



US Politics and Government – Supreme Court

Politics Edexcel and AQA – revision notes – based on Hodder Education revision guides

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Under the constitution, the Supreme Court has power over all matters arising under the constitution.

The Supreme Court is at the top of the federal judicial body

Below the Supreme there are the US courts of appeal (also known as circuit courts) and the US district court (known as trial courts).

- 9 justices, 1 of them chief justice, and 8 associate justices.
- The court is known by the name of the chief justice.
- Independence by virtue of separation of powers.
- Life tenure; they can retire or theoretically be impeached.
- While the president has the power to appoint justices, most of them are practically from the previous administration given their life tenure.
- Rigorous appointment process.
- Main power is held by judicial review.

The appointment and confirmation process

A five-stage procedure

- 1 – A vacancy = a justice retired, passed away or theoretically is impeached.
- 2 – President initiates a search = including interviews and shortlisting candidates.
- 3 – Nomination = the president announces their nominee.
- 4 – Senate Judiciary Committee = scrutinising the nominee and makes recommendations to vote.

American Bar Association = while it is not part of the constitution the ABA rates the nominees and attempting to shape the Senate's position.

- 5 – Senate vote = a simple majority is required for confirmation.

Strengths

- **Independent process** = and justices are not affiliated to a party.
- **Suitability and ability** = scrutiny by the Senate Judiciary Committee.
- **Accountability** = while ultimately the judiciary is an unelected and unaccountable branch, the Senators are elected members and they vote.

Weaknesses

- **Politicisation** = both by the president and the Senate.
- **Media** = biased, unneutral, unfair and can influence Senators.
- **Imbalanced court** = not necessarily balanced between liberals and conservatives, because of the features of the appointment process.

President's considerations

- Sharing similar judicial philosophy.
- Relatively young age.
- Likely to win a Senate majority.
- Uncontroversial background.
- Highly rated professionally, including by ABA.
- Relevant experience.

Judicial review

The power of the Supreme Court to declare Acts of Congress, actions of the executive, or Acts or actions by state governments to be **unconstitutional** and thus be **null and void**.

As the constitution is sovereign, judicial reviews cannot be overridden:

- The power of a judicial review is not enumerated in the constitution.
- It was first used over state law in *Marbury vs Madison* 1803.
- First used over a federal law in *Fletcher vs Peck* 1810.
- Since then, in a wide range of cases (thousands each year), primarily over civil rights and liberties.
- Therefore, such a significant role, because of rulings relating to capital punishment, rights of minority groups, gun control and freedom of speech.
- **The last stage of the process:** the Court reaches a judgement.
- **Majority opinion** = the view is supported by the majority of justices and takes effect.
- **Dissenting opinion** = the view of justices who disagreed when applicable: unlike majority opinion, dissenting opinion is not a binding law, and future cases are not obliged to follow.

Judicial activism and judicial restraint

The courts, which are unelected and unaccountable, can overturn decisions, make them null and void; decisions that were taken by elected and accountable bodies:

Judicial activism = an approach to judicial decision-making process that is characterised by the view that judges ought to employ their position to promote desirable social objectives, even if that requires overturning decisions of elected officials:

- Considers itself as being the body shaping sociopolitical life, a reformer.
- Guardian of civil rights and liberties.
- Protector of government's dominance.
- Less inclined to defer to the president and the Congress.
- Critics refer to activist court as an imperial judiciary 'legislating from the bench'.

Reasons for an activist court

- The founding fathers could not envisage modern life.
- Defence of citizens.
- Problems that require solutions that the legislature or the executive cannot provide for various political constraints.

Judicial restraint = an approach to judicial decision-making that is characterised by the view that judges should defer to the legislature and executive by turning to established precedents from previous Court decisions:

- A form of judicial deference.
- More inclined to accept the decisions and actions of elected officials and members.
- Reliant on precedents when possible.
- Considers the other branches as the shapers of society.

Reasons for a restraint court

- Justices are unelected and unaccountable.
- Insufficient checks and balances on the Court.
- If there is a precedent, there is no need for another different ruling.
- The Court must remain neutral, unbiased and independent.

Imperial judiciary = used by critics to describe an activist judiciary that seeks to override both state and federal law instead of interpreting the law.

Stare decisis = a legal principle that judges should be guided by past precedents as much as possible = 'let the decision stand'.

Loose constructionists = provide interpretation to the constitution as if it is a living document that ought to be contextualised by contemporary life.

Strict constructionists = literally seek to interpret the founding fathers of the constitution. For example, 'the right to bear arms' is non-ambiguous.

The Court and the Bill of Rights (also in civil rights document)

The first ten amendments of the US constitution are considered the Bill of Rights providing entrenched rights:

I Freedom of speech, religion, association, etc.

II The right to bear arms.

III No involuntary quartering soldiers.

IV Freedom from unreasonable searches.

V Freedom from self-incrimination (hence people 'plead the fifth').

VI Right to a fair and timely trial.

VII The right to trial by jury.

VIII Freedom from cruel and unusual punishment (no torture).

- *Roper v Simmons* (2005) = declared it is unconstitutional to sentence anyone to death for a crime they committed when under the age of 18.
- *Glossip v Gross* (2015) = declared that lethal injection did not infringe the Eight Amendment.

IX Making it clear that these rights are not the only rights people have.

X Some rights are reserved to the states (reinforcing federalism).

Further amendments added:

XI Suits against states, state sovereignty and immunity = federal courts cannot have the authority to hear cases that were brought forward privately by parties against a state in which they are not citizens, or by citizens of a foreign state. Effectively the states are protected from suits by citizens of other states or foreign countries.

XII Made a series of adjustments to the electoral college, specifically to allow for the president and the vice-president to be elected together.

XIII Slavery is illegal.

XIV Prevention of racial discrimination; equal protection before the law.

XV Right to vote; regardless of race.

XIX Granted women the right to vote.

XXIV Right to vote without a poll tax or other fee to vote.

XXVI The right to vote at 18.

Impact of the Supreme Court on public policy (see also civil rights)

Public policy = an action enacted by the government to address matters that are going to influence the public at large, such as health or education policy, abortion, same-sex marriage, etc.

Key features of influence

- (1) **Removes policy** = striking a policy down as unconstitutional.
- (2) **Defends policy** = ruling a policy to be constitutional.
- (3) **Policy creation** = while in theory the court should not create new policies = legislation; effectively, it has the power to do so, especially an **activist court**.

For example:

By ruling in favour of **same-sex marriage** in *Obergefell v Hodges* (2015) the Court effectively legalised same-sex marriages in the 13 states that had not yet legalised it.

Abortion = established by *Roe v Wade* (1973) and several subsequent rulings overturning some federal and state laws restricting a woman's right to choose. Despite that, since 2021 many Republican states introduced new restrictions, effectively threatening the 1973 ruling.

Euthanasia = established by *Gonzales v Oregon* (2006); states can legislate in favour of physician-assisted suicide without federal interference.

Some argue that these features make the Court into a **quasi-government** that in effect is the sovereign, yet unelected and unaccountable, with inadequate checks and balances.

Checks on the powers of the Supreme Court

By Congress

- The Senate has the power to confirm or reject appointments.
- Congress fixes the numerical size of the Court.
- Congress has the power to impeach individual judges = the threat itself exercises a sufficient check because a justice might be less inclined to overturn a decision made by the Congress.
- Congress can initiate constitutional amendments that can in effect overturn the Court's ruling.

By the president

- Has the power to nominate justices.
- Can decide if to support a decision made by the Court, effectively impacting its perceived legitimacy.

- The Court has no power of initiation and is utterly dependent on cases that are brought forward.
- No enforcement powers and it is dependent on implementation by other bodies.
- Public opinion can affect the perceived legitimacy of the Court.
- It is checked by the constitution = while some parts of it are vague, others are explicit and specific.

Political versus judicial nature of the Supreme Court

Judicial

- Neutral = 9-0 decisions are not uncommon, suggesting a fair degree of neutrality given the ideological differences between the justices.
- Rulings are restricted by the constitution itself and the Court cannot initiate anything by itself.
- Independence = the Court is deliberately designed to be politically independent: *United State v Nixon* 1974; justices that Nixon nominated ruled against him.

Political

- Ideological = how justices vote especially on social and moral issues is relatively predictable based on their ideological leaning.
- External influence = from the president, Congress, powerful interest groups, media, etc.
- 'Legalising from the bench' = judicial review especially the activist type, effectively creating = legislating, new policies.