability and legal reputation, only three or four of Washington's original appointees actually merited their justiceships. Many able men were either passed over or declined to serve.

The chief justiceship was the most important appointment Washington made. The president felt that the man to head the first Supreme Court should be an eminent lawyer, statesman, executive, and leader. Many names were presented to Washington, and at least one person, James Wilson, formally applied for the position. Ultimately, Washington settled upon John Jay of New York. Although only 44 years old, Jay had experience as a lawyer, a judge, and a diplomat. In addition, he was the main drafter of his state's first constitution. Concerning the selection of Jay as chief justice, it has been said:

> That Washington picked Jay over his top two rivals for the post, James Wilson and John Rutledge, was either fortuitous or inspired—for it would scarcely have added to the fledgling Supreme Court's popular prestige to have its Chief Justice go insane, as Rutledge later did, or spend his last days jumping from one state to another to avoid being arrested for a debt, as did Wilson.[4]

Washington did, however, appoint both Wilson and Rutledge to the Court as associate justices. Neither man contributed significantly to the Court as a government institution. Thus, Washington became the first of many presidents to misjudge an appointee to the Court.

The remaining three associate justices who served on the original Supreme Court were William Cushing, John Blair, and James Iredell. Cushing remained on the Court for 20 years, more than twice as long as any of the other original justices, although senility affected his competency in later years. Blair was a close personal friend of Washington's, and

Iredell was a strong Federalist from North Carolina who was instrumental in getting that state to join the Union. The appointments of Blair and Iredell, then, have been seen as sheer political rewards. Despite the generally mediocre quality of the original six appointees, though, they were held in somewhat higher esteem by their contemporaries, according to studies of letters and correspondence written during that early era.[5]

The Supreme Court met for the first time on Monday, February 1, 1790, in the Royal Exchange, a building located in the Wall Street section of New York City. Compared to today's Supreme Court, that first session was certainly unimpressive. Tongue in cheek, one Court historian noted: "The first President immediately on taking office settled down to the pressing business of being President. The first Congress enacted the first laws. *The first Supreme Court adjourned.*" [Emphasis added.][6]

Only Jay, Wilson, and Cushing, the three northern justices, were present on opening day. Justice Blair arrived from Virginia for the second day, while Rutledge and Iredell, the other southerners did not appear at all during the opening session.

The Supreme Court's first session lasted just 10 days. During this period the Court selected a clerk, chose a seal, and admitted several lawyers to practice before it in the future. There were, of course, no cases to be decided. In fact, the Court did not rule on a single case during its first three years. In spite of this insignificant and abbreviated beginning,

> the New York and the Philadelphia newspapers described the proceedings of this first session of the Court more fully than any other event connected with the new Government; and their accounts were reproduced in the leading papers of all the States.[7]

The minor role the Supreme Court played continued throughout its first decade of existence. The 1790-1799 period saw several individuals decline their nomination to the Court and one, Robert H. Harrison, refuse appointment even though the Senate had confirmed him. Harrison chose to accept a *state* position rather than a Supreme Court justiceship.

During its first decade the Court decided only about 50 cases. However, one of these, *Chisholm v. Georgia,* involved the Court in considerable controversy.[8] In *Chisholm* the justices held that a citizen of one state could sue another state in a federal court. That decision was vigorously attacked by states' rights forces and was ultimately overturned by ratification of the Eleventh Amendment in 1798.

The Impact of Chief Justice Marshall

John Marshall served as chief justice from 1801 to 1835 and dominated the Court to a degree unmatched by any other justice. In effect,

Marshall *was* the Court—perhaps because, in the words of one scholar, he "brought a first-class mind and a thoroughly engaging personality into second-class company." [9]

Marshall's dominance of the Court enabled him to initiate some major changes in the way opinions were presented. Prior to his tenure, the justices ordinarily wrote separate opinions (called *seriatim* opinions) in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion. As one might expect, the evidence shows that, from 1801 to 1835, Marshall himself wrote almost half the opinions.[10]

It was Marshall's goal to keep dissension to a minimum. Arguing that dissent undermined the Court's authority, he tried to persuade the justices to settle their differences privately and then present a united front to the public. No doubt his first-class mind and engaging personality aided him in this endeavor. As strange as it may sound, so did the cozy living arrangements of the time. The justices lived in the same Washington, D.C., boarding house while the Court was in session. Thus, they were together before, during, and after work in a pleasant, comfortable routine that discouraged deep disagreements. Can you imagine having breakfast, lunch, and dinner every day with a fellow justice whom you have sharply criticized in a public opinion? Human nature, it would seem, was on Marshall's side in keeping dissension to a low level.

In addition to bringing about changes in opinion-writing practices, Marshall used his powers to involve the Court in the policy-making process. Early in his tenure as chief justice, the Court asserted its power to declare an act of Congress unconstitutional, in *Marbury v. Madison* (1803).[11]

This case had its beginnings in the presidential election of 1800, when Thomas Jefferson defeated John Adams in his bid for reelection. Before leaving office in March 1801, however, Adams and the lame-duck Federalist Congress combined efforts to create several new federal judgeships. To fill these new positions Adams nominated, and the Senate confirmed, loyal Federalists. In addition, Adams named his outgoing secretary of state, John Marshall, to be the new chief justice of the Supreme Court.

As secretary of state it had been Marshall's job to deliver the commissions of the newly appointed judges. Time ran out, however, and 17 of the commissions were not delivered before Jefferson's inauguration. The new president ordered *his* secretary of state, James Madison, not to deliver the remaining commissions.

One of the disappointed nominees was William Marbury. He and three of his colleagues, all confirmed as justices of the peace for the

District of Columbia, decided to ask the Supreme Court to force Madison to deliver their commissions. They relied upon Section 13 of the Judiciary Act of 1789, which granted the Supreme Court the authority to issue *writs of mandamus*—court orders commanding a public official to perform an official, nondiscretionary duty.

The case placed Marshall in an uncomfortable predicament. Some suggested that he disqualify himself because of his earlier involvement as secretary of state. There was also the question of the Court's power. If Marshall were to grant the writ, Madison (under Jefferson's orders) was almost certain to refuse to deliver the commissions. The Supreme Court would then be powerless to enforce its order. On the other hand, if Marshall refused to grant the writ, Jefferson would win by default.

The decision Marshall fashioned from this seemingly impossible predicament was sheer genius. He declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted original jurisdiction to the Supreme Court in excess of that specified in Article III of the Constitution. Thus the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court ever handed down. A few years later the Court also claimed the right of judicial review over actions of state legislatures; during Marshall's tenure it overturned more than a dozen state laws on constitutional grounds.[12]

The Changing Issue Emphasis of the Supreme Court

We complete our brief historical review of the Supreme Court by looking at the major issue areas that have occupied the Court's attention. Up to approximately 1865 the legal relationship between the national and state governments, or cases of federalism, dominated the Court's docket. John Marshall believed in a strong national government and was not hesitant to restrict state policies that interfered with its activities. A case in point is *Gibbons v. Ogden* (1824), in which the Court overturned a state monopoly over steamboat transportation on the ground that it interfered with national control over interstate commerce.[13] Another good example of Marshall's use of the Court to expand the federal government's powers came in *McCulloch v. Maryland* (1819), in which the chief justice held that the necessary-and-proper clause of the Constitution permitted Congress to establish a national bank.[14] The Court also ruled that the state could not tax a nationally chartered bank. The Court's insistence on a strong government in Washington did not significantly diminish after Marshall's death. Roger Taney, who succeeded Marshall as chief justice, served from 1836 to 1864. Although the Court's position during this

period was not as uniformly favorable to the federal government, the Taney Court did not reverse the Marshall Court's direction.

During the 1865 to 1937 period issues of economic regulation dominated the Court's docket. The shift in emphasis from federalism to economic regulation was brought on by a growing number of national and state laws aimed at monitoring business activities. As such laws increased, so did the number of cases challenging their constitutionality. Early in this period the Court's position on regulation was mixed, but by the 1920s the bench had become quite hostile toward government regulatory policy. Federal regulations were generally overturned on the ground that they were unsupported by constitutional grants of power to Congress, while state laws were thrown out mainly as violations of economic rights protected by the Fourteenth Amendment.

Matters came to a head in the mid-1930s as a result of the Court's conflict with President Franklin D. Roosevelt, whose New Deal program to combat the effects of the Depression included broad measures to control the economy. However, "in the 16 months starting in January 1935, the Supreme Court heard cases involving ten major New Deal measures or actions; eight of them were declared unconstitutional by the Court." [15] Following his overwhelming reelection in 1936, Roosevelt fought back against the Court. On February 5, 1937, he proposed a plan whereby an additional justice could be added to the Court for each sitting justice over the age of 70. The result of FDR's "Court-packing" plan would have been to increase the Court's size temporarily to 15 justices.

While Roosevelt's proposal was being debated in Congress, the Court made an about-face and began to uphold New Deal legislation and similar state legislation.[16] This "switch in time that saved nine," as it has been called, came about because Chief Justice Charles Evans Hughes and Justice Owen Roberts changed their votes to establish majority support for the New Deal legislation. As a result, the Court-packing plan became a moot issue and quietly died in Congress.

Since 1937 the Supreme Court has focused on civil liberties concerns—in particular, the constitutional guarantees of freedom of expression and freedom of religion. In addition, an increasing number of cases have dealt with procedural rights of criminal defendants. Finally, the Court has decided a great number of cases involving equal treatment by the government of racial minorities and other disadvantaged groups.

The Supreme Court's position on civil liberties and civil rights has varied a good deal over the years. Without doubt, it gave its strongest and most active support for civil liberties and civil rights during the 1953 to 1969 period, when Earl Warren served as chief justice. Perhaps the best known decision of the period was *Brown v. Board of Education* (1954),