I. Introduction

- In its 1992 decision in *Planned Parenthood v. Casey*, the Supreme Court narrowly (5 to 4) reaffirmed a woman’s right to choose an abortion in the early stages of pregnancy
- The decision continued the controversy created by *Roe v. Wade* (7 to 2) 20 years earlier
- Both sides in the abortion debate pushed for Supreme Court appointees who would support their views
- The abortion issue illustrates three major points about court decisions
  i. The judiciary is an extremely important policy making body
  ii. The courts have considerable discretion when they rule
  iii. Courts are a political as well as legal institution
- The law itself is a result of contending political forces, is created through a political process, has political content, and is applied by political appointees

II. The Federal Judicial System

- Constitution establishes the Supreme Court of the United States and grants Congress the authority to establish lower federal courts of its choosing
- Federal judges are nominated by the president and confirmed by the Senate
- Most judges serve until they die or retire
- No age, residency, or citizenship qualification for federal judges

A. The Supreme Court of the United States

1. The Constitution grants the Supreme Court both *original* and *appellate jurisdiction*
   a. **Original jurisdiction** is the authority to be the first court to hear a case, and is exercised by the Supreme Court in legal disputes involving two or more states or foreign diplomats
   b. **Appellate jurisdiction** is the authority to review cases originating in lower courts and appealed by the losing party
      (1) Supreme Court does most of its significant work through this jurisdiction
      (2) Extends to cases arising under the Constitution, federal law and regulations, and treaties
      (3) Appellate courts determine whether a trial court acted in accord with applicable law
2. Selecting Cases
   a. the primary function of the Supreme Court is to establish *legal precedents* which guides lower courts in future rulings
      (1) a *precedent* is a judicial decision that serves as a rule for settling subsequent cases of a similar nature
   b. Supreme Court’s ability to set legal precedent is strengthened by its discretionary authority to choose its cases
      (1) most reach the Court through a *writ of certiorari*
         (a) losing party in lower court asks for Court’s review
         (b) 4 of 9 Justices must agree to accept the case before it is granted a writ
      (2) Court is most likely to grant certiorari when the U.S. Government through the *solicitor general* (high-ranking Justice Department official who serves as the government’s lawyer in Supreme Court Cases) requests it
   c. In recent years about three-fourths of the Supreme Court’s decisions have reversed the judgement of lower courts
   d. Court chooses cases “*that involve substantial legal issues*”
(1) cases that raise major constitutional issues, or affect the lives of many Americans, or address issues that are being decided inconsistently by the lower courts, or are in conflict with a previous Supreme Court ruling

3. Deciding cases
   a. after oral and written arguments, judicial conference is held
      (1) a closed meeting of the justices of the U.S. Supreme Court to discuss and vote upon the cases before them
         (a) strictly confidential

4. Issuing decisions and opinions
   a. Decision indicates which party the Court supports and by how large a margin
   b. Opinion explains the reasons behind the decision
      (1) informs others of the justices’ interpretations of laws
   c. Majority Opinion
      (1) majority of the justices agree on the legal basis of a decision
      (2) when part of the majority, Chief Justice decides who will write majority opinion
         (a) otherwise, senior justice decides
   d. Plurality Opinion
      (1) majority of justices agree on the decision but cannot agree on the legal basis for it
      (2) presents the view held by most of the justices who side with the winning party
   e. Concurring Opinion
      (1) a separate view written by a justice who votes with the majority but disagrees with its reasoning
   f. Dissenting Opinion
      (1) opinion of a justice in a Supreme Court case that explains the reasons for disagreeing with the majority decision

B. Other Federal Courts
   1. Contrary to the “upper-court myth”, the Supreme Court is not the only court of importance in the United States

<table>
<thead>
<tr>
<th>U.S. District Courts</th>
<th>U.S. Court of Appeals</th>
<th>Special U.S. Courts</th>
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<tbody>
<tr>
<td>• Lowest federal court</td>
<td>• Cases are appealed from the district courts</td>
<td>• U.S. Claims Court – United States government has been sued</td>
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<tr>
<td>• More than 90 in the U.S.</td>
<td>• Do not use juries</td>
<td>• U.S. Court of International Trade – appeals of U.S. Customs Office rulings</td>
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<tr>
<td>• District Court judge appointed by the president with Senate approval</td>
<td>• No new evidence submitted</td>
<td>• U.S. Court of Military Appeals – appeals of military court martial</td>
</tr>
<tr>
<td>• Trial courts which hear most federal cases (only federal cases in which juries hear testimony before a judge)</td>
<td>• Base their decisions on a review of lower-court records</td>
<td></td>
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<tr>
<td>• Rely on and follow Supreme Court decisions but often exercise considerable discretion in their judgements (“upper-court myth”)</td>
<td>• Correct what they consider legal errors</td>
<td></td>
</tr>
<tr>
<td>• Most of the district court judges decisions are not appealed to a higher court</td>
<td>• Since the Supreme Court severely limits the number of its cases, the Federal Appellate Courts act as regional Supreme Courts for the nation</td>
<td></td>
</tr>
</tbody>
</table>

C. The State Courts in the Federal System
   1. As part of American federalism, each state has its own system of laws and courts
      a. possess considerable autonomy and authority
      b. each state decides the method of judicial appointment
c. “federal court myth”: states do not play a subordinate role as the myth would say
   (1) more than 95% of nations legal cases are decided in state courts
   (2) most criminal and civil disputes are defined by state or local law
   (3) legal and factual determinations of state courts can bind the federal courts – a clear contradiction of the federal court myth
d. cases within the jurisdiction of the states can become federal cases through rulings of the federal courts
   (1) Roe v. Wade (1973)

### III. Federal Court Appointees

- All federal jurists bring their political views with them to the courtroom and have regular opportunities to promote their political beliefs through the cases they decide
- Process by which federal judges are appointed is a partisan one

#### A. Selecting Supreme Court Justices and Federal Judges

1. Supreme Court nominees
   a. presidents have always sought to appoint federal judges who share their political and ideological beliefs
      (1) president can influence judicial policy through their appointments
   b. presidents use a variety of approaches in selecting Supreme Court nominees
      (1) depend on his own counsel
      (2) asks Justice Department for advise
      (3) seeks views of interested parties who share his philosophy
   c. nominees must also be acceptable to others
   d. Senate Judiciary Committee, conduct hearings on judicial nominees and can recommend confirmation or rejection to the full Senate
      (1) Senate has rejected about 20% of nominees
         (a) partisan politics
      (2) middle-of-the-road, non-controversial nominees almost always approved by the Senate
   e. Senate feels it must have an overwhelming case for rejection to avoid the charge of unprincipled partisanship

2. Lower-court nominees
   a. Deputy Attorney General screens potential nominees
   b. Senatorial Courtesy
      (1) the tradition that a U.S. Senator from the state in which a federal judicial vacancy has arisen should have a say in the president’s nomination of the new judge if the Senator is of the same party as the president

#### B. Justices and Judges as Political Officials

1. The role of partisanship
   a. presidents generally manage to appoint jurists who have similar political philosophy
   b. about 3 of every 4 appointees have behaved on the Supreme Court approximately as presidents could have expected
   c. presidents choose members of their own party as nominees for the Supreme Court and lower-court judgeships
   d. the judiciary may give the impression of being completely apolitical, but jurists are in reality, political officials who exercise the authority of a separate but powerful branch of government
      (1) prize their judicial independence
2. Other characteristics of judicial appointees
   a. most Supreme Court justices have had prior legal experience
      (1) appellate court judge
      (2) high administrative position in Justice Department
   b. most have been white male Protestants
   c. number of women and minority-group judges have increased in recent years
   d. Supreme Court is demographically unrepresentative
   e. Scholars disagree on demographic importance
      (1) Henry J. Abraham: demographic makeup is of no concern because the courts were
          not meant to be representative bodies
      (2) Sheldon Goldman: judicial sensitivity to a diverse society is dependent on the
          social background of the judges

IV. The Nature of Judicial Decision Making

   • Justices serve in a legal institution and make their decisions in a legal context
     i. discretionary power is less than that of elected officials
     ii. Article III of the Constitution bars the federal judiciary from issuing decisions except on
         actual cases before it

   A. The Legal Context of Judicial Decisions
     1. The most substantial restriction on the courts is the law itself
        a. judiciary must justify its decision in terms of existing provisions of the law
        b. judges engage in a creative legal process that requires them to:
           (1) identify the facts of the case
           (2) determine and sometimes formulate the relevant legal principles or rules, and then
                apply them to the case at hand
     2. The constraints of the facts
        a. basic distinction in any legal case is between “the facts” and “the laws”
        b. facts of the case
           (1) the relevant circumstances of a legal dispute or offense as determined by a trial
               court
           (2) facts of the case are crucial because they determine which law or laws are
               applicable to the case
        c. the Supreme Court must respond to the facts of a dispute, relating them to legal provisions
     3. The constraints of the law
        a. laws of the case
           (1) Constitutional provisions, legislative statutes, or judicial precedents that apply to
               the court case

<table>
<thead>
<tr>
<th>Interpretation of the Constitution</th>
<th>Interpretation of Statutes</th>
<th>Interpretation of Precedents</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Sparsely worded document open to interpretation</td>
<td>• Judicial Review – has governmental institutions acted within its constitutional powers</td>
<td>• Involves the philosophy of stare decisis (to stand by things that have been settled) the doctrine that principles of law, once established, should be accepted as authoritative in all subsequent similar cases</td>
</tr>
<tr>
<td>• Judges respect the Constitution’s purpose and intent</td>
<td>• Most cases involve statutory law rather than constitutional law</td>
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<tr>
<td>• What did the Framers have in mind by a particular provision?</td>
<td>• Statutory law includes legislation that has been enacted by Congress and administrative regulations that have been developed by the bureaucracy on the basis of statutory provisions</td>
<td></td>
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<td></td>
<td>• Challenge to a statute involves</td>
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V. Political Influences on Judicial Decisions

- The courts can exercise powers of judicial discretion in interpreting laws
- Judges have leeway in their decisions
- Judiciary rulings reflect not only legal influences but political ones, which come from both outside and inside the judicial system

A. “Outside” Influences on Court Decisions

1. The force of public opinion
   a. judges are responsive to public opinion, but give it less importance than elected officials
      (1) Court can tailor its rulings in an effort to gain public support or dampen public resistance
   b. even though the Court stays close enough to popular opinion to avoid eroding public support for their decisions, they do not have to follow public opinion to keep their authoritative position
      (1) courts will not stand alone on controversial decisions

2. Lobbying the courts
   a. interest groups use the courts to advance their policy goals
      (1) litigation is expensive (can exceed $500,000 to take a case to the Supreme Court) but it often costs less than lobbying Congress
   b. lawsuits are the only way in which interest groups make their views known to the courts
      (1) amicus curiae (“friend of the court”) briefs have risen dramatically

3. The leverage of public officials
   a. elected officials try to persuade the judiciary to hand down rulings favored by their constituents
   b. Congress
      (1) constitutionally empowered to establish the Supreme Court’s size and appellate jurisdiction
      (2) rewrite legislation that the Court has misinterpreted
      (3) respond unfavorably to certain Court rulings
   c. Executive branch
      (1) responsible for implementing court decisions
      (2) pursuing or overlooking possible legal controversies, thereby influencing the cases that come before the court
      (3) judicial appointments
   d. judges are not popularly elected and hold appointments indefinitely allowing them to resist congressional and presidential pressures

B. “Inside” Influences: The Justices’ Own Political Beliefs

1. The personal views of individual justices have a strong influence on the positions they take on issues and cases
   a. justices are frequently divided in their opinions, and the divisions often reflect the justices’ political background
   b. since justices are constrained by legal principles, their political differences are seldom total
      (1) today’s conservative-leaning Rehnquist Court has modified substantially the criminal justice rulings of the more liberal Warren Court (1960’s) but has not repudiated what is arguably the Warren Court’s most important legacy in this area: the broad principle that the Constitution provides substantial protections for the accused in state trial proceedings
   c. Most Supreme Court justices hold relatively stable political views during their tenure
VI. Judicial Power and Democratic Government

- Since the Supreme Courts’ decisions inevitably reflect the political philosophy of its justices, they constitute a small political elite wielding significant power
  i. power is most evident when a court declares unconstitutional a law enacted by Congress
  ii. constitutional amendments impractical means of reversing the Supreme Court

A. The Debate Over the Proper Role of the Judiciary

1. Centers on the issue of legitimacy
   a. the proper authority of the judiciary in a political system based in part on the principle of majority rule
   b. the judiciary at times has acted almost legislatively by ordering broad social policies, such as busing and prison reform
      (1) through such actions, the judiciary has restricted the policy making authority of the states, has narrowed legislative discretion, and has made judicial action an effective alternative to election victory for certain interests

2. Unlike in English tradition, the Constitution has granted the judiciary a major role in the sphere of public-law policy making
   a. Supreme Court has the responsibility of interpreting the Constitution, overseeing federalism and the separation of powers, and defining individual rights

3. Important question: How far should the judiciary go in asserting its authority when that authority collides with or goes beyond the action of elected institutions?
   a. two view

<table>
<thead>
<tr>
<th>The Doctrine of Judicial Restraint</th>
<th>The Doctrine of Judicial Activism</th>
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<tbody>
<tr>
<td>• The judiciary should be highly respectful of precedent and should defer to the judgement of legislatures</td>
<td>• Courts should take a generous view of judicial power and involve themselves extensively in interpreting and enlarging upon the law</td>
</tr>
<tr>
<td>• Public good should be decided by the majority through legislation enacted by elected officials</td>
<td>• A dominant view of judicial activism holds that the Court is obligated to promote social justice by vigorously protecting and expanding the rights of individuals</td>
</tr>
<tr>
<td>• Judges role is to discover the application of legislation and precedent to specific cases rather than to search for new principles that essentially change the meaning of the law</td>
<td>• Constitution is supposed to protect people from government interference</td>
</tr>
<tr>
<td>• The right of the majority to choose policy must be protected</td>
<td>• Judiciary must stand up to coercive lawmaking majority</td>
</tr>
<tr>
<td>• Judicial self restraint preserves public support for the courts</td>
<td>• Judiciary concerned with compliance – the issue of whether judicial decisions will be respected and obeyed</td>
</tr>
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</table>

B. The Judiciary’s Proper Role: A Question of Competing Values

1. The dispute over judicial activism and judicial restraint is a dispute between majority rule v. minority rights, states rights v. federal power, legislative authority v. judicial authority, reflecting competing values which cannot be resolved by appeal to dogma or fact