

Appellate Court Agendas

The potential impact of courts on the rest of government and society is shaped first of all by their agendas, the mix of issues they address. The more cases that a court decides with Opinions in a particular field, the greater its potential to shape public policy in that field. As suggested in Chapter 8, the agendas of appellate courts reflect rules of jurisdiction, patterns of litigation and appeals, and judges' choices of cases in which to write opinions.

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The agenda of the U.S. Supreme Court is distinctive. The Court's focus on public law is even stronger than the exhibit suggests, because most of the private law cases it hears involve questions about government power and procedure by the time they reach the Court. The Court is something of a civil liberties specialist. Along with the cases in the civil liberties category, most of the criminal cases it hears involve civil liberties issues. But outside the criminal field, the Court today does not hear nearly as many civil liberties cases as it did a few decades ago.

That change is not unusual: the agendas of appellate courts, like those of trial courts, evolve over time. The federal courts of appeals illustrate this evolution.⁹ Criminal law has become more prominent with growth in the role of the federal government in criminal justice and the expansion of state prisoners' rights to challenge their convictions in federal court. The share of these agendas that is devoted to civil liberties has also grown, largely because of new legal protections of rights by Congress and the Supreme Court in the 1960s and later. There has been a corresponding decline in the portion of the agenda devoted to economic matters, especially those in which government plays no direct role. Thus, the work of the courts of appeals today is different from what it was seventy years ago.

Appellate courts address a broad range of issues, but there are some important areas of public policy in which they are largely inactive. The outstanding example is foreign policy, which state courts barely touch and in which federal courts make relatively few decisions. Even in fields where they are active, the courts may not deal with the most fundamental issues. In regulation of the economy, for instance, courts focus primarily on the details of government policy rather than on the general form and scope of regulation.

Ideological Patterns in Appellate Court Policy

In the issue areas on which appellate courts focus their attention, the content of their policies is most easily summarized in ideological terms: the distribution of liberal and conservative policies. At any given time, the courts' policies are ideologically diverse, but this does not mean they are random. For most of American history, by the current definitions of liberal and conservative positions, appellate courts as a whole were fairly conservative in their policies. In contrast, their policies over the last seventy years have been quite mixed.

The traditional conservatism of appellate courts was best reflected in economic policies. Federal and state courts addressed a wide range of legal issues that affected the interests of economically powerful groups, and the dominant theme in their decisions was support for those interests.

The U.S. Supreme Court did much to protect property rights and the freedom of business enterprises from restrictions by state and federal governments. As legislation to regulate and restrict business practices grew in the early twentieth century, the Court frequently struck laws down as unconstitutional. Ultimately, the Court overturned much of President Franklin Roosevelt's New Deal economic pro-

gram in the 1930s.

The economic policies of state courts also had a conservative tone, although scholars disagree about the strength of this tone. As the industrial economy developed, state courts did much to protect the business sector from threats to its economic well-being. For instance, they adopted a set of rules for personal injury law that favored businesses over injured individuals.

This conservative tone of appellate court policy is not difficult to understand. Judges came primarily from economically advantaged sectors of society and were imbued with the values of those sectors. They were trained in a legal profession in which conservative values predominated, and they often embarked on legal careers that involved service to business enterprises. Further, the most skilled advocates in court generally represented businesses and other institutions with conservative goals.

In the period from the 1940s to the present, the policies of appellate courts have been relatively liberal in comparison with earlier periods. Across a range of issues, the courts have given significant support to the interests of relatively weak groups in society, groups that possess limited 'social status, economic resources, and political power. But the content of judicial policies has varied considerably over time and across courts.

The Supreme Court became increasingly liberal in the first half of that period. Beginning in 1937, the Court quickly abandoned its earlier support for business interests that sought protection from government regulation. In a slower process that culminated in the 1960s, the Court began to provide support for the civil liberties of relatively powerless groups in American society. It extended the constitutional rights of criminal defendants from federal to state proceedings and established new controls on police investigations and trial procedures. It required the desegregation of southern public schools and protected the rights of racial minority groups in other areas of life. It strengthened freedom of expression for the mass media and for people who express their views through vehicles such as pamphlets and marches.

The Court has moderated its liberalism since the 1970s. In the current period it generally favors business interests in fields such as labor relations and environmental law. It has narrowed the rights of criminal defendants, and it has been less inclined to expand civil liberties in any area. It has also set some limits on congressional power to protect civil liberties. Still, the Court has maintained considerable support for individual liberties. And despite some hints of a new direction, the Court has continued to accept active government regulation of the economy in most respects.

To a degree, the federal courts of appeals have taken the same ideological path as the Supreme Court. But the positions of the courts of appeals have differed considerably from court to court. The stances of the various courts of appeals are shaped by the political views that predominate in their regions, but this influence is not overwhelming. The Fifth Circuit in the Deep South championed racial equality under the law during the 1950s and 1960s despite the pressures against civil rights in that region.

One major change in the policies of state supreme courts fell in tort law. Early in the twentieth century, supreme courts began to move away from their long-standing support for business in that field by expanding rights to recover compensation for personal injuries. This trend gained momentum as courts increasingly eliminated old rules that had favored defendants. Most dramatically, in the 1960s and 1970s, supreme courts largely eliminated the requirement that people who are injured by defective products must prove that the manufacturer was negligent. In the past three decades, the movement to expand the rights of injured people has slowed considerably. Indeed, some state courts have become considerably more favorable to the interests of tort defendants. But most of the revolution in personal injury law remains intact.

The positions of state supreme courts in constitutional law also evolved. Even

after the U.S. Supreme Court abandoned its active oversight of economic regulation by government in the late 1930s, many state courts continued to strike down laws in that field on the basis of their own constitutions.” Meanwhile, in the 1950s and 1960s, some supreme courts openly resisted the Supreme Court’s expansions of individual liberties, interpreting the court’s decisions narrowly.

Since the 1970s, as the Supreme Court itself has narrowed civil liberties to a degree, some state courts have accepted that direction enthusiastically. But others, especially in the West and Northeast, have undertaken their own expansions of liberties by finding independent sources of protections in their state constitutions. These expansions have been especially common in criminal justice. For instance, many state courts have gone further than the Supreme Court to prohibit the use of evidence that law enforcement officers had seized illegally. State courts have broadened protections of liberties in other areas, ranging from freedom of expression to discrimination based on gender and sexual orientation.

The relative liberalism of appellate courts since the 1940s is more difficult to explain than their conservatism in earlier eras. Undoubtedly, this liberalism has roots in a changing pattern of social values. Support for government regulation of business enterprises among the general public and political leaders increased during the twentieth century. Meanwhile, some civil liberties—especially those related to equality—gained more support. This change in values has been reflected in judges’ own attitudes and in the cases and arguments that come to appellate courts.

Another source of this ideological change is the attributes of people who become judges. Like judges in the past, most current judges come from families with high status. But there are more exceptions today. In part for this reason, the attitudes of judges on economic issues are less likely to be conservative. Further, the growing strength of the Democratic party in the North during and after the New Deal period meant that more judges were selected by liberal presidents and governors, and Democratic candidates probably became more successful in winning judicial elections as well.

To some extent, this shift to greater liberalism reinforced itself. The courts’ support for civil liberties encouraged interest groups to bring new cases, seeking further expansions of liberties. When the Supreme Court played a strong role in protecting civil liberties in the 1960s, many lawyers gained an appreciation for that role, and those who reached the bench themselves sought to maintain it. As the changes in tort law demonstrate especially well, a trend in judicial policy tends to gain a certain momentum of its own.

The partial reversal of this liberal trend in recent years reflects events outside the courts. The general success of Republican presidential candidates from 1968 through 2004 brought more conservatives into the federal courts, with an inevitable impact on judicial policy. Campaigns by interest groups helped to raise fears about negative effects of expanded rights for injured people, and these fears undoubtedly influenced state court decisions in tort law.

Of course, future directions in the policies of appellate court will reflect further developments in their political environments, developments as broad as trends in social thinking and as specific as the outcomes of presidential and gubernatorial elections. Observers of the courts tend to view their current tendencies as permanent, but the policy shifts in recent eras make it clear that the ideological stance of the courts is always subject to change.

Judicial Activism

Observers of the courts and judges themselves frequently speak of judicial activism, but it is not always clear what they mean by the term. For one thing, activism can refer to a wide range of actions by courts. And because judicial activism has a negative connotation, people often use the term simply to denounce court decisions and lines of judicial policy with which they disagree. Members of Congress regularly do so.

“Basically,” according to one scholar, “judicial activism is what the other guy does that you don’t like?” This reality is illustrated by reactions to two rulings by federal district judges on the 2010 federal health care law; both rulings struck down a key provision of the law, and one of the judges ruled that the law as a whole was unconstitutional. Supporters of the health care law denounced the two rulings as activist. But opponents of the law, some of whom had attacked other judges for activism, applauded the decisions as simply proper interpretations of the Constitution.

Thinking about Activism Yet the concept of activism does have real meaning, and its most important aspect concerns involvement in public policy making. Judges cannot avoid making policy, simply because they make decisions. But they have some control over the extent of their involvement in policy making. In deciding cases, judges sometimes face a choice between alternatives that would enhance their court’s impact on government policy and those that would limit its impact. A court might decide a tort case on the basis of a narrow rule, or it might announce a broad rule that affects a whole class of tort cases. If a statute is challenged under the Constitution, a court can uphold the statute or overturn it. When judges choose to increase their impact in these and other respects, their policies can be called activist.

When courts engage in activism, they may do so in support of either liberal or conservative policies. Activism in any era is ideologically mixed, but the relative strength of liberal and conservative activism reflects the tenor of judicial policy as a whole. The most prominent activism of the relatively conservative federal courts in the early twentieth century involved overturning of state and federal laws that restricted business practices. The more liberal courts of the 1960s and 1970s were activist in support of individual liberties for groups such as political dissenters, members of racial minority groups, and criminal defendants.

Leaving aside its negative connotation, is judicial activism undesirable? Many people think that it is, on several grounds. Most important, they perceive activism as illegitimate because it is the other branches of government that are supposed to do most policy making, not the courts. This is especially true of federal judges, whose lifetime appointments make them relatively free from popular control and accountability. In contrast, defenders of activism view the courts’ freedom from popular control as a virtue rather than a weakness, because this freedom allows the courts to protect values that are important but unpopular such as certain civil liberties. This debate is impossible to resolve definitively. In any event, most people react to activism not in terms of its benefits and costs in the abstract but in terms of its ideological content at a given time.

Judicial Activism Today

It is inevitable that courts engage in a good deal of activism, but the level of that activism can vary over time. It appears that this level has been unusually high in the past few decades. One measure of activism is the number of laws that the Supreme Court declares unconstitutional. By one count, the Court struck down 700 federal, state, and local laws between 1960 and 2010, with those decisions coming at an especially heavy rate in the first three decades of that period.²⁰ Of all the federal laws overturned during the Court’s history, more than half came in the last half century.

These figures reflect the Supreme Court’s involvement in a wide range of important policy questions. Some examples will underline the extent of that involvement:

- The Court has been a central participant in public policy on race. In decisions over the past half century, the Court has established rules about when school segregation is unconstitutional and what action is required when it is. It has shaped the meaning of federal statutes that prohibit discrimination in voting, employment, and other areas. Its decisions have also determined when affirmative action is legally acceptable.
- In *Roe v. Wade* (1973), the Court intervened in the developing debate over

abortion law with a ruling that effectively struck down the laws of at least forty-six states. Since then, the Court has handed down a series of decisions on abortion issues that range from the legality of restrictions on government funding for abortion to the legality of restrictions on protests at clinics that perform abortions.

- Partially reviving a role that it played in an earlier era, since the mid-1990s the Court has closely scrutinized the use of federal power under the Constitution to regulate state governments and the private sector. The Court has struck down several federal laws and limited the reach of others on a range of issues that include gun control, labor relations, and religious freedom.

- The Court intervenes in the political process as well. A series of decisions since 1976 has greatly limited government regulation of campaign finance, thus making it impossible to maintain a comprehensive system of regulation. The Court intervened in politics most dramatically after the 2000 presidential election, when its decision in *Bush v. Gore* (2000) ensured that George W. Bush would become president.

Judicial activism extends well beyond the Supreme Court. The federal courts of appeals frequently strike down federal and state policies, sometimes major policies, on the ground that they are inconsistent with statutes or provisions of the Constitution.

Federal district judges take similar actions, a role symbolized by the 2010 ruling that California's prohibition of same-sex marriage violated the 14th Amendment. In a different role, district judges sometimes intervene in the governance of public institutions such as schools, prisons, and mental institutions by holding that existing conditions are unconstitutional and then supervising the task of reforming them. One example was the long-running set of cases in which a district judge oversaw the provision of medical care in California's prisons. Ultimately, a three-judge district court in 2009 ordered a substantial reduction in the state's prison population to remedy what the judges saw as a continuing violation of prisoners' constitutional right to adequate health care, and the Supreme Court affirmed that decision in 2011.²²

State supreme courts have expanded their roles through their use of state constitutions as independent protections for certain rights. Perhaps the most striking example is the series of supreme court rulings on school funding. In 1973, the US Supreme Court ruled that systems based on local property taxes did not violate the equal protection clause of the Fourteenth Amendment even though those systems produced substantial differences in funding levels across school districts within a state. Litigants had already begun to challenge these funding systems under state constitutions. After 1973, they focused solely on state-level challenges. More often than not, courts have upheld their states' funding systems, but supreme courts in more than one-third of the states have struck down their systems—in several states, multiple times. These decisions sometimes require states to make basic changes in their funding systems and to expand greatly the amount of money they spend on their schools.

If activism is at a relatively high level today, what accounts for that increase? To a degree, it simply reflects the policy goals of judges. This is most often true of judges whose commitment to civil liberties leads them to invalidate policies of the other branches, but other judges act on their disagreement with affirmative action or consumer protection. The Supreme Court helps to foster activism in the lower courts through its own example, as the Court did with its expansions of civil liberties during the 1950s and 1960s. By the same token, lower courts set examples for each other. It is easier for a federal district judge to order major prison reforms when a dozen judges in other districts have already done so.

The high level of activism also reflects forces outside the courts. Perhaps its

most fundamental source is the growth in government action at all levels. Because government policies now touch people more often and more deeply than in past eras, it is inevitable that more questions arise about the legal validity of government action.

There has also been growth in interest group litigation to challenge government action. Interest groups cannot force activism on a reluctant court, but they can facilitate activism by providing opportunities and constructing arguments for it. Groups such as the American Civil Liberties Union have played a key role in bringing civil liberties cases to court, just as groups such as the Sierra Club have done on environmental issues. For their part, courts have encouraged interest groups and others to challenge government action through decisions that responded favorably to such challenges. Judicial activism, like so much about the courts, results from an interaction between judges and the larger society in which they work.