Constitutional Law for a Changing America

Twelfth Edition

In honor of my parents, Ann and Kenneth Spole—L.E.
To Fiona, Millie, and Carson—K.T.M.
To Carley, Clayton, Coleman, and Evan—T.G.W.

Constitutional Law for a Changing America

Institutional Powers and Constraints

Twelfth Edition

Lee Epstein
Washington University in St. Louis

Kevin T. McGuire
University of North Carolina at Chapel Hill

Thomas G. Walker
Emory University

Sage | CQPRESS

FOR INFORMATION:

2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

Unit No 323-333, Third Floor, F-Block
International Trade Tower Nehru Place
New Delhi 110 019
India

18 Cross Street #10-10/11/12
China Square Central
Singapore 048423

Acquisitions Editor: Anna Villarruel
Content Development Editor: Cassie Carey
Production Editor: Astha Jaiswal
Copy Editor: Colleen Brennan
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PREFACE

THREE DECADES have passed since *Constitutional Law for a Changing America: Institutional Powers and Constraints* made its debut in a discipline already supplied with many fine casebooks by law professors, historians, and social scientists. We believed then, as we do now, that a fresh approach was needed because, as professors who regularly teach courses on public law, and as scholars concerned with judicial processes, we saw a growing disparity between what we taught and what our research taught us.

We had adopted books for our classes that focused primarily on Supreme Court decisions and how the Court applied the resulting legal precedents to subsequent disputes, but as scholars we understood that to know the law is to know only part of the story. A host of political factors—internal and external—influence the Court's decisions and shape the development of constitutional law. These include the ways lawyers and interest groups frame legal disputes, the ideological and behavioral propensities of the justices, the politics of judicial selection, public opinion, and the positions elected officials take, to name just a few.

Because we thought no existing book adequately combined legal factors with the influences of the political process, we wrote one. In most respects, our book follows tradition: readers will see that we include excerpts from the classic cases, as well as the more recent leading precedents, that best illustrate the development of constitutional law. But our focus is different, as is the appearance of this volume. We emphasize the arguments raised by lawyers and interest groups and the politics surrounding litigation. We include tables and figures on Court trends and other materials that bring out the rich legal, social, historical, economic, and political contexts in which the Court reaches its decisions. As a result, students and instructors will find this work both similar to and different from casebooks they may have read before.

Integrating traditional teaching and research concerns was only one of our goals. Another was to animate the subject of constitutional law. As instructors, we find our subject inherently interesting—to us, con law is exciting stuff. Many of the books available, however, could not be less inviting in design, presentation, or prose. That kind of book seems to dampen enthusiasm. We have written a book that we hope mirrors the excitement we feel for our subject. We describe the events that led to the suits and include photographs of litigants and relevant exhibits from the cases. Moreover, because students often ask us about the fates of particular litigants—for example, Did William Marbury receive his commission? What happened to Fred Korematsu? Is the Heart of Atlanta Motel still in operation?—and hearing that colleagues elsewhere are asked similar questions, we decided to attach "Aftermath" boxes to a selected set of cases. In addition to providing final chapters to these stories, the focus on the human element leads to interesting discussions about the impact of judicial policy on the lives of ordinary Americans. We hope these materials demonstrate to students that Supreme Court cases are more than just legal names and citations, that they involve real people engaged in real disputes.

IMPORTANT REVISIONS

In preparing this twelfth edition, we have strengthened the distinctive features of the earlier versions by ensuring that the scope and content of the volume is up-to-date, comprehensive, and accessible to readers. The enduring issues of American constitutional law continue to be highlighted prominently alongside more recent innovations in the Supreme Court's policies.

Among the additions are cases that touch on executive, legislative, and judicial power, as well as federalism. Thus, for example, in Chapter 2 we revisit the decision in *Lujan v. Defenders of Wildlife*, a case that presents the question of when litigants have legal standing to go to court. Likewise, Chapter 4 excerpts *Trump v. United States*, the Court's recent decision concerning the immunity from legal liability that presidents enjoy when engaged in official acts. *Sonzinsky v. United* States, presented in Chapter 8, is an older case that speaks to a policy issue of more recent concern, the control of gun violence. Here, the Court addresses whether Congress can use its taxing power as a way of discouraging the use of weapons commonly used in criminal activity. Finally, we include in Chapter 7 one of the Court's latest decisions on the dormant commerce clause. In *National Pork Producers Council v. Ross*, the justices resolve a clash between a state's right to establish rules for the sale of products within a state and the national interest in protecting against states interfering with interstate commerce.

We continue to incorporate classic cases, and each and every excerpted opinion has been reviewed with a fresh eye. Some opinions have been streamlined to improve readability, while others have been expanded to ensure that they appropriately underscore the key issues. We also carefully read through our summaries of the lawyers' arguments to confirm that they meet our objective of highlighting the array of important claims before the Court and not simply those the justices chose to highlight.

In addition to the lawyers' arguments, we have retained and enhanced other features pertaining to case presentation that have proved to be useful. We continue to excerpt concurring and dissenting opinions; in fact, virtually all cases analyzed in the text now include one or the other or both. Although these opinions lack the force of precedent, they are useful in helping students to see alternative points of view. The "Aftermath" boxes remain an important device for conveying the real-world consequences of the Court's decisions. Photographs—both historic and contemporary—have long been an inviting feature of the text, and we have included a number of new images and replaced several others.

We also continue to provide universal resource locators (URLs) to the full texts of the opinions and, where available, to a website containing audio recordings of oral arguments in many landmark cases. We have taken this step for much the same reason that we now highlight attorneys' arguments: reading decisions in their entirety and listening to oral arguments can help students to develop the important skill of differentiating between compelling arguments and ineffective ones. Finally, we continue to retain the historical flavor of the decisions, reprinting verbatim the original language used in U.S. Reports to introduce the justices' writings. Students will see that during most of its history the Court used the courtesy title "Mr." to refer to justices, as in "Mr. Justice Holmes delivered the opinion of the Court" or "Mr. Justice Harlan, dissenting." In 1980 the Court dropped the "Mr." This point may seem minor, but we think it is evidence that the justices, like other Americans, updated their usage to reflect fundamental changes in American society—in this case, the emergence of women as a force in the legal profession and shortly thereafter on the Court itself.

Past editions have included a comparative component that explores how other high courts around the world have addressed some of the same issues that have confronted the U.S. Supreme Court. This feature of the text invites students to compare and contrast U.S. Supreme Court decisions over a wide range of issues, such as the death penalty and libel, with policies developed in other countries. The use of foreign law sources in their opinions has generated disagreement among some of the justices, and we have found that this material inspires lively debates in our classes. This information is now in the Resource Center. We hope it will continue to serve as a useful resource for generating discussion in your classes, just as it has in our own.

TEACHING RESOURCES

This text includes an array of instructor teaching materials designed to save you time and to help you keep students engaged. To learn more, visit sagepub.com or contact your SAGE representative at sagepub.com/findmyrep.

ACKNOWLEDGMENTS

Although the first edition of this volume was published thirty years ago, it had been in the works for many more. During those developmental years, numerous people provided guidance, but none as much as Joanne Daniels, a former editor at CQ Press. It was Joanne who conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. And it was Joanne who brought that concept to our attention and helped us develop it into a book. We are forever in her debt.

Because this new edition charts the same course as the first eleven editions, we remain grateful to all of those who had a hand in the previous editions. They include David Tarr and Jeanne Ferris at CQ Press, Jack Knight at Duke University, Joseph A. Kobylka of Southern Methodist University, Jeffrey A. Segal of the State University of New York at Stony Brook, and our many colleagues who reviewed and commented on our work: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, James Cauthen, Phillip J. Cooper, Sue Davis, John Fliter, John Forren, John B. Gates, John Gruhl, Edward V. Heck, Joshua Kaplan, Peter Kierst, David Korman, Cynthia Lebow, John A. Maltese, Wendy Martinek, Wayne McIntosh, Susan Mezey, Richard J. Pacelle Jr., C. K. Rowland, Chris Shortell, Joseph Smith, Donald R. Songer, Harry P. Stumpf, Seth Barrett Tillman, and Artemus Ward. We are also indebted to the many scholars who took the time to send us suggestions, including (again) Greg Caldeira, as well as Akiba J. Covitz, Jolly Emrey, Alec C. Ewald, Leslie Goldstein, and Neil Snortland. Many thanks also go to Jeff Segal for his frank appraisal of the earlier volumes; to Segal (again), Rebecca Brown, David Cruz, Micheal Giles, Linda Greenhouse, Dennis Hutchinson, Adam Liptak, and Judges Frank H. Easterbrook and Richard A. Posner for their willingness to share their expertise in all matters of constitutional law; to Jack Knight for his comments on the drafts of several chapters; and to Harold J. Spaeth for his wonderful Supreme Court Database.

Most of all, we acknowledge the contributions of our editors at CQ Press, Brenda Carter, Charisse Kiino, Scott Greenan, and most recently Anna Villarruel. Brenda saw *Constitutional Law for a Changing America* through the first five editions; Charisse came on board on the fifth and worked with us throughout the eighth. Both were just terrific, somehow knowing exactly when to steer us and when to steer clear. Scott guided us carefully through much of this edition, and we are thrilled that Anna has now taken on these duties with the same energy and dedication that we have always found among CQ's staff. We are equally indebted to Carolyn Goldinger, our copy editor on the first four editions and on the sixth edition. Her imprint, without exaggeration, remains everywhere. Over the years, she made our prose more accessible, questioned our interpretation of certain events and opinions—and was all too often right—and made our tables and figures understandable. There is not a better copy editor in this business. Period.

For this edition, we express our sincere thanks to our copy editor, Colleen Brennan. Her expertise and attention to detail not only enhanced our prose but also worked to improve the accuracy and relevance of what we wrote. We also express many thanks to production editors Aparajita Srivastava and Astha Jaiswal, and Cassie Carey, the editorial associate who worked on photo acquisition and other forms of author support. They are really great at their jobs!

Finally, we acknowledge the support of our home institutions and of our colleagues and friends. We are forever grateful to our former professors for instilling in us their genuine interest in and curiosity about things judicial and legal, and to our parents for their unequivocal support.

Shortly before the fifth edition went to press, we learned that the *Constitutional Law for a Changing America* volumes had won the award for teaching and mentoring presented by the Law and Courts section of the

American Political Science Association. Each and every one of the editors and scholars we thank above deserves credit for whatever success our books have enjoyed. Any errors of omission or commission, however, remain our sole responsibility. We encourage students and instructors alike to comment on the book and to inform us of any errors. Contact us at epstein@wustl.edu, kmcguire@unc.edu, or polstw@emory.edu.

L.E., St. Louis, MO
K.T.M., Chapel Hill, NC
T.G.W., Atlanta, GA

ABOUT THE AUTHORS

Lee Epstein (PhD, Emory University) is the Ethan A. H. Shepley Distinguished University Professor at Washington University in St. Louis. She is a fellow of the American Academy of Arts and Sciences and the American Academy of Political and Social Science. She is author, coauthor, and/or editor of nineteen books, including *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th edition, with Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker and *The Choices Justices Make* with Jack Knight, which won the C. Herman Pritchett Award for the best book on law and courts. Recent books/monographs include *The Behavior of Federal Judges* with William M. Landes and Richard A. Posner, *An Introduction to Empirical Legal Research* with Andrew D. Martin, *The Oxford Handbook of U.S. Judicial Behavior* with Stefanie A. Lindquist, and *The Strategic Analysis of Judicial Behavior: A Comparative Perspective* with Keren Weinshall.

Kevin T. McGuire (PhD, The Ohio State University) is Professor of Political Science at the University of North Carolina at Chapel Hill. A former Fulbright Scholar at Trinity College, Dublin, he is the author of *Understanding the U.S. Supreme Court: Cases and Controversies* and *The Supreme Court Bar: Legal Elites in the Washington Community*. He is the editor of *New Directions in Judicial Politics* and coeditor, with Kermit L. Hall, of *Institutions of American Democracy: The Judiciary*.

Thomas G. Walker (PhD, University of Kentucky) is the Goodrich C. White Professor Emeritus at Emory University, where he won several teaching awards for his courses on constitutional law and the judicial process. His book *A Court Divided*, written with Deborah J. Barrow, won the prestigious V. O. Key Award for the best book on Southern politics. He is the author of *Eligible for Execution* and coauthor of *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th edition, with Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth.

PART ONE

THE U.S. CONSTITUTION

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AN INTRODUCTION TO THE U.S. CONSTITUTION

ACCORDING TO President Franklin D. Roosevelt, "Like the Bible, it ought to be read again and again."[1] Senator Henry Clay said it "was made not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity."[2] Justice Hugo Black, who famously extoled its "plain words, easily understood,"[3] carried a copy with him virtually all the time. The object of all this admiration? The U.S. Constitution. To be sure, the Constitution has its flaws and its share of detractors, but most Americans take great pride in their charter. President Calvin Coolidge, for example, asserted that "[t]o live under the American Constitution is the greatest political privilege that was ever accorded to the human race."[4] And why shouldn't Americans be proud? It is, after all, the world's oldest written constitution.[5]

In what follows, we provide a brief introduction to the document—in particular, the circumstances under which it was written, the basic principles underlying it, and some controversies surrounding it. This material may not be new to you, but, as the balance of this book is devoted to Supreme Court interpretation of the Constitution, we think it is worth reviewing.

[1]Fireside chat, March 9, 1937.

[2]Speech to the Senate, January 29, 1850.

[3]Hugo L. Black, "The Bill of Rights," *New York University Law Review* 35 (1960): 874.

[4]Dinner at the White House, on December 12, 1924.

[5]Technically, the small microstate of San Marino, located completely within the nation of Italy, has the oldest constitution, but it is not a single document. It consists of a series of books that date to 1600.

THE ROAD TO THE U.S. CONSTITUTION

While the fledgling United States was fighting for its independence from England, it was being run (and the war conducted) by the Continental Congress. Although this body had no formal authority, it met in session from 1774 through the end of the war in 1781, establishing itself as a de facto government. But it may have been something more than that: About a year into the Revolutionary War, the Continental Congress took steps toward nationhood. On July 2, 1776, it passed a resolution declaring the "United Colonies free and independent states." Two days later, on July 4, it formalized this proclamation in the Declaration of Independence, in which the nation's founders used the term *United States of America* for the first time.[6] But even before the adoption of the Declaration of Independence, the Continental Congress had selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee labored for several months to produce a proposal for a national charter, the Articles of Confederation.[7] Congress passed the proposal and submitted it to the states for ratification in November 1777. Ratification was achieved in March 1781, when Maryland—a two-year holdout—gave its approval.

The Articles of Confederation, however, had little effect on the way the government operated; instead, the

[6]The text of the Declaration of Independence is available at http://avalon.law.yale.edu/18th_century/declare.asp.

[7]The text of the Articles of Confederation is available at http://avalon.law.yale.edu/18th_century/artconf.asp.

articles more or less institutionalized practices that had developed under the Continental Congress. Rather than provide for a compact between the people and the government, the 1781 charter institutionalized "a league of friendship" among the states, an agreement that rested on strong notions of state sovereignty. Indeed, the Declaration of Independence referenced "the thirteen *united* States of America," the lowercase "u" serving as a self-conscious reflection of a joint pronouncement of individual states, rather than an assertion of national awareness. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it, not from the people.

The condition of the United States under the Articles of Confederation was less than satisfactory. Analysts have pointed out several weaknesses of the articles, including the following:

- Because it allowed Congress only to requisition funds and not to tax, the federal government was virtually broke. Lacking any formal power to compel states to provide the requested revenue, Congress frequently found that its requests for funds went unheeded. Indeed, from 1781 to 1783 the national legislature requested $10 million from the states and received only $1.5 million. Given the foreign debts the United States had accumulated during the Revolution, this problem was particularly troublesome.

- Because Congress lacked any concrete way to regulate foreign commerce, treaties between the United States and other countries were of limited value. Some European nations (e.g., England and Spain) took advantage by imposing restrictions on trade that made it difficult for America to export goods.

- Because the government lacked coercive power over the states, cooperation among them dissipated quickly. The states resorted to protectionism—policies designed to aid a local economy by making interstate commerce more expensive. By discouraging the benefits of free trade, states ended up hurting one another economically. In short, they acted more like thirteen separate countries than a union or even a confederation.

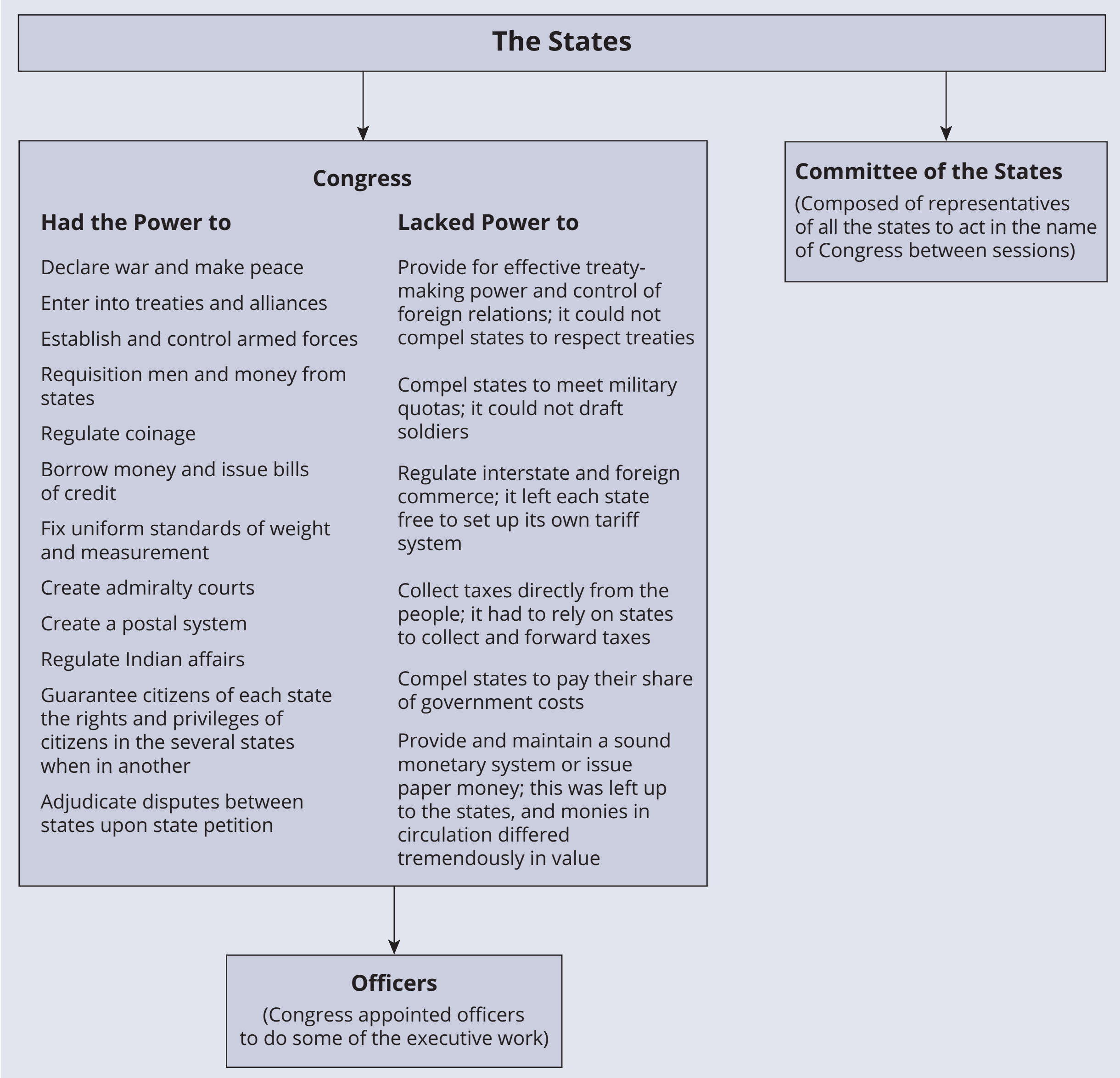
- Because the exercise of most national authority required the approval of nine states and because the passage of amendments required unanimity, the articles stymied Congress. Indeed, given the divisions among the states at the time, the approval of nine states for any action of substance was rare, and the required unanimity for amendment was never obtained.

Nevertheless, the government accomplished some notable objectives during the years the Articles of Confederation were in effect. Most critical among these, it brought the Revolutionary War to a successful end and paved the way for the 1783 Treaty of Paris, which helped make the United States a presence on the international scene. The charter served another important purpose: it prevented the states from going their separate ways until a better system could be put into place.

In the mid-1780s, as the articles' shortcomings were becoming more and more apparent, interest in revising the system of government began to take shape. In 1785, hoping to facilitate interstate trade, representatives of Maryland and Virginia met at George Washington's estate to hammer out an agreement regulating commerce along their mutual waterway of the Potomac River. Eager to capitalize on that momentum, those states proposed a national conference to "remedy defects of the federal government." That session, held in Annapolis in September 1786, included representatives from only five states, but among its attendees were James Madison of Virginia and Alexander Hamilton of New York. That convention urged the states to send delegations to another meeting scheduled for the following May in Philadelphia. Their plea could not have come at a more opportune time. Just the month before, a former Revolutionary War captain, Daniel Shays, had led disgruntled farmers in an armed rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers.

Shays' Rebellion was suppressed by state forces, but it was seen as yet another sign that the Articles of Confederation needed amending. In February 1787

Figure I-1 The Structure and Powers of Government under the Articles of Confederation



Source: Adapted from Steffen W. Schmidt, Mark C. Shelley II, and Barbara A. Bardes, *American Government and Politics Today*, 14th ed. (Boston: Wadsworth, 2008), 42.

Congress issued a call for a convention to reevaluate the current national system. It was clear, however, that Congress did not want to scrap the articles; in fact, it stated that the delegates were to meet "for the sole and express purpose of revising the Articles of Confederation."

Despite these words, the convention's fifty-five delegates quickly realized that they would be doing more than "revising" the articles: they would be framing a new charter. We can attribute this change in purpose, at least in part, to the Virginia delegation. When the Virginians arrived in Philadelphia on May 14, the day the convention was supposed to start, only they and the Pennsylvania delegation were there. Although lacking a quorum, the Virginia contingent used the eleven days that elapsed before the rest of the delegates arrived to craft a series of proposals that called for a wholly new government structure composed of a strong three-branch national government empowered to lead the nation.

Known as the Virginia Plan, these proposals were formally introduced to all the delegates on May 29, just four days after the convention began. And although it was the target of a counterproposal submitted by the New Jersey delegation, the Virginia Plan set the tone for the convention. It served as the basis for many of the ensuing debates and, as we shall see, for the Constitution itself (see Table I-1).

The delegates had much to accomplish during the convention period. Arguments between large states and small states over the structure of the new government and its relationship to the states threatened to deadlock the meeting. Indeed, it is miraculous that the delegates were able to frame a new constitution, which they did in just four months. One can speculate that the founders succeeded in part because they were able to close their meetings to the public, a feat almost inconceivable today; a contemporary convention of the states would doubtless receive extensive media coverage. Moreover, it is hard to imagine that delegates from fifty states could agree even to frame a new charter, much less do it in four months.

The difficulties facing such an enterprise raise an important issue. A modern constitutional convention would be hard-pressed to reach consensus because the delegates would bring with them diverse interests and aims. But was that not the case in 1787? If, as has been recorded, the framers were such a fractious group, how could they have reached accord so rapidly? So, who were these men, and what did they want to do?

These questions have been the subject of lively debates among scholars. Many agree with historian Melvin I. Urofsky, who wrote of the Constitutional Convention, “Few gatherings in the history of this or any other country could boast such a concentration of talent.” And, “despite [the framers’] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment.”[8] Indeed, they were an impressive group. Indeed, Thomas Jefferson, who was observing from afar as the U.S. Minister to France, declared,

[8]Melvin I. Urofsky and Paul Finkelman, *A March of Liberty*, 2nd ed. (New York: Oxford University Press, 2002), 94–95.

Table I-1 The Virginia Plan, the New Jersey Plan, and the Constitution

Item	Virginia Plan	New Jersey Plan	Constitution
Legislature	Two houses	One house	Two houses
Legislative representation	Both houses based on population	Equal for each state	One house based on population; one house with two votes from each state
Legislative power	Veto authority over state legislation	Authority to levy taxes and regulate commerce	Authority to levy taxes and regulate commerce; authority to compel state compliance with national policies
Executive	Single; elected by legislature for a single term	Plural; removable by majority of state legislatures	Single; chosen by Electoral College; removable by national legislature
Courts	National judiciary elected by legislature	No provision	Supreme Court appointed by executive, confirmed by Senate

"I have no doubt that all their other measures will be good and wise. It is really an assembly of demigods."[9] Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—all white men, many of whom had been educated at the country's best schools—skeptics suggest that the document the framers produced was biased in various ways. In 1987 Justice Thurgood Marshall said that the Constitution was "defective from the start," that despite its first words, "We the People," it excluded "the majority of American citizens" because it left out blacks and women. He further alleged that the framers "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[10]

Historian Charles Beard expressed a similar view in his controversial work *An Economic Interpretation of the Constitution of the United States*, which depicts the framers as self-serving. Beard says the Constitution was an "economic document" devised to protect the "property interests" of those who wrote it. Various scholars have refuted this view, and Beard's work, in particular, has been largely negated by other studies.[11] Still, by today's standards it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class.

Given these charges, how has the Constitution survived for so long, especially considering the U.S. population's increasing diversity? The answer lies in part with the Supreme Court, which generally has analyzed the document in light of its contemporary context. That is, some justices have viewed the Constitution—often written in abstract terms that embrace broad principles—as a living document and have sought to adapt it to their own times. In addition, the founders provided for an amending process to ensure the document's continuation. That we can alter the Constitution to fit changing needs and expectations is obviously important. Thus, for example, Americans have amended the Constitution to abolish slavery and guarantee the citizenship rights of Blacks, to grant women the right to vote, to impose—and repeal—Prohibition, and to limit presidential tenure.

This is not to suggest that controversies surrounding the Constitution no longer remain. To the contrary, charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome and requires extraordinary majorities that almost never exist. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers' biases.

Throughout this volume, you will have many opportunities to evaluate these claims. They will be especially evident in cases involving economic liberties—those that ask the Court, in some sense, to adjudicate claims between the privileged and the underdogs in society. For now, let us consider some of the basic features of that controversial document—the U.S. Constitution.

UNDERLYING PRINCIPLES OF THE CONSTITUTION

The framers of the Constitution were faced with a quandary: how to construct a government that both enlarged and limited national power. Being well versed in the political philosophies of the Enlightenment, the framers drew a blueprint that was clearly informed by the ideas of the leading lights of their age, writers such as Locke, Montesquieu, and Rousseau. That influence is evident in several fundamental principles that underlie, but are not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers/checks and balances system, which governs relations among the branches of government; federalism, which governs relations between the states and the national government; and the principle of individual rights and liberties, which governs relations between the government and the people.

9 Letter from Thomas Jefferson to John Adams, 30 August 1787, https://founders.archives.gov/documents/Jefferson/01-12-02-0075.

10 Quoted in *Washington Post*, May 7, 1987. See also Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101 (1987): 1–5.

11 See, for example, Robert E. Brown's *Charles Beard and the Constitution* (Princeton, NJ: Princeton University Press, 1956). Brown concludes, "We would be doing a grave injustice to the political sagacity of the Founding Fathers if we assumed that property or personal gain was their only motive" (198).

The Separation of Powers/ Checks and Balances System

One of the fundamental weaknesses of the Articles of Confederation was their failure to establish a strong and authoritative federal government. The articles created a national legislature, but that body had few powers, and those it did have were kept in check by the states. The new U.S. Constitution overcame this deficiency by creating a national government with three branches—the legislature, the executive, and the judiciary—and by providing each with significant power and authority within its sphere. Moreover, the three newly devised institutions were constitutionally and politically independent of one another (a separation of powers), yet mutually dependent on one another to achieve their policy goals (a system of checks and balances).

Articles I, II, and III of the Constitution spell out the specific powers assigned to each branch. Nevertheless, many questions have arisen over the scope of these powers as the three institutions use them. Consider a few examples:

- Article I provides Congress with various kinds of authority over the U.S. military—the authority to provide for and maintain a navy and to raise and support armies. But it does not specifically empower Congress to initiate and operate a draft. Does that omission mean that Congress may not do so?
- Article II provides the president with the power to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Officers of the United States," but it does not specifically empower the president to fire such officers. May the president independently dismiss appointees, or is the "advice and consent" of the Senate also necessary for the executive to take those actions?
- Article III provides the federal courts with the authority to hear cases involving federal laws, but it does not specifically empower these courts to strike down such laws if they are incompatible with the Constitution. Does that mean federal courts lack the power of judicial review?

These examples illustrate just a handful of the questions involving institutional powers that the U.S. Supreme Court has addressed.

But institutional powers are only one side of the coin. We should also consider the other side—constraints on those powers. As depicted in Figure I-2, the framers not only endowed each branch with distinct power and authority over its own sphere but also provided explicit checks on the exercise of those powers such that each branch can impose limits on the primary functions of the others. In addition, the framers included balances by making the institutions responsible to different sets of constituencies and selecting them on different timetables. They took these steps because they feared the concentration and abuse of power.

Although this system has been successful, it also has produced numerous constitutional questions, many of which become apparent when we have a politically divided government, such as a Democratic president and a Republican Congress, and when one party or the other is seeking to assert its authority. What is truly interesting about such cases is that they continue to appear at the Supreme Court's doorstep. Even though the Constitution is more than two hundred years old, the Court has yet to resolve all the "big" questions. During the past few decades the Court has addressed many such questions, including the following:

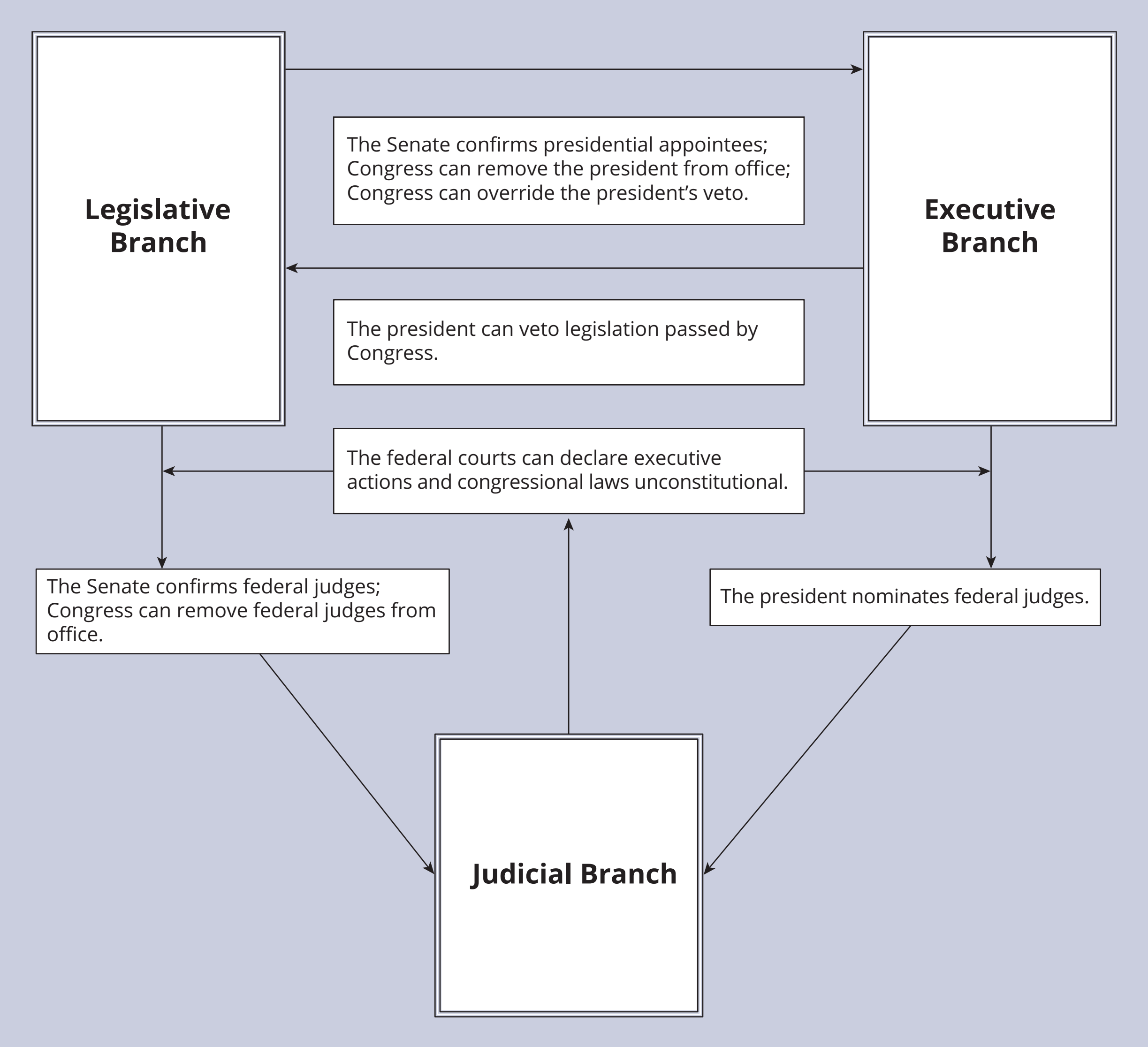
- May the president authorize the use of military commissions to try suspected terrorists?
- Does the president enjoy immunity from criminal liability for official acts?
- May Congress write into laws legislative veto provisions by which to nullify actions of the executive branch?
- May Congress pass legislation requiring the attorney general to appoint an independent counsel to investigate allegations of wrongdoing within the executive branch?

As you read the cases and narrative that follow, you will develop an understanding of how the Court has addressed these questions and many others relating to the separation of powers/checks and balances system.

Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the federal government and the states. As already noted, the

Figure I-2 The Separation of Powers/Checks and Balances System: Some Examples



national legislature was not just weak—it was more or less an apparatus controlled by the states. After all, states had set up the Articles of Confederation, and, therefore, the states empowered Congress.

The U.S. Constitution overcame this liability in two ways. First, it created three branches of government, all with significant authority. Second, it set out a plan of operation for the exercise of state and federal power. This plan of operation, called *federalism*, works today under the following constitutional guidelines:

- The Constitution grants certain legislative, executive, and judicial powers to the national government. Those not granted to the national government are reserved to the states.

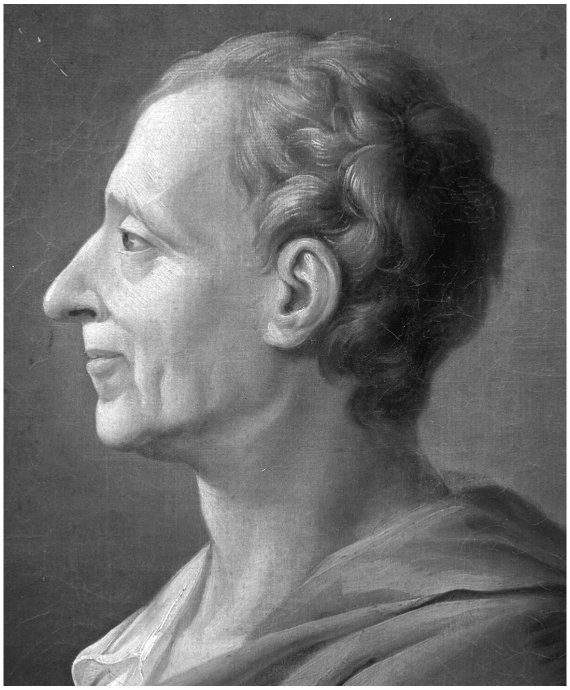
- The Constitution makes the national government supreme. The Constitution, all laws passed pursuant to it, and treaties are the supreme law of the land. American citizens, most of whom are also state citizens, and state officials owe their primary allegiance to the national government.

- The Constitution denies some powers to both national and state governments, some only to the national government, and still others only to the state governments.

In dividing authority between a national government and smaller constituent governments, the framers drew inspiration from Montesquieu's *The Spirit of the Laws* (1748). Montesquieu proposed "an assemblage of societies, that constitute a new one"; those individual societies (or states) could be responsive to local concerns, while the larger government could promote national security. Although Americans today tend to take this system of federalism for granted, it was quite novel when it was introduced. Indeed, it was perhaps the most innovative feature of the Constitution. As James Madison later explained, "The compound [government] is without a model, and to be explained by itself, not by similitudes or analogies."[12]

By making the national government supreme in its spheres of authority, the Constitution corrected a defect in the Articles of Confederation. But in spite of the best efforts of the framers to spell out the nature of federal-state relations, the Constitution still left many questions unanswered. For example, the Constitution authorizes Congress to lay and collect taxes, but it is unclear whether the states also may exercise powers that are granted to the federal government. States are not expressly prohibited from collecting taxes. Therefore, may Congress and the states both operate taxing systems?

As you know, the answer to this question is yes, even though the Constitution does not explicitly say so. Instead, elected government bodies (through legislation) and courts (through interpretation) have defined the specifics of federal-state relations. The Supreme Court, in particular, by defining the boundaries of federal and state power, has helped shape the contours of American federalism.



Maarten van Vliet, via Wikimedia Commons

Charles-Louis de Secondat, Baron de Montesquieu, the eighteenth-century French political philosopher whose treatise *The Spirit of the Laws* argued that liberty was best protected in a government that divided power and permitted policy makers to check one another. His ideas regarding the separation of powers and federalism were a principal influence on the framers.

Individual Rights and Liberties

For many of the framers, the most important purpose of the new Constitution was to safeguard individual rights and liberties. They created a limited government that would wield only those powers delegated to it and that could be checked by its own component parts—the states and the people. The majority of the founders felt it unnecessary to load the Constitution with specific individual rights, such as those later spelled out in the Bill of Rights. As Alexander Hamilton put it, "The Constitution is itself . . . a Bill of Rights." Under it, the government could exercise only those functions specifically bestowed on it; all other rights remained with the people. Stated differently, by enumerating national power and explicitly listing what it *could* do, the Constitution implicitly conveyed what the new government *could not* do. As Hamilton wrote, "[W]hy declare that things shall not be done which there is no power to do?" For his part, James Madison was skeptical that a Bill of Rights would actually curb governmental excesses. States had such provisions in their own constitutions, and these "parchment barriers" had often proved to be ineffective at limiting governmental oppression; they were, he suggested, "greatly overrated."

For this reason and possibly others—some scholars argue that the framers were too exhausted to continue—the

[12]Quoted in "James Madison, Outline," September 1829, in *The Founders' Constitution*, eds., Philip B. Kurland and Ralph Lerner (Chicago, IL: University of Chicago Press, September 1987), https://press-pubs.uchicago.edu/founders/documents/v1ch7s27.html.

Constitution was sent to the states without a list of rights. That omission became the source of major controversy and served as the vehicle by which states exacted a compromise over the Constitution's ratification.

By January 1788 four states had ratified the Constitution, but then the pace began to slow. A movement opposed to ratification was growing in size and marshaling arguments to deter state convention delegates. What these opponents, the so-called Anti-Federalists, most feared was the Constitution's new balance of powers. They believed that strong state governments would provide the best defense against the accumulation of too much power by the national government and that the Constitution tipped the scales the other way. These fears were countered by the self-labeled Federalists, who favored ratification of the Constitution.

The Federalists' arguments and writings took many forms, but among the most important was a series of eighty-five articles published in New York newspapers under the pen name Publius. Written by John Jay, James Madison, and Alexander Hamilton, *The Federalist Papers*—as we shall see throughout this book—continue to provide great insight into the objectives and intent of the nation's founders.[13]

The debates between the Federalists and their opponents were often highly philosophical, with emphasis on the appropriate roles and powers of national institutions. Within the states, however, ratification drives were full of the stuff of ordinary politics—deal making. The Massachusetts ratifying convention provides a case in point. After three weeks of debate among delegates, Federalist leaders realized that they would achieve victory only if they could obtain Governor John Hancock's support. They called on Hancock at home and proposed that he endorse ratification on condition that a series of amendments be drawn up for consideration by Congress. The governor agreed as long as he would become president of the United States if Virginia failed to ratify or if George Washington refused to serve. Or he would accept the vice presidency. With the deal cut, Hancock went to the convention to propose a compromise—the ratification of the Constitution with amendments. The delegates went along with the plan, making Massachusetts the sixth state to ratify.[14]

This compromise—the call for a bill of rights—caught on, and Madison began to advocate it whenever close votes were likely. As it turned out, he and other Federalists needed to mention the point quite often: of the nine states ratifying after January 1788, seven recommended that the new Congress consider amendments. New York and Virginia probably would not have agreed to the Constitution without such an addition. In the Virginia ratification debates, the Anti-Federalist Patrick Henry made an impassioned plea for a Bill of Rights, arguing that the Constitution should "[s]ecure to us the great important rights of humanity." Other states began revising their own wish lists of specific rights they wanted included in the document.[15]

The Federalists realized that if they did not accede to state demands, either the Constitution would not be ratified or a new constitutional convention would be necessary. Because neither alternative was particularly attractive, it was agreed that the document would be amended as soon as the new government came into power. And with that promise came the ratification of the Constitution by the requisite number of states just a year after it was written. The ratification of the Bill of Rights, on December 15, 1791, quieted those who had voiced objections. But the guarantees these ten amendments provide continue to serve as fodder for debate and, most relevant here, for Supreme Court litigation. Many of these debates involve the construction of specific guarantees, such as free speech and free exercise of religion, under which individuals seek relief when governments allegedly infringe on their rights.

The debates also involve clashes between the authority of the government to protect the safety, health, morals, and general welfare of citizens and the right of individuals not to be deprived of their liberty without due process of law. These disputes arise from specific and often difficult questions. For example, may government force a business owner to pay employees a certain wage, or does that requirement infringe on the employer's liberty? May government force home owners to vacate their houses if it needs the property to construct a road and is willing to pay the owners "fair market value" for their property, or does that interfere with a right contained in the Fifth Amendment? The answers to these questions and others like them reveal the contours of government power in relation to individual rights.

[13] *The Federalist Papers* are available at https://www.congress.gov/resources/display/content/The+Federalist+Papers.

[14] Joseph T. Keenan, *The Constitution of the United States* (Chicago, IL: Dorsey Press, 1988), 32–33.

[15] Alpheus T. Mason, ed., *The States Rights Debate*, 2nd ed. (New York: Oxford University Press, 1972), 92–93.

CHAPTER ONE

UNDERSTANDING THE U.S. SUPREME COURT

THIS BOOK IS DEVOTED to providing an overview of how the U.S. Supreme Court has interpreted the Constitution. It is organized around a discussion of the principal issues that the justices have confronted, with a primary focus on the text of the Court's opinions. Making sense of these opinions often requires a blend of different types of knowledge; depending on the case, an understanding of some leading legal concepts, an awareness of history, a grasp of the mechanics of deliberative government, an appreciation of social conditions, and some familiarity with principles of economics can each offer insight into the justices' constitutional choices. One constant across all of these opinions, however, is a set of procedures by which the Supreme Court makes decisions. Like any governmental institution, the Court is bound by formal rules and informal norms; they provide structure to the business of judicial policy making, and they channel and constrain how (and, in some cases, whether) the Court exercises its power. Because the opinions that you will read are the product of the justices following an established set of rules and procedures, it is important to understand how those rules and procedures guide the Court to reaching its results. In what follows, we outline the basic features of Supreme Court decision making. We begin with a discussion of how the justices select their cases. We then consider how—and why—the justices make their most significant decisions, the resolution of disputes.

PROCESSING SUPREME COURT CASES

A great deal happens before the justices actually decide cases. As Figure 1-1 shows, the Court must first sort through a large number of potential candidates in order to identify which cases it will resolve on the merits. During the 2023 term,[1] more than four thousand cases arrived at the Supreme Court's doorstep, but the justices decided only fifty-five with signed opinions.[2] The disparity between the number of parties that want the Court to resolve their disputes and the number of disputes the Court agrees to resolve raises some important questions: How do the justices decide which cases to hear? What happens to the cases they reject? What about those the Court agrees to resolve?

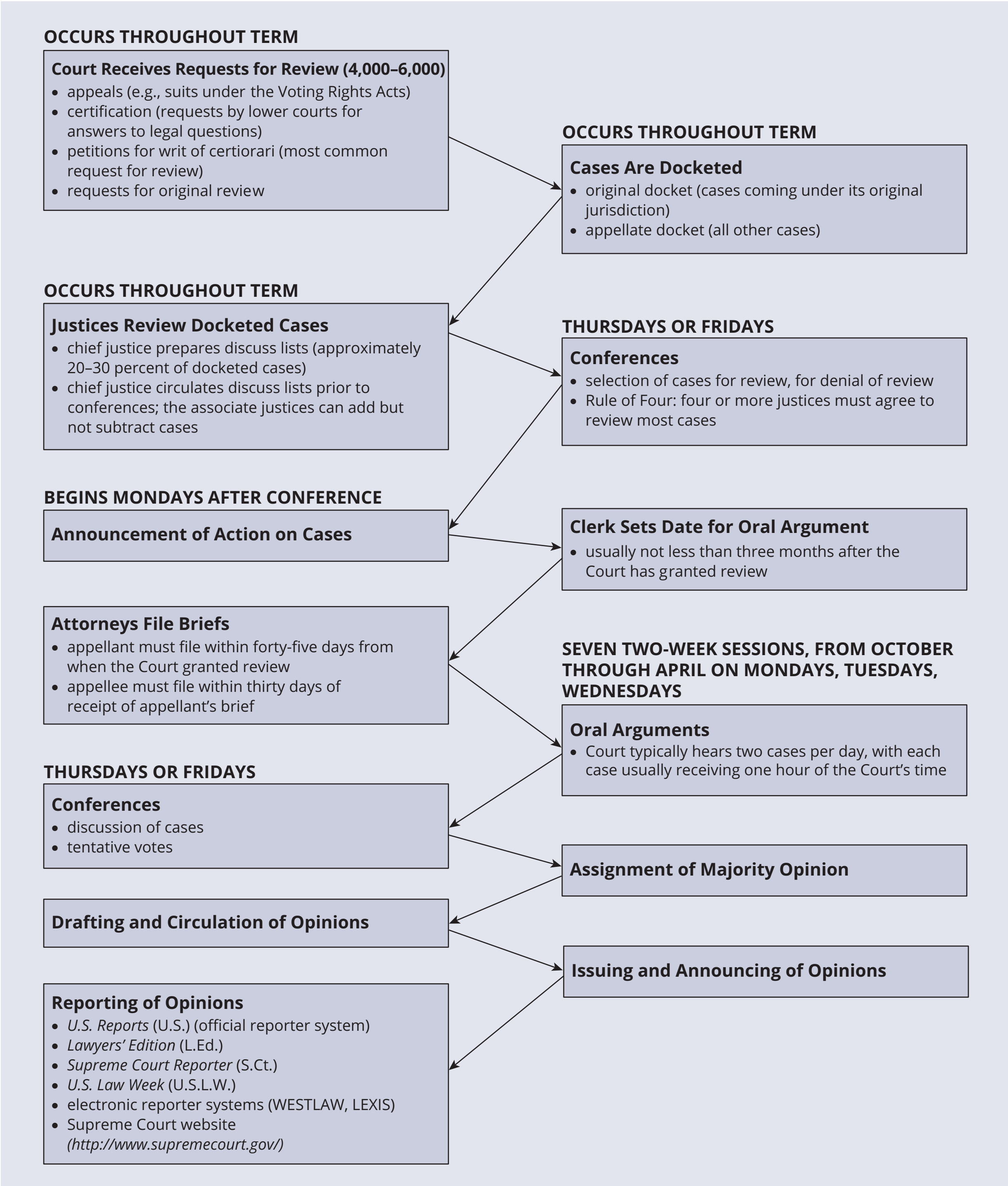
Deciding to Decide: The Supreme Court's Caseload

As the figures for the 2023 term indicate, the Court heard and decided only about 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth century, but the number of cases the Court formally decided each year did not increase. For example, in 1930 the Court agreed to decide 159 of the 726 disputes sent to it. In 1990 the number of cases granted review fell to 141, but the sum total of petitions

[1]Because it begins in October, the Court's annual term is formally referred to as the October Term of that year, even though it spans two calendar years, ending the following spring. So, the Court's term is referred to by the year in which it commences.

[2]The number of cases filed was calculated by the authors from the data at https://www.supremecourt.gov/docket/docket.aspx. The number of signed opinions is available at https://www.supremecourt.gov/opinions/slipopinion/23 and https://empiricalscotus.com/2023-stats/.

Figure 1-1 The Processing of Cases



for review had risen to 6,302—nearly nine times greater than in 1930.[3]

So, how cases get to the Supreme Court, how the justices select from among them, and what factors affect their choices are matters of some importance. In fact, they are fundamental to an understanding of judicial decision making and the role of the Court in American society.

How Cases Get to the Court: Jurisdiction and the Routes of Appeal

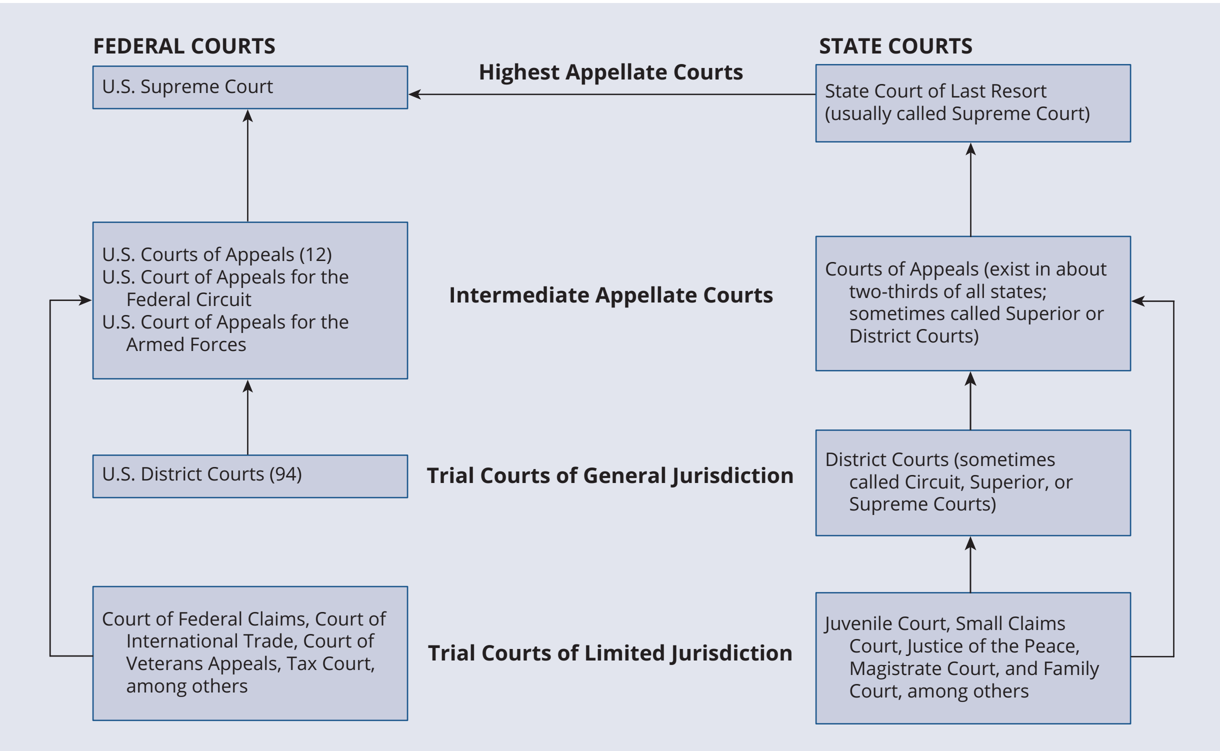
Cases come to the Court in one of four ways: either by a request for review under the Court's original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (*see Figure 1-1*). Chapter 2 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that no other court has heard. Article III of the Constitution authorizes such suits in cases involving ambassadors from foreign countries and those to which a state is a party. But, because Congress has authorized lower courts to consider such cases as well, the Supreme Court does not have exclusive jurisdiction over them. Consequently, the Court normally reviews, under its original jurisdiction, only those cases in which one state is suing another (usually over a disputed boundary). In recent years, original jurisdiction cases have made up only a tiny fraction of the Court's overall docket—between one and five cases per term.

Almost all cases reach the Court under its appellate jurisdiction, meaning that a lower federal or state court has already rendered a decision and one of the parties is asking the Supreme Court to review that decision. As Figure 1-2 shows, such cases typically come from one of the U.S. courts of appeals or state supreme courts. The U.S. Supreme Court, the nation's highest tribunal, is the court of last resort.

To invoke the Court's appellate jurisdiction, litigants can take one of three routes, depending on the nature of

[3]Data are from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, The Supreme Court Compendium: Data, Decisions, and Developments, 7th ed. (Thousand Oaks, CA: CQ Press, 2021), tables 2-5 and 2-6.

Figure 1-2 The American Court System



their dispute: appeal as a matter of right, certification, or certiorari. Cases falling into the first category (normally called "on appeal") involve issues Congress has determined are so important that a ruling by the Supreme Court is necessary. Before 1988 these included cases in which a lower court declared a state or federal law unconstitutional or in which a state court upheld a state law challenged on the ground that it violated the U.S. Constitution. Although the justices were technically obligated to decide such appeals, they often found a more expedient way to deal with them—by either failing to consider them or issuing summary decisions (shorthand rulings). At the Court's urging, in 1988 Congress virtually eliminated "mandatory" appeals. Today the Court is legally obliged to hear only those few cases (typically involving the Voting Rights Act) appealed from special three-judge district courts. When the Court agrees to hear such cases, it issues an order noting its "probable jurisdiction."

A second, but rarely used, route to the Court is certification. Under the Court's appellate jurisdiction and by an act of Congress, lower appellate courts can file writs of certification asking the justices to respond to questions aimed at clarifying federal law. Because only judges may use this route, very few cases come to the Court this way—fewer than one per decade.[4] The justices are free to accept a question certified to them or to dismiss it.

That leaves the third and most common appellate path, a request for a writ of certiorari (from the Latin meaning "to be informed"). In a petition for a writ of certiorari, the litigants seeking Supreme Court review ask the Court, literally, to become "informed" about their cases by requesting the lower court to send up the record. Most of the cases that arrive each year come as requests for certiorari. The Court, exercising its ability to choose which cases to review, grants "cert" to less than 1 percent of the petitions. A grant of cert means that the justices have decided to give the case full review; a denial means that the decision of the lower court remains in force.

How the Court Decides: The Case Selection Process

Regardless of the specific design of a legal system, in many countries jurists must confront the task of "deciding to decide," that is, choosing which cases among many hundreds or even thousands they will actually resolve. The U.S. Supreme Court is no exception; it, too, has the job of deciding to decide, or identifying those cases to which it will grant cert. This task presents something of a mixed blessing to the justices. Selecting cases to review—about 60 or so in recent terms—from the large number of requests is an arduous undertaking that requires the justices or their law clerks to look over hundreds of thousands of pages of briefs and other memoranda. The ability to exercise discretion, however, frees the Court from one of the major constraints on judicial bodies: the lack of agenda control. The justices may not be able to reach out and propose cases for review the way members of Congress can propose legislation, but the enormous number of petitions ensures that they can resolve at least some issues important to them.

In selecting cases, the justices follow a set of protocols that they have established over time. The original pool of petitions—about four to six thousand in recent terms—faces several checkpoints *(see Figure 1-1)* that significantly reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari arrives, the clerk's office examines it to make sure it conforms to the Court's precise rules. Briefs must be "prepared in a 6 1/8-by-9 1/4-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines." Exceptions are made for litigants who cannot afford to pay the Court's administrative fees, currently $300. The rules governing these petitions, known as *in forma pauperis* briefs, are somewhat looser, allowing indigents to submit briefs on 8½-by-11-inch paper. The Court's major concern, or so it seems, is that the document "be legible."[5]

The clerk's office gives all acceptable petitions an identification number, called a docket number, and forwards copies to the chambers of the individual justices. At present (2024), all the justices but Samuel Alito and Neil Gorsuch use the certiorari pool system, in which clerks from the different chambers collaborate by dividing, reading, and then writing memos on the petitions.[6] Upon receiving the preliminary or pool memos, the

[4] See Marcia Coyle, "Supreme Court Asked to Take Certified Question for Only Fifth Time in Six-Plus Decades," *National Law Journal*, August 3, 2009.

[5] Rules 33 and 39 of the Rules of the Supreme Court of the United States. All Supreme Court rules are available at https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf.

[6] Supreme Court justices are authorized to hire four law clerks each. Typically, these clerks are outstanding recent graduates of the nation's top law schools. Pool (or preliminary) memos, as well as other documents pertaining to the Court's case selection process, are available at http://blackmun.wustl.edu. See also Ryan C. Black and Christina L. Boyd, "The Role of Law Clerks in the U.S. Supreme Court's Agenda-Setting Process," *American Politics Research* 40 (2012): 147–173.

individual justices may ask their own clerks for their thoughts about the petitions. The justices then use the pool memos, along with their clerks' reports, as a basis for making their own independent determinations about which cases they believe are worthy of a full hearing.

During this process, the chief justice plays a special role, serving as yet another checkpoint on petitions. Before the justices meet to make case selection decisions—which they do on Fridays when the Court is in session—the chief circulates a "discuss list" containing those cases he or she feels merit consideration; any justice may add cases to this list but may not remove any. About 20 to 30 percent of the cases that come to the Court make it to the list and are discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.[7]

This much we know. Because only the justices attend the Court's conferences, we cannot say precisely what transpires. We can offer only a rough picture based on scholarly writings, the comments of justices, and our examination of the private papers of a few retired justices. These sources tell us that the discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating his vote. The associate justices, who sit at a rectangular table in order of seniority, then comment on each petition, with the most senior justice speaking first and the newest member last. As Figure 1-3 shows, the justices record the certiorari votes—and, for cases they agree to decide on the merits, their subsequent votes on the outcome—in their personal records, called docket books. But, given the large number of petitions, the justices apparently discuss few cases in detail.

By tradition, the Court adheres to the so-called Rule of Four: it grants certiorari to those cases receiving the affirmative vote of at least four justices. The Court identifies the cases accepted and rejected on a "certified orders list," which is released to the public. For cases granted certiorari (or alternatively, appeals in which probable jurisdiction is noted), the clerk informs participating attorneys, who then have specified time limits in which to submit their written legal arguments (briefs), and the case is scheduled for oral argument.

[7]For information on the discuss list, see Ryan C. Black and Christina L. Boyd, "Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process," *Social Science Quarterly* 94 (2013): 1124–1144; and Gregory A. Caldeira and John R. Wright, "The Discuss List: Agenda Building in the Supreme Court," *Law and Society Review* 24 (1990): 807–836.

Figure 1-3 A Page from Justice Harry Blackmun's Docket Books

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION		
	RELIST	CVSG	G	D	G & R	N	POST	DIS	AFF	REV	AFF	G	D	
Rehnquist, Ch. J.				✓							✓			
White, J.			3								✓			
Blackmun, J.			✓							✓				
Stevens, J.			✓							✓				
O'Connor, J.			3								✓			
Scalia, J.				✓							✓			
Kennedy, J.			✓							✓				
Souter, J.			✓								✓			
Thomas, J.				✓							✓			

Source: Dockets of Harry A. Blackmun, Manuscript Division, Library of Congress, Washington, DC.

Note: As the docket sheet shows, the justices have a number of options when they meet to vote on cert. They can grant (G) the petition or deny (D) it. They also can cast a "Join 3" (3) vote. Justices may have different interpretations of a Join 3 but, at the very least, it tells the others that the justice agrees to supply a vote in favor of cert if three other justices support granting review. In the MERITS column, REV = reverse the decision of the court below, and AFF = affirm the decision of the court below.

Considerations Affecting Case Selection Decisions

The process described here is how the Court considers petitions, but why do the justices make the decisions that they do? Scholars have developed several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.[8]

Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process. Many cases in the lower courts raise similar legal questions, and when judges reach different conclusions on those issues, there is *conflict*—disagreement among judges about the meaning of federal law. Under Rule 10, the Court considers conflict, such as when a U.S. "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when decisions of state courts of law collide with one another or the federal courts.[9]

To what extent do the considerations in Rule 10 affect the Court? The answer is mixed. On one hand, the Court seems to follow its dictates. The presence of actual conflict between or among federal courts substantially increases the likelihood of review; if actual conflict is present in a case, it has a 33 percent chance of gaining Court review, as compared with the usual 1 percent certiorari rate.[10] On the other hand, although the Court may look more closely at cases that present actual conflict, it does not accept all cases with conflict because there are simply too many.[11]

If cases that present genuine conflict are still rejected, then there must be additional criteria that the justices weigh in their decision making. That is why scholars have looked to *political* factors that may influence the Court's case selection process. Three are particularly important. The first is the U.S. solicitor general (SG), the attorney who represents the U.S. government before the Supreme Court. Simply stated, when the SG files a petition, the Court is very likely to grant certiorari. In fact, the Court accepts about 70 to 80 percent of the cases in which the federal government is the petitioning party, a staggeringly high success rate compared to other litigants.

Why is the solicitor general so successful? One reason is that the Court is well aware of the SG's special role. A presidential appointee whose decisions often reflect the administration's philosophy, the SG also represents the interests of the United States. As the nation's highest court, the Supreme Court cannot ignore these interests. In addition, the justices rely on the solicitor general to act as a filter—that is, they expect the SG to examine carefully the cases to which the government is a party and bring only the most important to their attention. Further, because solicitors general are involved in so much Supreme Court litigation, they acquire a great deal of knowledge about the Court that other litigants do not. They are "repeat players" who can use their knowledge of Supreme Court decision making to their advantage. For example, they know how to structure their petitions to attract the attention and interest of the justices. Finally, the professionalism of the SG and the lawyers working in that office is also beneficial; the justices know that these lawyers are invested in the Court's mission. They are, as some scholars have put it, "consummate legal professionals whose information justices can trust."[12]

The second political factor is the amicus curiae (friend of the court) brief. Interest groups and other third parties usually file these briefs after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage *(see Box 1-1)*. Research by political scientists shows that amicus briefs significantly enhance a case's chances of being heard, and multiple briefs have a greater effect.[13] An interesting finding of these studies is that, even when groups file *in opposition* to granting certiorari, they increase rather than decrease the probability that

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[8]Some scholars have noted a third set: procedural considerations. These emanate from Article III, which—under the Court's interpretation—places constraints on the ability of federal tribunals to hear and decide cases. Chapter 2 considers these constraints, which include justiciability (the case must be appropriate for judicial resolution by presenting a real "case" and "controversy") and standing (the appropriate person must bring the case). Unless these procedural criteria are met, the Court—at least theoretically—will deny review.

[9]Rule 10 also stresses the Court's interest in resolving "important" federal questions.

[10]See Gregory A. Caldeira and John R. Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," *American Political Science Review* 82 (1988): 1109–1127.

[11]See Lawrence Baum, *The Supreme Court*, 13th ed. (Washington, DC: CQ Press, 2019), 99.

[12]Ryan C. Black and Ryan J. Owens, *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions* (Cambridge, UK: Cambridge University Press, 2012), 71.

[13]Caldeira and Wright, "Organized Interests and Agenda Setting"; and Ryan C. Black and Ryan J. Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," *Journal of Politics* 71 (2009): 1062–1075.

BOX 1-1

The Amicus Curiae Brief

The amicus curiae practice probably originates in Roman law. A judge would often appoint a consilium (officer of the court) to advise him on points where the judge was in doubt. That may be why the term *amicus curiae* translates from the Latin as "friend of the court." But today it is the rare amicus who is a friend of the court. Instead, contemporary briefs almost always are a friend of a party, supporting one side over the other at the certiorari and merits stages. Consider one of the briefs filed in *United States v. Windsor* (2013), the cover of which is reprinted here. In that case, the American Psychological Association and other organizations filed in support of Edith Windsor. They, along with Windsor, asked the Court to invalidate the Defense of Marriage Act (DOMA), which defined marriage under federal law as a "legal union between one man and one woman." These groups were anything but neutral participants.

How does an organization become an amicus curiae participant in the Supreme Court of the United States? Under the Court's rules, groups wishing to file an amicus brief at the certiorari or merits stage must obtain the written consent of the parties to the litigation (the federal and state governments may file at their own discretion). If the parties refuse to give their consent, the group can file a motion with the Court asking for its permission. The Court today almost always grants these motions.

No. 12–307

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

—V.—

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.,

On Writ of Certiorari to the United States

Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC ASSOCIATION, THE CALIFORNIA MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS NEW YORK CITY AND STATE CHAPTERS, AND THE NEW YORK STATE PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* ON THE MERITS IN SUPPORT OF AFFIRMANCE

NATHALIE F.P. GILFOYLE AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E. Washington, DC 20002

WILLIAM F. SHEEHAN *Counsel of Record* ANDREW HUDSON GOODWIN | PROCTER LLP
901 New York Avenue, N.W. Washington, D.C. 20001 (202) 346–4000

wsheehan@goodwinprocter.com

PAUL M. SMITH JENNER & BLOCK LLP 1099 New York Avenue, N.W. Washington, DC 20001

Counsel for Amici Curiae

the Court will hear the case. This suggests that the Court reacts to the presence of amicus briefs rather than what they have to say. Regardless of whether a brief argues for or against granting review, it is a signal to the justices that the case affects some broader segment of society. Because amicus curiae briefs filed at the certiorari stage are somewhat uncommon—less than 10 percent of all petitions are accompanied by amicus briefs—they do draw the justices' attention. If major organizations are sufficiently interested in an appeal to pay the cost of filing briefs in support of (or against) Court review, then the petition for certiorari is probably worth the justices' serious consideration.

In addition, we have strong reasons to suspect that a third political factor—the ideology of the justices—affects actions on certiorari petitions. Specifically, the members of the Court favor reviewing lower court decisions that run contrary to their preferences. Researchers tell us, for example, that the justices during the liberal period under Chief Justice Earl Warren (1953–1969) were more likely to grant review to cases in which the lower court reached a conservative decision so that they could reverse that legal policy, while those of the moderately conservative Court during the years of Chief Justice Warren E. Burger (1969–1986) took cases in order to undo the liberal decisions of lower courts. It would be difficult to believe that the current justices would be any less likely than their predecessors to vote based on their ideology. These ideological considerations are brought to bear in a collegial context, and the members of the Court consider not only their preferences but also the preferences of their brethren. Scholarly studies suggest that justices engage in strategic voting behavior at the cert stage. In other words, justices are forward thinking; they consider the implications of their cert vote for the later merits stage, asking themselves, If I vote to grant a particular petition, what are the odds of my position winning down the road? As one justice explained his calculations, "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent."[14]

The Role of Attorneys

Once the Supreme Court agrees to decide a case, the clerk of the Court informs the parties. Each party presents its side of the dispute to the justices in written and oral arguments.

Written Arguments

Written arguments, called briefs, are the major vehicles for parties to Supreme Court cases to document their positions. Under the Court's rules, the appealing party (known as the appellant or petitioner) must submit its brief within forty-five days of the time the Court grants certiorari; the opposing party (known as the appellee or respondent) has thirty days after receipt of the appellant's brief to respond with arguments urging affirmance of the lower court ruling.

As is the case for cert petitions, the Court maintains specific rules covering the presentation and format of merits briefs. For example, the briefs of both parties must be submitted in forty copies and may not exceed thirteen thousand words. Rule 24 outlines the material that briefs must contain, such as a description of the questions presented for review, a list of the parties, and a statement describing the Court's authority to hear the case. Also worth noting is that the Court's rules now mandate electronic submission of all briefs (including amicus briefs) in addition to the normal hard-copy submissions.

The clerk sends the briefs to the justices, who normally study them before oral argument. Written briefs are important because the justices may use them to formulate the questions they ask the lawyers representing the parties. The briefs also serve as a permanent record of the positions of the parties, available to the justices for consultation after oral argument when they decide the case outcome. A well-crafted brief can place into the hands of the justices arguments, legal references, and possible remedies that later may be incorporated into the opinion. Indeed, some research suggests that such briefs do exactly that.[15]

In addition to the briefs submitted by the parties to the suit, Court rules allow interested persons, organizations, and government units to participate as amici curiae on the merits—just as they are permitted to file such briefs at the review stage *(see Box 1-1)*. Those wishing to submit friend of the court briefs must obtain the written permission of the parties or the Court. Only the federal government and state governments are exempt from this requirement.

[14] Quoted in H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991), 200.

[15] Pamela C. Corley, "The Supreme Court and Opinion Content: The Influence of Parties' Briefs," *Political Research Quarterly* 61 (2008): 468–478.

Oral Arguments

Attorneys also present their cases orally before the justices. Each side has thirty minutes to convince the Court of the merits of its position and to field questions from the justices.[16]

In some important cases, the Court will allocate additional time for argument. In the 2011 term, the Court took the unusual step of hearing six hours of oral argument, over three days, on the Patient Protection and Affordable Care Act (also known as Obamacare), the health care law passed in 2010. This was unprecedented in the modern era, but not in the Court's early years. In the past, because attorneys did not always prepare written briefs, the justices relied on oral arguments to learn about the cases and to help them marshal their arguments for the next stage. Orals were considered important public events, opportunities to see the most prominent attorneys of the day at work. Arguments often went on for days: *Gibbons v. Ogden* (1824), the landmark commerce clause case, was argued for five days, and *McCulloch v. Maryland* (1819), the litigation challenging the constitutionality of the national bank, took nine days to argue.

The justices can interrupt the attorneys at any time with comments and questions, as illustrated by the following exchange between Justice Byron White and Sarah Weddington, the attorney representing Jane Roe in *Roe v. Wade* (1973). White got the ball rolling when he asked Weddington to respond to an issue her brief had not addressed: whether abortions should be performed during all stages of pregnancy or should somehow be limited. The following discussion ensued:

WHITE: And the statute doesn't make any distinction based upon at what period of pregnancy the abortion is performed?

WEDDINGTON: No, Your Honor. There is no time limit or indication of time, whatsoever. So I think—

WHITE: What is your constitutional position there?

WEDDINGTON: As to a time limit . . . It is our position that the freedom involved is that of a woman to determine whether or not to continue a pregnancy. Obviously, I have a much more difficult time saying that the State has no interest in late pregnancy.

WHITE: Why? Why is that?

WEDDINGTON: I think that's more the emotional response to a late pregnancy, rather than it is any constitutional—

WHITE: Emotional response by whom?

WEDDINGTON: I guess by persons considering the issue outside the legal context, I think, as far as the State—

WHITE: Well, do you or don't you say that the constitutional—

WEDDINGTON: I would say constitutional—

WHITE: —right you insist on reaches up to the time of birth, or—

WEDDINGTON: The Constitution, as I read it . . . attaches protection to the person at the time of birth.

In the Court's early years, there was little doubt about the importance of such exchanges, and of oral arguments in general, because, as noted earlier, the justices did not always have the benefit of written briefs. Today, however, some observers have questioned the effectiveness of oral arguments and their role in decision making. Chief Justice Earl Warren contended that they made little difference to the outcome. Once the justices have read the briefs and studied related cases, most have relatively firm views on how the case should be decided, and so these arguments change few minds. Justice William J. Brennan Jr., however, maintained that they are extremely important because they help justices to clarify core arguments. Recent scholarly work seems to come down on Brennan's side. According to a study by Timothy Johnson and his colleagues, the justices are more likely to vote for the side that performs more effectively at oral argument. Along somewhat different lines, a study by Epstein, Landes, and Posner shows that orals may be a good predictor of the Court's final votes: the

[16] Recently, however, the Court has adopted the practice of allowing each justice, in order of seniority, the opportunity to ask additional questions at the end of those thirty minutes, which has extended slightly the length of some arguments.

side that receives more questions tends to lose.[17] One possible explanation is that the justices use oral argument as a way to express their opinions and attempt to influence their colleagues because formal deliberation (described below) is often limited and highly structured.

Even if oral arguments turn out to have little effect on the justices' decisions, we should not forget their symbolic importance: they are the only part of the Court's decision-making process that occurs in public and that you now have the opportunity to hear. Political scientist Jerry Goldman has made the oral arguments of many cases available online at www.oyez.org. Throughout this book, you will find references to this website, indicating that you can listen to the arguments in the case you are reading.

The Supreme Court Decides: Some Preliminaries

After the Court hears oral arguments, it meets in a private conference to discuss the case and to take a preliminary vote. In this section we describe the Court's conference procedures and the two stages that follow the conference: the assignment of the opinion of the Court and the opinion circulation period.

The Conference

Despite popular support for "government in the sunshine," the Supreme Court insists that its decisions take place in a private conference, with no one in attendance except the justices. Congress has agreed to this demand, exempting the federal courts from open government and freedom of information legislation. There are two basic reasons for the Court's insistence on the private conference. First, the Court—which, unlike Congress, lacks an electoral connection—is supposed to base its decisions on factors other than public opinion. Opening up deliberations to press scrutiny, for example, might encourage the justices to take notice of popular sentiment, which is not supposed to influence them. Or so the argument goes. Second, although in conference the Court reaches tentative decisions on cases, the opinions explaining the decisions remain to be written. This process can take many weeks or even months, and a decision is not final until the opinions have been written, circulated, and approved. Because the Court's decisions can have major impacts on politics and the economy, any party having advance knowledge of case outcomes could use that information for unfair business or political advantage.

This system generally works well, and the justices have not experienced many information leaks. One notable exception occurred in the spring of 2022, when the news website Politico published a leaked copy of the draft opinion in *Dobbs v. Jackson Women's Health Organization*, the decision that overturned *Roe v. Wade* (1973). Such a breach of secrecy was virtually unprecedented for an institution whose decisions are ordinarily closely guarded.

After the public announcement of a decision, clerks and even justices have sometimes thrown their own sunshine on the Court's deliberations. *National Federation of Independent Business v. Sebelius* (2012) *(excerpted in Chapters* 7 *and 8)*, involving the constitutionality of the health care law passed in 2010, provides a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice John G. Roberts Jr. initially voted to join the Court's four conservative justices to strike down the law but later changed his vote to join the four liberals to uphold it.[18]

So, although it can be difficult to know precisely what occurs in the deliberation of any particular case, from journalistic accounts and the papers of retired justices we can piece together the procedures and the general nature of the Court's discussions. We have learned the following. First, we know that the chief justice presides over the deliberations. He or she calls up the case for discussion and then presents his or her views about the issues and how the case should be decided. The remaining justices state their views and vote in order of seniority.

The level and intensity of discussion, as the justices' notes from conference deliberations reveal, differ from case to case. In some, it appears that the justices had very little to say. The chief presented his views, and the rest noted their agreement. In others, every Court member had something to add. Whether the discussion is subdued or lively, it is unclear to what extent conferences

[17] Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs II, "The Influence of Oral Arguments on the U.S. Supreme Court," *American Political Science Review* 100 (2006): 99–113; and Lee Epstein, William Landes, and Richard A. Posner, "Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument," *Journal of Legal Studies* 39 (2010): 433–467.

[18] Jan Crawford, "Roberts Switched Views to Uphold Health Care Law," CBS News, *Face the Nation*, July 2, 2012, https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/.

affect the final decisions. It would be unusual for a justice to enter the conference room without having reached a tentative position on the cases to be discussed; after all, he or she has read the briefs and listened to oral arguments. But the conference, in addition to oral arguments, provides an opportunity for the justices to size up the positions of their colleagues. This sort of information, as we shall see, may be important as the justices begin the process of crafting and circulating opinions.

Opinion Assignment and Circulation

The conference typically leads to a tentative outcome and vote. What happens at this point is critical because it determines who assigns the opinion of the Court—the Court's only authoritative policy statement, the only one that establishes precedent. Under Court norms, when the chief justice votes with the majority, he or she assigns the writing of the opinion. The chief may decide to write the opinion or assign it to one of the other justices who voted with the majority. When the chief justice votes with the minority, the assignment task falls to the most senior member of the Court who voted with the majority.

In making these assignments, the chief justice (or the senior associate in the majority) takes a number of factors into account.[19] First and perhaps foremost, the chief tries to equalize the distribution of the Court's workload. After all, the Court will not run efficiently, given the burdensome nature of opinion writing, if some justices are given many more assignments than others. The chief may also consider the justices' particular areas of expertise, recognizing that some justices are more knowledgeable than others about particular areas of the law. By encouraging specialization, the chief may also be trying to increase the quality of opinions and reduce the time required to write them.

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of *Brown v. Board of Education* (1954), and Roberts did the same in the health care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, "[T]here are occasions when an opinion should carry extra weight which pronouncement by the Chief Justice gives."[20] Finally, for cases decided by a one-vote margin (usually 5–4), chiefs have been known to assign the opinion to a moderate member of the majority rather than to an extreme member. In such cases, for example, Chief Justice Roberts disproportionately favored Justice Anthony Kennedy, who was widely regarded as the ideological center of the Court. There is a strategic reason for this decision: if the writer in a close case drafts an opinion with which other members of the majority are uncomfortable, the opinion may drive justices to the other side, causing the majority to become a minority. A chief justice may try to minimize this risk by asking justices squarely in the middle of the majority coalition to write.

Regardless of the factors the chief considers in making assignments, one thing is clear: the opinion writer is a critical player in the opinion circulation phase, which eventually leads to the final decision of the Court. The writer begins the process by circulating an opinion draft to the others.

Once the justices receive the first draft of the opinion, they have many options. First, they can join the opinion, meaning that they agree with it and want no changes. Second, they can ask the opinion writer to make changes, that is, *bargain* with the writer over the content of and even the disposition—to reverse or affirm the lower court ruling—offered in the draft. The following memo sent from William J. Brennan Jr. to Byron White is exemplary: "I've mentioned to you that I favor your approach to this case and want if possible to join your opinion. If you find the following suggestions . . . acceptable, I can join you."[21]

Third, they can tell the opinion writer that they plan to circulate a dissenting or concurring opinion. A concurring opinion generally agrees with the disposition but not with the rationale; a dissenting opinion means that the writer disagrees with the disposition the majority opinion reaches and with the rationale it invokes. Finally, justices can tell the opinion writer that they await further writings, meaning that they want to study various dissents or concurrences before they decide what to do.

As justices circulate their opinions and revise them—the average majority opinion undergoes three

[19]See, for example, Forrest Maltzman and Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (1996): 421–443; and Elliot E. Slotnick, "The Chief Justices and Self-Assignment of Majority Opinions," *Western Political Quarterly* 31 (1978): 219–225.

[20]Felix Frankfurter, "The Administrative Side of Chief Justice Hughes," *Harvard Law Review* 63 (1949): 4.

[21]Memorandum from Justice Brennan to Justice White, December 9, 1976, re: 75–104, *United Jewish Organizations of Williamsburgh v. Carey*.

to four revisions in response to colleagues' comments—many different opinions on the same case, at various stages of development, may be floating around the Court over the course of several months. Because this process is replicated for each case the Court decides with a formal written opinion, it is possible that scores of different opinions may be working their way from office to office at any point in time.

Eventually, the final version of the opinion is reached, and each justice expresses a position in writing or by signing an opinion of another justice. This is how the final vote is taken. When all of the justices have declared themselves, the only remaining step is for the Court to announce its decision and the vote to the public.

SUPREME COURT DECISION MAKING: LEGALISM

So far, we have examined the processes the justices follow to reach decisions on the disputes brought before them. We have answered basic questions about the institutional procedures the Court uses to carry out its responsibilities. The questions we have not addressed concern why the justices reach particular decisions and what forces play a role in determining their choices.

As you might imagine, the responses to these questions are many, but they can be categorized into two groups. One focuses on the role of law, broadly defined, and legal methods in determining how justices interpret the Constitution, emphasizing, among other things, the importance of its words, American history and tradition, and precedent (previously decided constitutional rulings). Judge Richard Posner and his coauthors have referred to this as a legalistic theory of judicial decision making.[22] The other—what Posner et al. call a realistic theory of judging—emphasizes nonlegalistic factors, including the role of politics. "Politics" can take many forms, such as the particular ideological views of the justices, the mood of the public, and the political preferences of the executive and legislative branches.

Commentators sometimes define these two sides as "should" versus "do." That is, they say the justices *should* interpret the Constitution in line with, say, the language of the text of the document or in accord with precedent. They reason that justices are supposed to shed all their personal biases, preferences, and partisan attachments when they take their seats on the bench. But, it is argued, justices *do not* shed these biases, preferences, and attachments; rather, their decisions often reflect the justices' own politics or the political views of those around them.

Although it may be tempting to assume that the justices use the law to camouflage their politics, there are several reasons to believe that they actually do seek to follow a legal approach. One reason is that the justices themselves often say they look to the founding period, the words of the Constitution, previously decided cases, and other legalistic approaches to resolve disputes because they consider them appropriate criteria for reaching decisions. Another reason is that the justices are obliged to be "principled in their decision-making process." That is, "if they are to have the continued respect of their colleagues, the wider legal community, citizens, and leaders," the Court members cannot follow their own personal preferences, the whims of the public, or other non–legally relevant factors.[23]

Whether they are principled in their decision making is for you to determine as you read the cases to come. For you to make this determination, it is of course necessary to develop some familiarity with both legalism and realism. In the next section we turn to realism; here we begin with legalism, which, in constitutional law, centers on the methods of constitutional interpretation that the justices frequently say they employ. We consider some of the most important methods and describe the rationale for their use. These methods include original intent, original meaning, textualism, structural analysis, stare decisis, pragmatism, and consulting other jurisdictions.[24]

Table 1-1 provides a brief summary of each method, using the debate over congressional term limits as an example (in what follows, we supply more details). To understand this debate, you should know that several clauses in Article I of the Constitution contain requirements that all prospective members of Congress must meet: A senator must be at least thirty years old, and a representative must be twenty-five years old. Every

[22]Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013).

[23]Ronald Kahn, "Institutional Norms and Supreme Court Decision Making: The Rehnquist Court on Privacy and Religion," in *Supreme Court Decision-Making*, ed. Cornell W. Clayton and Howard Gillman (Chicago, IL: University of Chicago Press, 1999), 176.

[24]For overviews (and critiques) of these and other approaches, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); and Lackland H. Bloom, *Methods of Constitutional Interpretation: How the Supreme Court Reads the Constitution* (New York: Oxford University Press, 2009).

Table 1-1 Methods of Constitutional Interpretation as Applied to the Issue of State-Imposed Congressional Term Limits

Method	Example
Originalism 1. **Original intent.** Asks what the framers wanted to do.	"The framers would have been shocked by the notion of a state interfering with the ability of the people to choose whom they please to govern them." OR "The framers would have been shocked by the notion of the U.S. Supreme Court interfering with the decision of the people of a state to limit the terms of their representatives and senators."
2. **Original meaning.** Considers what a clause meant to (or how it was understood by) those who enacted it (or at the time of its enactment).	"It would have been more expedient for the framers simply to allow existing state law to define the qualifications for the elected, as they did with the qualifications for voters. But instead by establishing certain qualifications as necessary for office, the framers meant to exclude all others." OR "In the immediate post-ratification period, the qualifications clauses were understood to specify minimum, not exclusive, (dis)qualifications."
Textualism. Places emphasis on what the Constitution says.	"The qualifications clauses establish national, uniform qualifications for federal representatives and senators. Neither provision, on its face, grants either Congress or the states any authority to impose additional qualifications." OR "Nothing in the text of the qualifications clauses excludes states from adopting term limits as a method for rejecting candidates for federal legislative office."
Structural analysis. Suggests that interpretation of particular clauses should be consistent with or follow from overarching structures or governing principles established in the Constitution—for example, the democratic process, federalism, and the separation of powers.	"That election to the national legislature should be open to all people of merit provides a critical foundation for democracy. Allowing individual states to craft their own qualifications for Congress would erode this structure." OR "Although the Constitution does set forth a few nationwide disqualifications for the office of presidential elector, in line with federalism principles, these disqualifications do not prohibit the states from adding any other eligibility requirements. Instead, Article II leaves the states free to establish qualifications for their delegates to the Electoral College."
Stare decisis. Looks to what courts have written about the clause.	"In *Powell v. McCormack,* the Court said that qualifications fixed in Article I are exclusive and unalterable." OR "In *Powell,* the Court said that Congress may not alter the qualifications clauses; it did not limit the authority of the states to impose certain requirements. And, in fact, previous rulings suggest that the states enjoy this very power."
Pragmatism. Considers the effects of various interpretations, suggesting that courts should adopt the one that avoids bad consequences.	"Failure to interpret the qualifications clauses as fixed would encourage states to engage in bad practices, such as adding many more ballot requirements (e.g., barring lawyers from the ballot)." OR "Term limits, which could be eliminated if the qualifications clauses are interpreted as fixed, are an effective solution to the growing problem of long-term, entrenched incumbents—professional legislators who make remaining in office their life's work and thus deprive voters of genuine electoral choices."
Consulting other jurisdictions. Examines practices in the United States and even abroad.	"No state passed term limits provisions in the years following the adoption of the Constitution. Moreover, every Court that has considered the qualifications clauses has concluded that they are fixed." OR "In response to the unprecedented level of incumbent reelection, since 1990 more than 22 million votes have been cast in fifteen states in favor of term limits."

Source: We adopt the framework for this table from Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," http://www.law.ucla.edu/volokh/2amteach/interp.htm and the briefs and opinions in *U.S. Term Limits, Inc. v. Thornton* (1995).

member must be, when elected, an inhabitant of the state she or he is to represent. Finally, representatives must have been citizens of the United States for at least seven years, and senators must have been citizens for nine. In *Powell v. McCormack* (1969) the Court held that Congress could not add further qualifications. All duly elected persons must be seated unless they fail to meet the criteria set out in the qualifications clauses.

But may the states add qualifications? Legal briefs filed in the case, along with commentary about it, employed a range of methods of constitutional interpretation, as Table 1-1 shows. Notice that no method seems entirely dispositive; rather, lawyers used those methods that supported their side. Ultimately, in *U.S. Term Limits, Inc. v. Thornton* (1995) *(excerpted in Chapter 3)*, the Court held that the U.S. Constitution is the exclusive source of qualifications for members of Congress and the states may not add to the existing criteria (including term limits).

Originalism

Originalism comes in several different forms, and we discuss two below—original intent and original understanding (or meaning)—but the basic idea is that originalists attempt to interpret the Constitution in line with what it meant at the time of its drafting. One form of originalism emphasizes the objectives or purposes of the Constitution's framers. The Supreme Court first invoked the term *intention of the framers* in 1796. In ***Hylton v. United States***, the Court said, "It was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation."[25] In *Hustler Magazine v. Falwell* (1988), the Court used the same grounds to find that cartoon parodies, however obnoxious, constitute expression protected by the First Amendment.

No doubt, justices over the years have looked to the intent of the framers to reach conclusions about the disputes before them.[26] But why? What possible relevance could the framers' intentions have for today's controversies? Advocates of this approach offer several answers. First, they assert that the framers acted in a calculated manner—that is, they knew what they were doing—so why should we disregard their precepts? One adherent said, "Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was."[27]

Second, it is argued that if they scrutinize the intent of the framers, justices can deduce "constitutional truths," which they can apply to cases. Doing so, proponents say, produces neutral principles of law and eliminates value-laden decisions.[28] Consider speech advocating the violent overthrow of the government. Suppose the government enacted a law prohibiting such expression and arrested members of a radical political party for violating it. Justices could scrutinize this law in several ways. A liberal might conclude, solely because of his or her liberal values, that the First Amendment prohibits a ban on such expression. Conservative jurists might reach the opposite conclusion. Neither would be proper jurisprudence in the opinion of those who advocate an original intent approach because both are value-laden and ideological preferences should not creep into the law. Rather, justices should examine the framers' intent as a way to keep the law value-free. Applying this approach to free speech, one adherent argues, leads to a clear, unbiased result:

> Speech advocating violent overthrow is . . . not [protected] "political speech" . . . as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority.[29]

Finally, supporters of this mode of analysis argue that it fosters stability in law. They maintain that, without originalism, the law becomes far too fluid, changing with the ideological whims of the justices and creating havoc for those who must interpret and implement Court

[25]Example cited by Boris I. Bittker in "The Bicentennial of the Jurisprudence of Original Intent: The Recent Past," *California Law Review* 77 (1989): 235.

[26]Given the subject of this volume, we deal here exclusively with the intent of the framers of the U.S. Constitution and its amendments, but one also could apply this approach to statutory construction by considering the intent of those who drafted and enacted the laws in question.

[27]Edwin Meese III, address before the American Bar Association, Washington, DC, July 9, 1983.

[28]See, for example, Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1–35.

[29]Ibid., 31.

decisions. Lower court judges, lawyers, and even ordinary citizens do not know if today's rights will still exist tomorrow. Following a jurisprudence of original intent would eliminate such confusion because it provides a principle that justices can follow consistently.

The last justification applies with equal force to a second form of originalism: *original meaning or understanding*. Justice Scalia explained the difference between this approach and intentionalism:

> The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[30]

By "textualist," Justice Scalia meant that he looked at the words of whatever constitutional provision he was interpreting and then interpreted them in line with what they would have ordinarily meant to the people of the time when they were written.[31] This is the "originalist" aspect of his method of interpreting the Constitution. So, while intentionalism focuses on the intent behind phrases, an original understanding approach would emphasize "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted."[32]

Even so, as we suggested earlier, the merits of this approach are similar to those of intentionalism. By focusing on how the framers defined their own words and then applying their definitions to disputes over those constitutional provisions containing them, this approach seeks to generate value-free and ideology-free jurisprudence. Indeed, one of the most important developers of this approach, historian William W. Crosskey, specifically embraced it to counter "sophistries"—mostly, the idea that the Constitution is a living document whose meaning should evolve over time.[33]

Chief Justice William H. Rehnquist's opinion in *Nixon v. United States* (1993) *(excerpted in Chapter 2)* provides an example. Here, the Court considered a challenge to the procedures the Senate used to impeach a federal judge, Walter L. Nixon Jr. Rather than the entire Senate trying the case, a special twelve-member committee heard evidence and reported to the full body, which in turn used that report to convict and remove him from office. Nixon argued that this procedure violated Article I of the Constitution, which states, "The Senate shall have the sole Power to try all Impeachments." But before addressing Nixon's claim, Rehnquist sought to determine whether courts had any business resolving such disputes. He used a meaning-of-the-words approach to consider the word *try* in Article I:

> Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. . . . There are several difficulties with this position which lead us ultimately to reject it. The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as "[t]o examine" or "[t]o examine as a judge." See 2 S. Johnson, A Dictionary of the English Language (1785). In more modern usage the term has various meanings. For example, try can mean "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation. . . ." Webster's Third New International Dictionary (1971).

Nixon is far from the only example of originalism. Indeed, many Supreme Court opinions contemplate the original intent of the framers or the original meaning of the words, and at least one justice on the current Court—Clarence Thomas—regularly invokes forms of

[30]Antonin Scalia, "A Theory of Constitutional Interpretation," remarks at the Catholic University of America, Washington, DC, October 18, 1996.

[31]See Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849–865.

[32]Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review* 68 (2001): 105.

[33]William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, IL: University of Chicago Press, 1953), 1172–1173.

originalism to answer questions ranging from the appropriate balance of power between the states and the federal government to limits on campaign spending.

Such a jurisprudential course would have dismayed Thomas's predecessor, Thurgood Marshall, who did not believe that the Constitution's meaning was "forever 'fixed' at the Philadelphia Convention." And, considering the 1787 Constitution's treatment of women and Blacks, Marshall did not find "the wisdom, foresight, and sense of justice exhibited by the framers particularly profound."[34]

Marshall has not been the only critic of originalism (whatever the form); the approach has generated many others over the years. One reason for the controversy is that originalism became highly politicized in the 1980s. Those who advocated it—particularly Edwin Meese, an attorney general in President Ronald Reagan's administration, and defeated Supreme Court nominee Robert Bork—were widely viewed as conservatives who were using the doctrine to promote their own ideological ends.

Others joined Marshall, however, in raising several more concrete objections to this jurisprudence. Justice Brennan in 1985 argued that if the justices employed only this approach, the Constitution would lose its applicability and be rendered useless:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[35]

Some scholars have echoed the sentiment. C. Herman Pritchett has noted that originalism can "make a nation the prisoner of its past, and reject any constitutional development save constitutional amendment."[36]

Another criticism often leveled at intentionalism is that the Constitution embodies not one intent but many. Jeffrey A. Segal and Harold J. Spaeth pose some interesting questions: "Who were the Framers? All fifty-five of the delegates who showed up at one time or another in Philadelphia during the summer of 1787? Some came and went. . . . Some probably had not read [the Constitution]. Assuredly, they were not all of a single mind."[37] Then there is the question of what sources the justices should use to divine the original intentions of the framers. They could look at the records of the constitutional debates and at the founders' journals and papers, but some of the documents that pass for "records" of the Philadelphia convention are jumbled, and some are even forged. During the debates, the secretary became confused and thoroughly botched the minutes. James Madison, who took the most complete and probably the most reliable notes on what was said, edited them after the convention adjourned. And then there are other writings of the period, such as the enormous number of pamphlets in circulation that argued for and against ratification of the new Constitution. Perhaps this is why in 1952 Justice Robert H. Jackson wrote:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly specification yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[38]

One useful illustration is the competing opinions in *District of Columbia v. Heller* (2008). In his majority opinion establishing that the Second Amendment protected a personal right to keep firearms for protection, Justice Scalia relied extensively upon, among other things, the English Bill of Rights of 1689, eighteenth-century dictionaries, early state constitutions, and the views of various framers of the Constitution. Using similar

[34]Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101 (1987): 1.

[35]William J. Brennan Jr., address to the Text and Teaching Symposium, Georgetown University, Washington, DC, October 12, 1985.

[36]C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs, NJ: Prentice Hall, 1984), 37.

[37]Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 68. See also William Anderson, "The Intention of the Framers: A Note on Constitutional Interpretation," *American Political Science Review* 49 (1955): 340–352.

[38]*Youngstown Sheet & Tube Co. v. Sawyer* (1952).

materials—indeed, sometimes the very same materials—Justice Stevens wrote a dissent that concluded that there was no such personal right.

As hard as it may be to ascertain the intention of the framers, it may be just as difficult for the Court to determine the original meaning of their words. There were a variety of dictionaries that were available during the founding era, some general and some legal, sometimes with contrary definitions. Even conscientious efforts to divine the meaning of a word or phrase as it was used in the late eighteenth century could yield inconclusive results.

Textualism

On the surface, textualism resembles originalism: it values the Constitution itself as a guide above all else. But this is where the similarity ends. In an effort to prevent the infusion of new meanings from sources outside the text of the Constitution, adherents of original intent seek to deduce constitutional truths by examining the *intended* meanings behind the words. Textualists look no further than the words of the Constitution to reach decisions.

This may seem similar to the original meaning approach we just considered, and there is certainly a commonality between the two approaches: both place emphasis on the words of the Constitution. But under the original meaning approach (Scalia's brand of textualism), it is fair game for justices to go beyond the literal meanings of the words and consider what they would have ordinarily meant to the people of that time. Other textualists, those we might call pure textualists or *literalists*, believe that justices ought to consider only the words in the constitutional text, and the words alone.

And it is these distinctions—between original intent and even meaning versus pure textualism—that can lead to some radically different results. To use the example of speech aimed at overthrowing the U.S. government, originalists would hold that the meaning or intent behind the First Amendment prohibits such expression. Those who consider themselves *pure* literalists, by contrast, might scrutinize the words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—and construe them literally: *no law* means *no law*. Therefore, any statute limiting speech, including a law that prohibits expression advocating the overthrow of the government, would violate the First Amendment.

Originalism and pure textualism sometimes overlap. When it comes to the right to privacy, particularly where it is leveraged to create other rights, such as legalized abortion, *some* originalists and literalists would reach the same conclusion: it does not exist. The former would argue that it was not the intent of the framers to confer privacy; the latter, that because the Constitution does not expressly mention this right, it does not exist.

Textual analysis is quite common in Supreme Court opinions. Many, if not most, opinions interpreting the Constitution look to its words in one way or another, but Justice Hugo Black is most closely associated with this view—at least in its pure form. During his thirty-four-year tenure on the Court, Black continually emphasized his literalist philosophy. His own words best describe his position:

> My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that government shall not do anything to people . . . either for the views they have or the views they express or the words they speak or write. Some people would have you believe that this is a very radical position, and maybe it is. But all I am doing is following what to me is the clear wording of the First Amendment. . . . As I have said innumerable times before I simply believe that "Congress shall make no law" means Congress shall make no law. . . . Thus we have the absolute command of the First Amendment that no law shall be passed by Congress abridging freedom of speech or the press.[39]

Why did Black advocate literalism? Like originalists, he viewed it as a value-free form of jurisprudence. If justices looked only at the words of the Constitution, their decisions would not reflect ideological or political values but, rather, those of the document. Black's opinions provide good illustrations. Although he almost always supported claims of free *speech* against government challenges, he refused to extend constitutional protection to *expression* that was not strictly speech. He believed, for example, that symbolic activities such as wearing clothing bearing profanity or burning a draft card or the American flag—even if calculated to express political views—fell outside the protections of the First Amendment. Speech is protected; conduct is not.

Despite the seeming logic of his justifications and the high regard many scholars have for Black, his

[39]Hugo L. Black, *A Constitutional Faith* (New York: Knopf, 1969), 45–46.

brand of jurisprudence has been vulnerable to attack. Some assert that it led him to take some rather peculiar positions, particularly in cases involving the First Amendment. Most analysts and justices—even those considered liberal—agree that obscene materials fall outside of First Amendment protection and that states can prohibit the dissemination of such materials. But in opinion after opinion, Black clung to the view that no publication could be banned because it was obscene.

A second objection is that literalism can result in inconsistent outcomes. Is it really sensible to assert that one has a First Amendment right to condemn the United States with words but no similar right to express the same idea by desecration of the flag or some other symbolic act?

Segal and Spaeth raise yet a third problem with literalism: it presupposes a precision in the English language that does not exist.[40] Many words, including those used by the framers, have multiple meanings.[41] To take one leading example, *McCulloch v. Maryland* (1819) *(excerpted in Chapters 3 and 6)* asked the Court to determine whether Congress had the power to establish a national bank, a power the Constitution did not explicitly grant to Congress. Chief Justice Marshall, however, concluded that Congress had implicit power to create the bank by way of the necessary and proper clause, found in Article 1, Section 8, of the Constitution, which authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution [Congress's explicit] Powers. . . ." Marshall considered the multiple meanings of the word *necessary*. He acknowledged that the word is often used to mean "essential" or "indispensable," but he emphasized that it can also mean "useful." He wrote, "To employ the means necessary to an end is generally understood as employing any means calculated to produce the end. . . ." Since a bank is a useful means to help Congress carry out its explicit power to collect and dispense revenue, it is constitutional. That is certainly a plausible interpretation of the word *necessary*, but it is scarcely the only one, as those opposing the bank argued.

Finally, even when the words are crystal clear, pure textualism may not be on firm ground. Despite the precision of some constitutional provisions—such as the minimum age of thirty-five for the president—they are loaded with "reasons, goals, values, and the like."[42] Law professor Frank Easterbrook notes that the framers might have imposed the presidential age limit "as a percentage of average life expectancy" (to ensure that presidents have a good deal of practical political experience before ascending to the presidency and little opportunity to engage in politicking after they leave) or "as a minimum number of years after puberty" (to guarantee that they are sufficiently mature while not unduly limiting the pool of eligible candidates). Seen in this way, the words "thirty five Years" in the Constitution may not have much value: they may be "simply the framers' shorthand for their more complex policies, and we could replace them by 'fifty years' or 'thirty years' without impairing the integrity of the constitutional structure."[43] More generally, as Justice Oliver Wendell Holmes Jr. once put it, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[44]

Structural Analysis

Textualist and originalist approaches tend to focus on particular words or clauses in the Constitution. Structural reasoning suggests that interpretation of these clauses should follow from, or at least be consistent with, overarching structures or governing principles established in the Constitution—most notably, federalism and the separation of powers. Interestingly enough, these terms do not appear in the Constitution, but they "are familiar to any student of constitutional law,"[45] and they will become second nature to you, too, as you work your way through the material in the pages to follow. The idea behind structuralism is that these structures or relationships are so important that judges and lawyers should read the Constitution with an eye toward preserving them.

[40]Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 54.

[41]Anyone who has ever seen Shakespeare's *The Merchant of Venice* has seen this illustrated when the clever Portia, posing as judge, saves Antonio from forfeiting a "pound of flesh" for his failure to repay a loan. While other characters assume a commonly understood meaning of the word *flesh*, Portia interprets the word more strictly—to exclude "blood"—and thus makes it impossible for the bargain to be fulfilled.

[42]Frank Easterbrook, "Statutes' Domains," *University of Chicago Law Review* 50 (1983): 536.

[43]Mark Tushnet, "A Note on the Revival of Textualism," in *Southern California Law Review* 58 (1985): 686.

[44]*Towne v. Eisner* (1918).

[45]Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe Jr., *Constitutional Theory: Arguments and Perspectives*, 3rd ed. (Newark, NJ: LexisNexis, 2007), 321.

There are many famous examples of structural analyses, especially, as you would expect, in separation of powers and federalism cases. Charles Black, a leading proponent of structuralism, points to *McCulloch v. Maryland* (1819), which again serves as a useful illustration. Among the questions the Court addressed was whether a state could tax a federal entity—the Bank of the United States. Even though states have the power to tax, Chief Justice John Marshall for the Court said it could not be taxed because the states could use this power to extinguish the bank. If states could do this, they would damage what Marshall believed to be "the warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy."[46]

Here, Marshall invalidated a state action aimed at the federal government. Throughout this book, you will see the reverse, as well: the justices invoking structural-federalism arguments to defend state laws against attack. You will also spot structural arguments relating to the democratic process. ***National League of Cities v. Usery* (1976)** and *Printz v. United States* (1997) are but two examples *(the latter is excerpted in Chapter 6)*, and there are many others in the pages to follow.

Despite their frequent appearance, structural arguments have their weaknesses. Primarily, as Philip Bobbitt notes, "while we all can agree on the presence of the various structures, we [bicker] when called upon to decide whether a particular result is necessarily inferred from their relationship."[47] What this means is that structural reasoning does not necessarily lead to a single answer in each and every case. *INS v. Chadha* (1983), involving the constitutionality of the legislative veto (used by Congress to veto decisions made by the executive branch), provides an example. Writing for the majority, Chief Justice Burger held that such a veto violated the constitutional doctrine of separation of powers; it eroded the "carefully defined limits of the power of each Branch" established by the framers. Writing in dissent, Justice White, too, relied in part on structural analysis but came to a very different conclusion: the legislative veto fit compatibly with the separation of powers system because it ensured that Congress could continue to play "its role as the Nation's lawmaker" in the wake of the growth in the size of the executive branch.

The gap between Burger and White reflects disagreement over the very nature of the separation of powers system, and similar disagreements arise over federalism and the democratic process. Hence, even when justices reason from structure, it is possible, even likely, that they will reach different conclusions.

Stare Decisis

Translated from Latin, the term *stare decisis* means "let the decision stand." What this concept suggests is that, as a general rule, jurists should decide cases on the basis of previously established rulings, or precedent. In shorthand terms, judicial tribunals should honor prior rulings.

The benefits of this approach are fairly evident. If justices rely on past cases to resolve current cases, the law they generate becomes predictable and stable. Justice Harlan Fiske Stone acknowledged the value of precedent in a somewhat more ironic way: "The rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right."[48] The message, however, is the same: if the Court adheres to past decisions, it provides some direction to all who labor in the legal enterprise. Lower court judges know how they should and should not decide cases, lawyers can frame their arguments in accord with the lessons of past cases, legislators understand what they can and cannot enact or regulate, and so forth.

Precedent, then, can be an important and useful factor in Supreme Court decision making. It certainly seems important to the justices; the Court rarely reverses itself, having done so fewer than three hundred times over its entire history. Even modern-day Courts, as Table 1-2 shows, have been loath to overrule precedents. In the seven decades covered in the table, the Court overturned only 170 precedents, or, on average, about 2.4 per term. What is more, the justices almost always cite previous rulings in their decisions; indeed, it is the rare Court opinion that does not mention other cases.[49] Finally, several scholars have verified that precedent helps to explain Court decisions in some areas of the law. In one study, analysts found that the Court reacted quite consistently to legal doctrine presented in more than fifteen years of

[46]Charles L. Black Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969), 15.

[47]Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 84.

[48]*United States v. Underwriters Association* (1944).

[49]See Jack Knight and Lee Epstein, "The Norm of Stare Decisis," *American Journal of Political Science* 40 (1996): 1018–1035.

Table 1-2 Precedents Overruled, 1953–2022 Terms

Court Era (Terms)	Number of Terms	Number of Overruled Precedents	Average Number of Overrulings per Term
Warren Court (1953–1968)	16	45	2.8
Burger Court (1969–1985)	17	54	3.2
Rehnquist Court (1986–2004)	19	43	2.3
Roberts Court (2005–2022)	18	28	1.6

Source: Calculated by the authors from data in the U.S. Supreme Court Database (http://supremecourtdatabase.org).

death penalty litigation. Put differently, using precedent from past cases, the researchers could correctly categorize the outcomes (for or against the death penalty) in 75 percent of sixty-four cases decided since 1972.[50] Scholarly work considering precedent in search and seizure litigation has produced similar findings.[51]

Despite these data, we should not conclude that the justices necessarily follow this approach. Many observers allege that judicial appeal to precedent often is mere window dressing, used to hide ideologies and values, rather than a substantive form of analysis. There are several reasons for this allegation.

First, although explicit overrulings, which Table 1-2 shows, are certainly departures from prior decisions, they are not the only or even usual method for extinguishing "unloved precedents."[52] The Court also can question, limit, criticize, or otherwise distinguish the unloved precedent and, in fact, does so in nearly 30 percent of its cases.[53] When the justices attack a prior decision in one of these ways, the effect on the precedent can be just as devastating as when they overrule it, as you will see in some of the cases to come. Compare, for example, the decisions in *Watkins v. United States* (1957) and *Barenblatt v. Watkins* (1959)—both dealing with the rights of witnesses testifying before congressional committees *(and both excerpted in Chapter 3)*. Although the Court did not overrule *Watkins* in *Barenblatt*, it made it more difficult for witnesses to refuse to answer questions. Second, the Supreme Court has generated so much precedent that it is usually possible for justices to find support for any conclusion. By way of proof, turn to almost any page of any opinion excerpted in this book and you probably will find the writers—both for the majority and the dissenters—citing precedent.

Third, it may be difficult to locate the rule of law emerging in a majority opinion. That conflict is an important determinant of case selection is an indicator that the lines drawn by precedent can be difficult to discern; if lower courts, doing their level best, end up reaching different conclusions on the same legal question, a clear command of stare decisis may not exist. To decide whether a previous decision qualifies as a precedent, judges and commentators often say, one must strip away the nonessentials of the case and expose the basic reasons for the Supreme Court's decision. This process is generally referred to as "establishing the principle of the case," or the *ratio decidendi*. Other points made in a given opinion—*obiter dicta* (any expression in an opinion that is unnecessary to the decision reached in the case or that relates to a factual situation other than the one actually before the court)—have no legal weight and do not bind judges. It is up to courts to separate the ratio decidendi from dicta. Not only is this task difficult, but it also provides a way for justices to skirt precedent with which they do not agree; all they need to do is declare parts of it to be dicta. Or justices can brush aside even the ratio decidendi when it suits their interests. This is made easier by the Supreme Court, at least today, being so selective about the cases it decides; it probably would not take a case for which clear precedent existed. Even in the past, two cases that were precisely identical probably would not be accepted. What this means is that justices can always deal with "problematic" ratio decidendi by distinguishing a case from those already decided (or, alternatively, by refusing to decide such cases).

[50]Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *American Political Science Review* 86 (1992): 323–337.

[51]Jeffrey A. Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1984," *American Political Science Review* 78 (1984): 891–900.

[52]Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2010), 277.

[53]Lee Epstein, William M. Landes, and Adam Liptak, "The Decision to Depart (or Not) from Constitutional Precedent," *NYU Law Review* 90 (2015): 1115–1156.

A scholarly study of the role of precedent in Supreme Court decision making offers a fourth reason. Two political scientists hypothesized that if precedent matters, it ought to affect the subsequent decisions of at least some members of the Court: if a justice dissented from a decision establishing a particular precedent, the same justice would not dissent from a subsequent application of the precedent. But, it turned out, that was not the case. Of the eighteen justices included in the study, only two occasionally subjugated their preferences to precedent.[54]

Finally, many justices recognize the limits of stare decisis in cases involving constitutional interpretation. Indeed, the justices often say that when constitutional issues are involved, stare decisis is a less rigid rule than it might normally be. This view strikes some observers as prudent, for the Constitution is difficult to amend, and judges make mistakes or they come to see problems quite differently as their perspectives change. As Justice Lewis F. Powell Jr. wrote:

> Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative, but also our duty, to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.[55]

Pragmatism

Justices often look to the future, appraising alternative rulings and forecasting their consequences. This means that, quite apart from legal principle, the members of the Court often consider the effects of a decision for different segments of society—agriculture, airlines, banks, churches, energy producers, financial institutions, physicians, railroads, retirees, and technology companies, among others. The Court is not necessarily interested in abstract doctrine alone; it often wants to know how its doctrines will work when put into practice.

This interpretive approach often takes the form of a balancing exercise: How should one weigh the president's interest in confidentiality against the need for information in a criminal proceeding? Which demands greater consideration—a state's safety interest in banning certain trucks from its highways or the national interest in eliminating burdens on interstate commerce? What is the appropriate balance between the state's interest in compulsory education and a religious claim to be exempt from such laws? In answering such questions, a justice will select from among plausible constitutional interpretations the one that has the best consequences and reject the ones that have the worst.

Thus, when pragmatism makes an appearance in Supreme Court opinions, justices may attempt to create rules, or analyze existing ones, so that they maximize benefits and minimize costs. Consider the exclusionary rule, which forbids use in criminal proceedings of evidence obtained in violation of the Fourth Amendment. Claims that the rule hampers the conviction of criminals have affected judicial attitudes, as Justice White frankly admitted in *United States v. Leon* (1984): "The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern." In *Leon* a majority of the justices applied a "cost-benefit" calculus to justify a "good faith" seizure by police on an invalid search warrant.

When you encounter cases that engage in this sort of analysis, you might ask the same questions some critics of the approach raise: By what account of values should judges weigh costs and benefits? How do they take into account the different people whom a decision may simultaneously punish and reward?

Consulting Other Jurisdictions

Aside from turning to originalism, textualism, or other historical approaches, a justice might probe English traditions or early colonial or state practices to determine how public officials of the times—or of contemporary times—interpreted similar words or phrases.[56] The Supreme Court has frequently used such evidence.

[54]Jeffrey A. Segal and Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices," *American Journal of Political Science* 40 (1996): 971–1003.

[55]Justice Powell, concurring in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). Whether the justices follow this idea—that stare decisis policy is more flexible in constitutional cases—is a matter of debate. See Epstein, Landes, and Liptak, "The Decision to Depart (or Not) from Constitutional Precedent."

[56]We adopt the material in this section from Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Courts, Judges, and Politics*, 6th ed. (New York: McGraw-Hill, 2006).

When ***Wolf v. Colorado*** (1949) presented the Court with the question of whether the Fourth Amendment barred use in state courts of evidence obtained through an unconstitutional search, Justice Frankfurter surveyed the law in all the states and in ten jurisdictions within the British Commonwealth. He used the information to bolster a conclusion that, although the Constitution forbade unreasonable searches and seizures, it did not prohibit state officials from using such questionably obtained evidence against a defendant. In 1952, however, when *Rochin v. California* asked the justices whether a state could use evidence it had obtained from a defendant by pumping his stomach—evidence admissible in the overwhelming majority of states at that time—Frankfurter declined to rely upon those other authorities. Instead, he declared that gathering evidence by a stomach pump was "conduct that shocks the conscience" whose fruits could not be used in either state or federal courts.

When *Mapp v. Ohio* (1961) later overruled *Wolf* and held that state courts must *exclude* all unconstitutionally obtained evidence, the justices again returned to survey the field of other authorities. For the Court, Justice Tom C. Clark said, "While in 1949 almost two-thirds of the States were opposed to the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the [rule]."

The point of this set of examples is not that Frankfurter or the Court was inconsistent but that the method itself—although it offers insights—is, according to some commentators, far from foolproof. First of all, the Constitution of 1787 as it initially stood and has since been amended rejects many English and some colonial and state practices. Second, even a steady stream of precedents from the states may signify nothing more than the fact that judges, too busy to give the issue much thought, imitated each other under the rubric of stare decisis. Third, even if we can document early legal traditions or practices, it is difficult to imagine how the thinking of people in the eighteenth century could be used to evaluate government practices in the twentieth and twenty-first centuries. Canvassing authorities beyond the confines of the Court is useful if we want to know what other judges, now and in the recent past, have thought about the Constitution, writ large or small. Nevertheless, they say nothing about the correctness of those thoughts, and the correctness of a lower court's interpretation may be precisely the issue before the Supreme Court.

Despite these criticisms, the Supreme Court continues to consider the practices of other U.S. jurisdictions, just as courts in other societies occasionally look to their counterparts elsewhere—including the U.S. Supreme Court—for guidance. The South African ruling in *The State v. Makwanyane* (1995) provides a vivid example. To determine whether the death penalty violated its nation's constitution, South Africa's Constitutional Court surveyed practices elsewhere, including those in the United States. Ultimately, the justices decided not to follow the path taken by the U.S. Supreme Court, ruling instead that the South African Constitution prohibited the state from imposing capital punishment. Rejection of U.S. practice was made all the more interesting in light of a speech Justice Harry Blackmun delivered only a year before *Makwanyane*.[57] In that address, Blackmun chastised his colleagues for failing to take into account a decision of South Africa's court to dismiss a prosecution against a person kidnapped from a neighboring country. This ruling, Blackmun argued, was far more faithful to international conventions than the one his court had reached in *United States v. Alvarez-Machain* (1992), which permitted U.S. agents to abduct a Mexican national.

Alvarez-Machain aside, the tendency seems to be growing for American justices to consider the rulings of courts abroad and practices elsewhere as they interpret the U.S. Constitution. This trend is particularly evident in opinions regarding capital punishment; justices opposed to this form of retribution often point to the nearly one hundred countries that have abolished the death penalty.

Whether this practice will become more widespread or filter into other legal areas is an intriguing question that has caused debate among the justices. In his book *The Court and the World*,[58] Justice Stephen Breyer contends that the cases before the Court increasingly raise questions that, like it or not, force the justices to confront "foreign realities." He suggests that in response the justices should and must expand their horizons beyond U.S. borders. Others, though, apparently agree with Justice Scalia, who argued "the views of other nations, however enlightened the Justices of this court may think them to be, cannot be imposed upon Americans through the Constitution."[59]

[57]"Justice Blackmun Addresses the ASIL Annual Dinner," *American Society of International Law Newsletter*, March 1994.

[58]Stephen Breyer, *The Court and the World* (New York: Knopf, 2016).

[59]*Thompson v. Oklahoma* (1987); see also Scalia's dissent in *Atkins v. Virginia* (2002).

SUPREME COURT DECISION MAKING: REALISM

So far in our discussion we have not mentioned the justices' ideologies, their political party affiliations, or their personal views on various public policy issues. The reason is that legal approaches to Supreme Court decision making do not admit that these factors figure into the way the Court arrives at its decisions. Instead, they suggest that justices divorce themselves from their personal and political biases and settle disputes based on the law. The approaches we consider in the sections that follow—what some call more realistic or nonlegalistic approaches—posit a quite different vision of Supreme Court decision making. They argue that the forces that drive the justices are anything but legal in orientation and that it is unrealistic to expect justices to shed all their preferences and values or to ignore public opinion when they put on their black robes. Indeed, the justices are people and, like all people, they tend to have strong and pervasive political biases and partisan attachments.

Because justices usually do not admit that they are swayed by the public or that they vote according to their ideologies, our discussion of realism is distinct from that of legalism. Here you will find little in the way of supporting statements from Court members, for it is an unusual justice indeed who admits to following anything but, say, precedent, history, or the text of the Constitution in deciding cases. Instead, we offer the results of decades of research by scholars who think that political and other extralegal forces shape judicial decisions. We organize these nonlegalistic approaches into three categories: preference-based, strategic, and external factors. See if you think these scholarly accounts are persuasive.

Preference-Based Approaches

Preference-based approaches see the justices as rational decision makers who hold certain values they would like to see reflected in the outcomes of Court cases. Two prevalent preference-based approaches stress the importance of judicial attitudes and the judicial role.

Judicial Attitudes

Attitudinal approaches emphasize the centrality of the justices' political ideologies. Typically, scholars examining the ideologies of the justices discuss the degree to which a justice is conservative or liberal—as in "Justice X holds conservative views on issues of criminal law" or "Justice Y holds liberal views on free speech." This school of thought maintains that when a case comes before the Court, each justice evaluates the facts of the dispute and arrives at a decision consistent with his or her personal ideology.

C. Herman Pritchett was one of the first scholars to study systematically the relevance of the justices' personal attitudes.[60] Examining the Court during the 1930s and 1940s, Pritchett observed that dissent had become an institutionalized feature of judicial decisions. During the early 1900s, in no more than 20 percent of the cases did one or more justices file a dissenting opinion; by the 1940s, that figure was more than 60 percent. If precedent and other legal factors drove Court rulings, why did various justices interpreting the same legal provisions frequently reach different results? Not only that, why did the same sets of justices consistently vote together? Perhaps the justices might disagree, but why did they disagree so systematically? Pritchett concluded that the justices were not following precedent but were "motivated by their own preferences."[61]

Pritchett's findings touched off an explosion of research on the influence of attitudes on Supreme Court decision making.[62] Much of this scholarship describes how liberal or conservative the various justices have been and attempts to predict their voting behavior based on their ideological preferences. To understand some of these differences, consider Figure 1-4, which presents the voting records of the present chief justice, John G. Roberts Jr., and his three immediate predecessors: Earl Warren, Warren E. Burger, and William H. Rehnquist. The data report the percentage of times each voted in the liberal direction in two different issue areas: civil liberties and economic liberties.

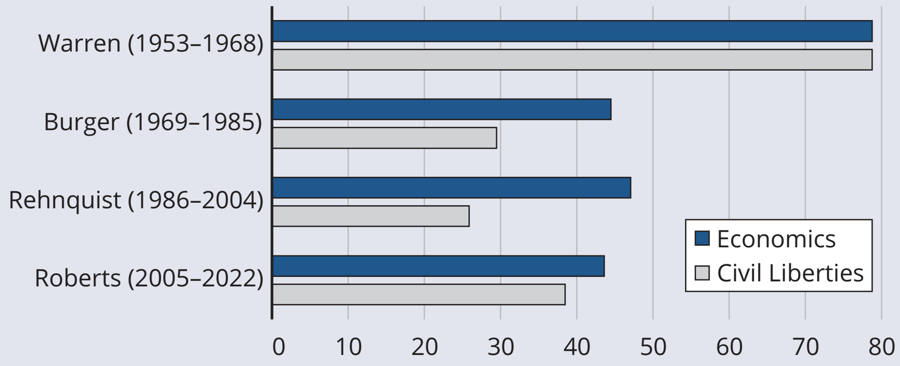
The data show dramatic differences among these four important jurists, especially in cases involving civil

[60]C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948); and Pritchett, "Divisions of Opinion among Justices of the U.S. Supreme Court, 1939–1941," *American Political Science Review* 35 (1941): 890–898.

[61]Pritchett, *The Roosevelt Court*, xiii.

[62]The classic works in this area are Glendon Schubert, *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965); and David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (New York: Freeman, 1976). For a lucid modern-day treatment, see Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, chaps. 3 and 8.

Figure 1-4 Percentage of Cases in Which Each Chief Justice Voted in the Liberal Direction, 1953–2022 Terms



Source: Calculated by the authors from data in the U.S. Supreme Court Database (http://supremecourtdatabase.org).

liberties. Cases in this category include disputes over issues such as the First Amendment freedoms of religion, speech, and press; the right to privacy; the rights of the criminally accused; and illegal discrimination. The liberal position is a vote in favor of the individual who is claiming a denial of these basic rights. Warren supported the liberal side almost 80 percent of the time, but Burger and Rehnquist did so in about one-third (or less) of such cases. Roberts has voted for the liberal position a bit more often but still only 40 percent of the time.

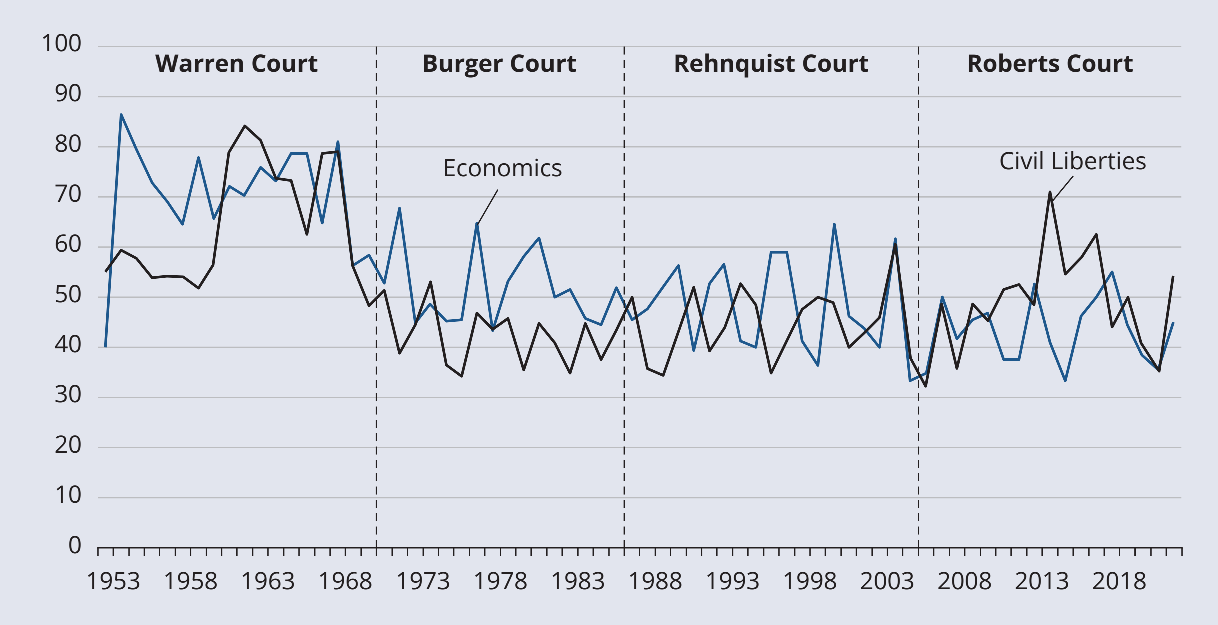
Economics cases involve challenges to the government's authority to regulate the economy. The liberal position supports an active role by the government in controlling business and economic activity, and a conservative position opposes such government intervention. Here, too, the four justices show different ideological positions. Warren is the most liberal of the four, ruling in favor of government regulatory activity in roughly 80 percent of the cases, while Burger, Rehnquist, and Roberts supported such government activity less than half of the time. The data depicted in Figure 1-4 are typical of the findings of most attitudinal studies: within given issue areas, individual justices tend to show consistent ideological predispositions.

Moreover, we often hear that a particular Court is ideologically predisposed toward one side or the other. For example, on May 29, 2002, the *New York Times* ran a story claiming that "Chief Justice William Rehnquist and his fellow conservatives have made no secret of their desire to alter the balance of federalism, shifting power from Washington to the states." Three years later, in September 2005, it titled the chief justice's obituary "William H. Rehnquist, Architect of Conservative Court, Dies at 80." After President George W. Bush appointed Rehnquist's replacement, John G. Roberts Jr., and a new associate justice, Samuel Alito, the press was quick to label both "reliable members of the conservative bloc." Current (2024) justices chosen by Democratic presidents—Sonia Sotomayor and Elena Kagan, President Obama's appointees, and Ketanji Brown Jackson, President Biden's nominee—are described by the *Washington Post* as the Court's "three-member liberal wing." Likewise, it has characterized the most recent Republican appointees—Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—as responsible for the Court's "hard-right turn" and "launch[ing] a conservative judicial revolution."

Sometimes an entire Court era is described in terms of its political preferences, such as the "liberal" Warren Court or the "conservative" Rehnquist Court. The data in Figure 1-5 confirm that these labels have some basis in fact. Looking at the two lines from left to right, from the 1950s through the early 2000s, note the mostly downward trend, indicating the increased conservatism of the Court in economics and civil liberties cases.

How valuable are the ideological terms used to describe particular justices or Courts in helping us understand judicial decision making? On one hand, knowledge of justices' ideologies can lead to fairly accurate predictions about their voting behavior. Suppose that

Figure 1-5 Court Decisions on Economics and Civil Liberties, 1953–2022 Terms



Source: Calculated by the authors from data in the U.S. Supreme Court Database (http://supremecourtdatabase.org).

the Roberts Court (prior to Justice Scalia's death) had handed down a decision dealing with the death penalty and that the vote was 5–4 in favor of the criminal defendant. The most conservative members of that Court on death penalty cases were Chief Justice Roberts and Justices Scalia, Thomas, and Alito—they almost always voted against the defendant in death penalty cases. If we had predicted that Roberts, Scalia, Thomas, and Alito cast the dissenting votes in our hypothetical death penalty case, we almost certainly would have been right.[63]

On the other hand, preference-based approaches are not foolproof. First, how do we know if a particular justice is liberal or conservative? The answer typically is that we know a justice is liberal or conservative because he or she casts liberal or conservative votes. Scalia favored conservative positions on the Court because he was a conservative, and we know he was a conservative because he favored conservative positions in the cases he decided. This is circular reasoning—and rather unconvincing. Second, knowing that a justice is liberal or conservative or that the Court decided a case in a liberal or conservative way does not tell us much about the Court's (or the country's) actual policy positions. To say that *Roe v. Wade* is a liberal decision or that the decision to overturn *Roe* in *Dobbs v. Jackson Women's Health Organization* is conservative is to say little about the policies governing abortion under either of those rulings. If it did, this book would be nothing more than a list of cases labeled liberal or conservative—such labels would give us no sense of more than two hundred years of constitutional interpretation.

Finally, we must understand that ideological labels are occasionally time dependent, that they are bound to particular historical eras. In ***Muller v. Oregon*** (1908), the Supreme Court upheld a state law that set a maximum number on the hours women (but not men) could work. How would you, as a student in the twenty-first century, view such an opinion? You might well classify it as conservative because it evokes a paternalistic attitude toward women. But when it was decided, most considered *Muller* a liberal ruling because it allowed the government to regulate business.

[63]We adopt this example from Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), 223.

A related problem is that some decisions do not fall neatly on a single conservative-liberal dimension. In ***Wisconsin v. Mitchell*** (1993), the Court upheld a state law that increased the sentence for crimes if the defendant "intentionally selects the person against whom the crime is committed" on the basis of race, religion, national origin, sexual orientation, or other similar criteria. Is this ruling liberal or conservative? If you view the law as penalizing racial or ethnic hatred, you would likely see it as a liberal decision. If, however, you see the law as treating criminal defendants more harshly and penalizing a person because of what he or she believes or says, the ruling is conservative.

Judicial Role

Another concept within the preference-based category is the judicial role, which scholars have defined as norms that constrain the behavior of jurists.[64] Students of the Court sometimes argue that each justice has a view of his or her role, a view that is based far less on political ideology and far more on fundamental beliefs of what a good judge should do or what the proper role of the Court should be. Some scholars claim that jurists vote in accordance with these role conceptions.

Analysts typically discuss judicial roles in terms of activism and restraint. An activist justice believes that the proper role of the Court is to assert independent positions in deciding cases, to review the actions of the other branches vigorously, to be willing to strike down acts the justice believes are unconstitutional, and to impose far-reaching remedies for legal wrongs whenever necessary. Restraint-oriented justices take the opposite position. Courts should not become involved in the operations of the other branches unless it is absolutely unavoidable. The benefit of the doubt should be given to actions taken by elected officials. Courts should impose remedies that are narrowly tailored to correct a specific legal wrong.

Based on these definitions, we might expect to find activist justices more willing than their opposites to strike down legislation. Therefore, a natural question to ask is this: To what extent have specific jurists practiced judicial activism or restraint? The data in Table 1-3 address this question by reporting the votes of justices serving on the Roberts Court for some period between the 2005 and 2022 terms (and who are still on the Court) in cases in which the majority declared federal, state, or local legislation unconstitutional. With the exception of Justice Sotomayor, all of these justices show a strong willingness to strike down federal laws, joining those decisions at least 70 percent of the time. Note that Kagan, a reliably liberal justice, votes to invalidate federal laws about as often as her conservative counterparts, Justices Alito and Thomas. Not only that, most of the justices have about the same affinity for invalidating state and local laws, regardless of where they might fall on the ideological spectrum. Other than Chief Justice Roberts, who most frequently votes to exercise judicial review, the justices look more alike than different.

Table 1-3 Percentage of Votes to Invalidate Laws as Unconstitutional, 2005–2022 Terms

Justice	Federal Laws	State and Local Laws
Roberts	80.0	76.7
Thomas	76.0	60.5
Kagan	72.2	65.6
Alito	72.0	66.7
Sotomayor	54.5	64.7

Source: Calculated by the authors from data in the Supreme Court Database (http://supremecourtdatabase.org).

Note: The figures shown indicate the percentage of cases in which each justice voted with the majority to invalidate laws as unconstitutional. Twenty-five cases struck down federal laws and forty-three cases struck state and local laws. Some justices may not have participated in all cases. We include only justices currently on the Court, though we exclude Amy Coney Barrett, Neil Gorsuch, Ketanji Brown Jackson, and Brett Kavanaugh because each participated in fewer than ten of the cases in both categories.

These patterns are suggestive: judicial activism and restraint do not necessarily equal judicial liberalism and conservatism. An activist judge need not be liberal, and a judge who practices restraint need not be conservative. In the aggregate, it is also true that so-called liberal Courts are no more likely to strike down legislation than are conservative Courts. During the liberal Warren era, the Court invalidated 156 laws, or about 9.8 per term. During the more conservative Rehnquist years, the Court struck 158 laws, or about 8.3 per term, which was less than during the equally conservative Burger Court (240 laws, or about 14 per term). Data such as these may call into question any strong relationship between ideology and judicial role.

[64]See James L. Gibson, "Judges' Role Orientations, Attitudes, and Decisions," *American Political Science Review* 72 (1978): 917.

Although scholars have used the number of laws struck down to assess the extent to which the justices practice judicial activism or restraint, the question arises: To what extent does this information help us understand Supreme Court decision making? This is difficult to answer because few scholars have studied the relationship between roles and voting in a systematic way. One obstacle to undertaking such research is the challenge of separating roles from attitudes. When Thomas (the most conservative justice on the Roberts Court) votes to uphold a law restricting access to abortions, can we conclude that he is practicing restraint? The answer is probably no. It may be his attitude toward abortion, not restraint, that guides him. Another limitation of the judicial role approach is that it tells us very little about the resulting policy in a case, just as was true for attitudinal studies. To say that *Roe v. Wade* was an activist decision because it struck down abortion laws nationwide is to say nothing about the policy content of the opinion.

Strategic Approaches

Strategic accounts of judicial decisions rest on a few simple propositions: Justices may be primarily seekers of legal policy (as the attitudinal adherents claim) or they may be motivated by jurisprudential principles (as approaches grounded in law suggest), but they are not unconstrained actors who make decisions based solely on their own ideological attitudes or jurisprudential desires. Rather, justices are strategic actors who realize that their ability to achieve their goals—whatever those goals might be—depends on a consideration of the preferences of other relevant actors (such as their colleagues and members of other political institutions), the choices they expect others to make, and the institutional context in which they act. Scholars term this approach *strategic* because the ideas it contains are derived from the rational choice paradigm, on which strategic analysis is based and as it has been advanced by economists and political scientists working in other fields. Accordingly, we can restate the strategic argument in this way: we can best explain the choices of justices as strategic behavior and not merely as responses to ideological or jurisprudential values.[65]

Such arguments about Supreme Court decision making are quite plausible: a justice can do very little alone. It takes a majority vote to decide a case and a majority agreeing on a single opinion to set precedent. Under such conditions, human interaction is important, and case outcomes—not to mention the rationale of decisions—can be influenced by the nature of relations among the members of the group.

Although scholars have not considered strategic approaches to the same degree that they have studied judicial attitudes, several influential works point to their importance. Research started in the 1960s and continuing today into the private papers of former justices consistently has shown that through intellectual persuasion, effective bargaining over opinion writing, informal lobbying, and so forth, justices have influenced the actions of their colleagues.[66]

How does strategic behavior manifest itself? One way is in the frequency of vote changes. During the conference deliberations that take place after oral arguments, the justices discuss the case and vote on it. These votes do not become final until the opinions are completed and the decision is made public *(see Figure 1-1)*. Research has shown that between the initial vote on the merits of cases and the official announcement of the decision, at least one vote switch occurs more than 50 percent of the time.[67]

One example, as we already noted, is Chief Justice Roberts's change of heart over the constitutionality of the health care law. Because of his (purported) vote switch, the Court upheld key parts of the law by a vote of 5–4 rather than striking them down by a vote of 5–4. This episode, along with the figure of 50 percent, indicates that justices change their minds—perhaps reevaluating their initial positions or succumbing to the persuasion of their colleagues—which seems inexplicable if we believe that justices are simply liberals or conservatives and always vote their preferences.

[65]For more details on this approach, see Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998).

[66]Walter F. Murphy, *Elements of Judicial Strategy* (Chicago, IL: University of Chicago Press, 1964); David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," in *The Federal Judicial System*, ed. Thomas P. Jahnige and Sheldon Goldman (New York: Holt, Rinehart & Winston, 1968); J. Woodford Howard, "On the Fluidity of Judicial Choice," *American Political Science Review* 62 (1968): 43–56; Epstein and Knight, *The Choices Justices Make*; and Forrest Maltzman, Paul J. Wahlbeck, and James Spriggs, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).

[67]Forrest Maltzman and Paul J. Wahlbeck, "Strategic Considerations and Vote Fluidity on the Burger Court," *American Political Science Review* 90 (1996): 581–592.

Vote shifts are just one manifestation of the interdependence of the Court's decision-making process. Another is the revision of opinions that occurs in almost every Court case.[68] As opinion writers try to accommodate their colleagues' wishes, their drafts may undergo five, ten, even fifteen revisions. Bargaining over the content of an opinion is important because it can significantly alter the policy ultimately expressed. A clear example is *Griswold v. Connecticut* (1965), in which the Court considered the constitutionality of a state law that prohibited the dissemination of birth control information and devices, even to married couples. In his initial draft of the majority opinion, Justice William O. Douglas struck down the law on the ground that it interfered with the First Amendment's right of association. A memorandum from Justice Brennan convinced Douglas to alter his rationale and to establish the foundation for a right to privacy. "Had the Douglas draft been issued as the *Griswold* opinion of the Court, the case would stand as a precedent on the freedom of association" rather than serve as the landmark ruling it became.[69]

External Factors

In addition to internal bargaining, some explanations of decision making also take into account political pressures that come from outside the Court. We consider three sources of such influence: public opinion, partisan politics, and interest groups. While reading about these sources of influence, keep in mind that one of the fundamental differences between the Supreme Court and the political branches is the lack of a direct electoral connection between the justices and the public. Once appointed, justices may serve for life. They are not accountable to the public and are not required to undergo any periodic reevaluation of their decisions. So why would they let the stuff of ordinary partisan politics, such as public opinion and interest groups, influence their opinions?

Public Opinion

To address this question, let us first look at public opinion as a source of influence on the Court. We know that the president and members of Congress are always trying to find out what the people are thinking. Conducting and analyzing public opinion polls is a never-ending task, and those who commission the polls have a good reason for this activity. The political branches are supposed to represent the people, and incumbents can jeopardize their reelection prospects by straying too far from what the public wants. But federal judges—including Supreme Court justices—are not dependent on pleasing the public to stay in office, and they do not serve in the same kind of representative capacity that legislators do.

Does that mean that the justices are not affected by public opinion? Some scholars say they are and offer three reasons for this claim.[70] First, because justices are political appointees, nominated and approved by popularly elected officials, it is logical that they should reflect, however subtly, the views of the majority. It is probably true that an individual radically out of step with either the president or the Senate would not be nominated, much less confirmed. Second, the Court, at least occasionally, views public opinion as a legitimate guide for decisions. It has even gone so far as to incorporate that consideration into some of its jurisprudential standards. For example, in evaluating whether certain kinds of punishments violate the Eighth Amendment's prohibition against cruel and unusual punishment, the Court announced that it would look toward "evolving standards of decency," as defined by public sentiment.[71] The third reason relates to the Court as an institution. Put simply, the justices have no mechanism for enforcing their decisions. Instead, they depend on other political officials to support their positions and on general public compliance, especially when controversial Court opinions have ramifications beyond the particular concerns of the parties to the suit.

Certainly, we can think of cases that lend support to these claims—cases in which the Court seems to have embraced public opinion, especially under conditions of extreme national stress. One example occurred during World War II. In *Korematsu v. United States* (1944) the justices endorsed the government's program to remove all Japanese Americans from the Pacific Coast states and relocate them to inland detention centers. It seems clear that the justices were swept up in the same wartime apprehensions as the rest of the nation. But it

[68]Epstein and Knight, *The Choices Justices Make*, chap. 3.

[69]See Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985), chap. 7.

[70]See, for example, Barry Friedman, *The Will of the People* (New York: Farrar, Straus & Giroux, 2009); and William Mishler and Reginald S. Sheehan, "The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *American Political Science Review* 87 (1993): 89.

[71]*Trop v. Dulles* (1958).

is equally easy to summon examples of the Court handing down rulings that fly in the face of what the public wants. The most obvious example occurred after Franklin D. Roosevelt's 1932 election to the presidency. By choosing Roosevelt and electing many Democrats to Congress, the voters sent a clear signal that they wanted the government to take vigorous action to end the Great Depression. The president and Congress responded with many laws—the so-called New Deal legislation—but the Court remained unmoved by the public's endorsement of Roosevelt and his legislation. In case after case, at least until 1937, the justices struck down many of the laws and administrative programs designed to get the nation's economy moving again.

In fact, some scholars doubt that public opinion affects the Court's decision making. After systematically analyzing the data, Helmut Norpoth and Jeffrey A. Segal concluded: "Does public opinion influence Supreme Court decisions? If the model of influence is of the sort where the justices set aside their own (ideological) preferences and abide by what they divine as the vox populi, our answer is a resounding no."[72] What Norpoth and Segal find instead is that Court appointments made by Richard Nixon in the early 1970s caused a "sizable ideological shift" in the direction of Court decisions *(see Figure 1-5)*. Sitting justices did not modify their voting patterns to conform to the changing views of the public. Instead, the entry of new conservative justices, they argue, created the illusion that the Court was echoing public opinion.

This finding reinforces yet another criticism of the external factors approach: that public opinion affects the Court only indirectly through presidential appointments, not through the justices' reading of public opinion polls. This distinction is important, for if justices were truly influenced by the public, their decisions would change with the ebb and flow of opinion. But if they merely share their appointing president's ideology, which must mirror the majority of the citizens *at the time of the president's election*, their decisions would remain constant over time. They would not fluctuate, as public opinion often does.

The question of whether public opinion affects Supreme Court decision making is still open for discussion, as illustrated by a more recent article, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)."[73] The authors find that when the "mood" is liberal (or conservative), the Court is significantly more likely to issue liberal (or conservative) decisions. But why, as the article's title suggests, is anyone's guess. It could be that the justices bend to the will of the people because the Court requires public support to remain an efficacious branch of government. Or it could be that "the people" include the justices; the justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinions of other members of the public. As Justice Benjamin Cardozo once put it, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by."[74]

Partisan Politics

Public opinion is not the only political factor that allegedly influences the justices. As political scientist Jonathan Casper wrote, we cannot overestimate "the importance of the political context in which the Court does its work." In his view, the statement that the Court follows the election returns "recognizes that the choices the Court makes are related to developments in the broader political system."[75] In other words, the political environment has an effect on Court behavior. In fact, many observers assert that the Court is responsive to the influence of partisan politics, both internally and externally.

On the inner workings of the Court, one possibility is that the justices carry their partisan attachments onto the bench. Since 1789, the beginning of constitutional government in the United States, those who have ascended to the bench have typically had strong connections to political institutions. Of course, the justices do not serve under party labels. But just as the members of the present Court tend to reflect the views of the Republican Party or Democratic Party, so, too, did the justices who came from the ranks of the Federalists and Jeffersonians. As one might expect, justices who affiliate with the Democratic Party tend to be more

[72]Helmut Norpoth and Jeffrey A. Segal, "Popular Influence in Supreme Court Decisions," *American Political Science Review* 88 (1994): 711–716.

[73]Lee Epstein and Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)," *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 263–281.

[74]Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 168.

[75]Jonathan Casper, *The Politics of Civil Liberties* (New York: Harper & Row, 1972), 293.

liberal in their decision making than those who are Republicans. Some commentators say that *Bush v. Gore* (2000), in which the Supreme Court issued a ruling that virtually ensured that George W. Bush would become president, provides an example. In that case, five of the Court's seven Republicans "voted" for Bush, and its two Democrats "voted" for Gore.

Political pressures from the outside also can affect the Court. Although the justices have no electoral connection or mandate of responsiveness, the other institutions of government have some influence on judicial behavior, and, naturally, the direction of that influence reflects the partisan composition of those branches. The president has some direct links with the Court, including obviously the power to nominate justices and shape the Court. Historically, presidents have even had personal friendships with sitting justices, such as Franklin D. Roosevelt's with James Byrnes, Lyndon Johnson's with Abe Fortas, and Richard Nixon's with Warren E. Burger. In addition, when presidents are buoyed by high levels of public support, their political capital is enhanced, and that may be hard for the Court to ignore. The opposite is also true: presidents with less clout to wield may have little success in influencing the Court. In 2024, for example, President Biden, frustrated by some of the more conservative decisions of the Roberts Court, proposed that Congress impose term limits on the justices. Coming late in the second term of a president with relatively low approval ratings, however, the proposal was generally regarded as having no realistic chances of coming to fruition. Hence, the justices had no real motive to adjust their policies.

A less direct source of influence is the executive branch, which operates under the president's command. The bureaucracy can assist the Court in implementing its policies, or it can hinder the Court by refusing to do so, a fact of which the justices are well aware. As a judicial body, the Supreme Court cannot implement or execute its own decisions. It often must depend on the executive branch to give its decisions legitimacy through action. The Court, therefore, may act strategically, anticipate the wishes of the executive branch, and respond accordingly to avoid a confrontation that could threaten its legitimacy. *Marbury v. Madison*, in which the Court enunciated the doctrine of judicial review, is the classic example *(see Chapter 2 for an excerpt)*. Some scholars suggest that Chief Justice John Marshall, aware that the Jefferson administration might spurn any direct order from the Court, crafted an opinion that expressed disagreement with Jefferson, without risking a costly rebuff from the president. Another indirect source of presidential influence is the U.S. solicitor general (SG). In addition to the SG's success as a petitioning party, the office can have an equally pronounced effect at the merits stage. In fact, data indicate that whether acting as an amicus curiae or as a party to a suit, the SG's office is generally able to convince the justices to adopt the position advocated by the SG.[76]

Presidential influence is also demonstrated in the kinds of arguments an SG brings into the Court. That is, SGs representing Democratic administrations tend to present more liberal arguments; those from the ranks of the Republican Party, more conservative arguments. Although the policy preferences of an administration are inevitably reflected in the arguments of the SG, part of the reason for the SG's success is that it also takes consistent positions that favor long-term stability in the law; the office historically defends the constitutionality of federal law, regardless of the law's ideological content, for instance. Similarly, when a new SG assumes responsibility for the cases in which the previous administration has taken a position, the office typically will not revise its positions—even if they are contrary to the views of the incoming president. The Trump administration raised eyebrows when its SG, Noel Francisco, often disregarded that tradition.[77] Likewise, the SG under President Biden has reversed course in several leading cases, leading some observers to speculate about the costs to the SG's reputation.[78]

Congress, too—or so some argue—can influence Supreme Court decision making. Like the president, the legislature has many powers over the Court the justices cannot ignore.[79] Some of these resemble presidential powers—the Senate's role in confirmation proceedings, the implementation of judicial decisions—but there are others. Congress can restrict the Court's jurisdiction to hear cases, enact legislation

[76]See Epstein et al., *The Supreme Court Compendium*, tables 7-10 and 7-12.

[77]Ian Millhiser, "The Government Has Abandoned Trump's Effort to Repeal Obamacare by Judicial Decree," *Vox*, February 11, 2021, https://www.vox.com/2021/2/11/22276954/supreme-court-obamacare-justice-department-solicitor-general-noel-francisco-california-texas.

[78]Kimberly Strawbridge Robinson, "Biden on Pace to Flip Positions at Supreme Court More Than Trump," *Bloomberg Law*, March 18, 2021, https://news.bloomberglaw.com/us-law-week/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump.

[79]See Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369–398.

or propose constitutional amendments to recast Court decisions, and hold judicial salaries constant. To forestall a congressional attack, the Court might accede to legislative wishes. Often-cited examples include the Court's willingness to defer to the Radical Republican Congress after the Civil War and to approve New Deal legislation after Roosevelt proposed his Court-packing plan in 1937. Of course, these examples could represent anomalies, not the rule. The Court, one might argue, has no reason to respond strategically to Congress because it is so rare that the legislature threatens, much less takes action against, the judiciary. Only infrequently has Congress taken away the jurisdiction of the Supreme Court to hear particular kinds of cases, most prominently just after the Civil War and more recently in response to the war on terrorism *(see Chapter 2 for more details).* Still, there is good evidence that the justices are close students of how they are regarded by Congress and are sensitive to legislative displeasure.[80] You should keep this argument in mind as you read the cases that pit the Court against Congress and the president.

Interest Groups

In *Federalist* No. 78, Alexander Hamilton wrote that the U.S. Supreme Court was "to declare the sense of the law" through "inflexible and uniform adherence to the rights of the constitution and individuals." Despite this expectation, Supreme Court litigation has become political over time. We see manifestations of politics in virtually every aspect of the Court's work, from the nomination and confirmation of justices to the factors that influence their decisions, but perhaps the most striking example of this politicization is the incursion of organized interest groups into the judicial process.

Naturally, interest groups may not attempt to persuade the Supreme Court the same way lobbyists deal with Congress. It would be grossly improper for the representatives of an interest group to approach a Supreme Court justice directly. Instead, interest groups try to influence Court decisions by submitting amicus curiae briefs *(see Box 1-1).* Presenting a written legal argument to the Court allows interest groups to make their views known to the justices, even when the group is not a direct party to the litigation.

These days, it is a rare case before the U.S. Supreme Court that does not attract such submissions.[81] In recent years, organized interests have filed at least one amicus brief in over 90 percent of all cases decided by full opinion between 2000 and 2019, on average.[82] Some cases, particularly those involving controversial issues such as abortion, affirmative action, and same-sex marriage, are especially attractive to interest groups. In *Regents of the University of California v. Bakke* (1978), involving admission of minority students to medical school, more than one hundred organizations filed fifty-eight amici briefs: forty-two backed the university's admissions policy and sixteen supported Allan Bakke. A more recent affirmative action case, *Grutter v. Bollinger* (2003), drew eighty-four briefs from a wide range of interests—colleges and universities, Fortune 500 companies, and retired military officers, to name just a few.[83] Eighty-eight amicus briefs were submitted in *Fisher v. University of Texas*, a 2013 affirmative action case. The abortion rights case that overturned *Roe v. Wade* (1973), *Dobbs v. Jackson Women's Health Organization* (2022), saw more than 140 amicus briefs filed, and *Obergefell v. Hodges* (2015), the decision upholding the right to same-sex marriage, the Court received a record 148 amicus briefs.[84] But it is not only cases of civil liberties and rights that attract interest group attention. In the 2012 challenge to the constitutionality of the Patient Protection and Affordable Care Act, the Court received more than one hundred amicus briefs. In addition to participating as amici, groups in record numbers are sponsoring cases, that is, providing litigants with attorneys and the money necessary to pursue their cases.

The explosion of interest group participation in Supreme Court litigation raises two questions. First, why do groups go to the Court? One answer is obvious: they want to influence the Court's decisions. But groups also go to the Supreme Court to achieve other, subtler ends. One is the setting of institutional agendas: by

[80]Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2010).

[81]See Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008).

[82]See Epstein et al., *The Supreme Court Compendium*, table 7-20.

[83]We adopt some of this material from Murphy et al., *Courts, Judges, and Politics*, chap. 6.

[84]Nina Totenberg, "Record Number of Amicus Briefs Filed in Same-Sex Marriage Cases," *NPR*, April 28, 2015, https://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases.

filing amicus curiae briefs at the case selection stage or by bringing cases to the Court's attention, organizations seek to influence the justices' decisions on which disputes to hear. Group participation also may serve as a counterbalance to other interests that have competing goals. So if Planned Parenthood, a pro-choice group, knows that Life Legal Defense Foundation, a pro-life group, is filing an amicus curiae brief in an abortion case (or vice versa), it, too, may enter the dispute to ensure that its side is represented in the proceedings. Finally, groups go to the Court to publicize their causes and their organizations. The National Association for the Advancement of Colored People (NAACP) Legal Defense Fund's legendary litigation campaign to end school segregation provides an excellent example. It not only resulted in a favorable policy decision in *Brown v. Board of Education* (1954) but also established the Legal Defense Fund as the foremost organizational litigant of this issue.

The second question is this: Can groups influence the outcomes of Supreme Court decisions?[85] This question has no simple answer. When interest groups participate on both sides, it is reasonable to speculate that one or more exerted some intellectual influence—or at least that the intervention of groups on the winning side neutralized the arguments of those who lost. In some instances, the Court's opinion may cite directly an argument advanced in an amicus brief, but that might indicate merely that a justice is citing the brief to support a conclusion he or she had already reached.

What we can say is that attorneys for some groups, such as the Women's Rights Project of the American Civil Liberties Union and the NAACP, are often more experienced and their staffs more adept at research than counsel for what law professor Marc Galanter called "one-shotters."[86] When he was chief counsel for the NAACP, Thurgood Marshall would solicit help from allied groups and orchestrate their cooperation on a case, dividing the labor among them by assigning specific arguments to each while enlisting sympathetic social scientists to muster supporting data. Before going to the Supreme Court for oral argument, Marshall would sometimes have a practice session with friendly law professors, each one playing the role of a particular justice and trying to pose the sorts of questions that justice would be likely to ask. Such preparation can pay off, but it need not be decisive. In oral argument, Allan Bakke's attorney displayed a surprising ignorance of constitutional law and curtly told one justice who tried to help him that he would like to argue the case his own way. Despite this poor performance, Bakke won.

Some evidence, however, suggests that attorneys working for interest groups are no more successful than private counsel. One study paired two similar cases decided by the same district court judge in the same year, with the only major difference being that one case was sponsored by a group and the other was brought by attorneys unaffiliated with an organized interest. Despite Galanter's contentions about the obstacles confronting one-shotters, the study found no major differences between the two.[87]

The debate over the influence of interest groups is one that you will have ample opportunity to consider. With the case excerpts in this volume, we often provide information on the arguments of amici and attorneys so that you can compare these points with the justices' opinions.

CONDUCTING RESEARCH ON THE SUPREME COURT

As you can see, considerable disagreement exists in the scholarly and legal communities about how justices should interpret the Constitution and even why they decide cases the way they do. These approaches show up in many of the Court's opinions in this book. Keep in mind, however, that the opinions are not presented here in full; the excerpts included in the text are intended to highlight the most important points of the various majority, dissenting, and concurring opinions. Occasionally you may want to read the decisions in their entirety. Following is an explanation of how to find opinions and other kinds of information on the Court and its members.

Locating Supreme Court Decisions

U.S. Supreme Court decisions are published by various reporters. The four major reporters are *U.S. Reports;*

[85]We adopt some of this material from Murphy et al., *Courts, Judges, and Politics*, chap. 6.

[86]Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95–160.

[87]Lee Epstein and C. K. Rowland, "Debunking the Myth of Interest Group Invincibility in the Court," *American Political Science Review* 85 (1991): 205–217.

United States Supreme Court Reports, Lawyers' Edition; Supreme Court Reporter; and *U.S. Law Week.* All contain the opinions of the Court, but they vary in the kinds of ancillary material they provide. For example, as Table 1-4 shows, the *Lawyers' Edition* contains excerpts of the briefs of attorneys submitted in orally argued cases, *U.S. Law Week* provides a topical index of cases on the Court's docket, and so forth.

Locating cases within these reporters is easy if you know the case *citation.* Case citations, as the table shows, take different forms, but they all work in roughly the same way. To see how, turn to the excerpt of *Immigration and Naturalization Service v. Chadha* (1983) in Chapter 5. Directly under the case name is a citation, 462 U.S. 919, which means that *Immigration and Naturalization Service v. Chadha* appears in volume 462, page 919, of *U.S. Reports.*[88] The first set of numbers is the volume number, the U.S. is the form of citation for *U.S. Reports*, and the second set of numbers is the starting page of the case.

[88]In this book, we list only the *U.S. Reports* cite for each case citation because *U.S. Reports* is the official record of Supreme Court decisions. It is the only reporter published by the federal government; the other three are privately printed. Almost every law library has *U.S. Reports.* If your college or university does not have a law school, check with your librarians. If they have any Court reporter, it is probably *U.S. Reports.*

Table 1-4 Reporting Systems

Reporter/ Publisher	Form of Citation (Terms)	Description
U.S. Reports, Government Printing Office	Dall. 1–4 (1790–1800) Cr. 1–15 (1801–1815) Wheat. 1–12 (1816–1827) Pet. 1–16 (1828–1843) How. 1–24 (1843–1861) Bl. 1–2 (1861–1862) Wall. 1–23 (1863–1875) U.S. 91– (1875–)	Contains official text of opinions of the Court. Includes tables of cases reported, cases and statutes cited, miscellaneous materials, and subject index. Includes most of the Court's decisions. Court opinions prior to 1875 are cited by the name of the reporter of the Court. For example, Dall. stands for Alexander J. Dallas, the first reporter.
United States Supreme Court Reports, Lawyers' Edition, LexisNexis	L. Ed. L. Ed. 2d	Contains official reports of opinions of the Court. Additionally, provides per curiam and other decisions not found elsewhere. Summarizes individual majority and dissenting opinions and counsel briefs.
Supreme Court Reporter, Thomson Reuters	S. Ct.	Contains official reports of opinions of the Court. Contains annotated reports and indexes of case names. Includes opinions of justices in chambers. Appears semimonthly.
U.S. Law Week, Bloomberg BNA	U.S.L.W.	Weekly periodical service contains full text of Court decisions. Includes four indexes: topical, table of cases, docket number table, and proceedings section. Contains summary of cases filed recently, journal of proceedings, summary of orders, arguments before the Court, argued cases awaiting decisions, review of Court's work, and review of Court's docket.

Sources: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 7th ed. (Thousand Oaks, CA: CQ Press, 2021), table 2.9. Dates of reporters are from David Savage, *Guide to the U.S. Supreme Court*, 5th ed. (Washington, DC: CQ Press, 2010).

Immigration and Naturalization Service v. Chadha also can be found in the three other reporters. The citations are as follows:

Lawyers' Edition: 77 L. Ed. 2d 317 (1983)

Supreme Court Reporter: 103 S. Ct. 2764 (1983)

U.S. Law Week: 51 U.S.L.W. 4907 (1983)

Note that the abbreviations vary by reporter, but in form the citations parallel *U.S. Reports* in that the first set of numbers is the volume number and the second set is the starting page number.

These days, however, many students turn to electronic sources to locate Supreme Court decisions. Several companies maintain databases of the decisions of federal and state courts, along with a wealth of other information. In some institutions these services—Lexis and Westlaw—are available only to law school students. If you are in another academic unit, check with your librarians to see if your school provides access to other students, perhaps through Nexis Uni (a subset of the LexisNexis service and formerly known as Academic Universe). Also, the Legal Information Institute (LII) at Cornell Law School (https://www.law.cornell.edu/supremecourt/text), FindLaw (https://caselaw.findlaw.com/court/us-supreme-court), and now the Supreme Court itself (http://www.supremecourt.gov)—to name just three—house Supreme Court opinions and offer an array of search capabilities. You can read the opinions online, have them e-mailed to you, or download them immediately.

Locating Other Information on the Supreme Court and Its Members

As you might imagine, there is no shortage of reference material on the Court. Three (print) starting points are the following:

- *The Supreme Court Compendium: Data, Decisions, and Developments*, 7th edition, contains information on the following dimensions of Court activity: the Court's development, review process, opinions and decisions, judicial background, voting patterns, and impact.[89] You will find data as varied as the number of cases the Court decided during a particular term, the votes in the Senate on Supreme Court nominees, and the law schools the justices attended.
- *Guide to the U.S. Supreme Court*, 5th edition, provides a fairly detailed history of the Court. It also summarizes the holdings in landmark cases and provides brief biographies of the justices.[90]
- *The Oxford Companion to the Supreme Court of the United States*, 2nd edition, is an encyclopedia containing entries on the justices, important Court cases, the amendments to the Constitution, and the like.[91]

The U.S. Supreme Court also gets a great deal of attention on the Internet. The Legal Information Institute (http://www.law.cornell.edu) is particularly useful. In addition to Supreme Court decisions, the LII contains links to various documents (such as the U.S. Code and state statutes) and to a vast array of legal indexes and libraries. If you are unable to find the material you are looking for on the LII site, you may locate it by clicking on one of the links.

Another worthwhile site is SCOTUSblog, a project of a law firm (http://www.scotusblog.com). This site provides extensive summaries of pending Court cases, as well as links to briefs filed by the parties and amici. Likewise, Empirical SCOTUS (https://empiricalscotus.com) offers a wealth of data regarding the Court's docket and the justices' individual and collective behavior, as well as details on oral arguments, attorneys, and amici curiae.

As already mentioned, you can listen to selected oral arguments of the Court at the Oyez Project site (http://www.oyez.org). Oyez contains audio files of Supreme Court oral arguments for selected constitutional cases decided since the 1950s.

These are just a few of the many sites—perhaps hundreds—that contain information on the federal courts. But there is at least one other important electronic

[89] Epstein et al., *The Supreme Court Compendium*.

[90] David Savage, *Guide to the U.S. Supreme Court*, 5th ed. (Washington, DC: CQ Press, 2010).

[91] Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States*, 2nd ed. (New York: Oxford University Press, 2005).

source of information on the Court worthy of mention: the U.S. Supreme Court Database, developed by Harold J. Spaeth, a political scientist and lawyer. This resource provides a wealth of data from the time of the Vinson Court (1946 term) to the present. Among the many attributes of Court decisions it includes are the names of the courts that made the original decisions, the identities of the parties to the cases, the policy contexts of the cases, and the votes of each justice. Indeed, we deployed this database to create many of the charts and tables you have just read. You can obtain all the data and accompanying documentation, free of charge, at http://supremecourtdatabase.org.

In this chapter, we have examined Supreme Court procedures and attempted to shed some light on how and why justices make the choices they do. Our consideration of preference-based factors, for example, highlighted the role ideology plays in Court decision making, and our discussion of political explanations emphasized public opinion and interest groups. After reading this chapter, you may have concluded that the justices are relatively free to go about their business as they please. But, as you shall see in the next chapter, that is not necessarily so. Although Court members have a good deal of power and the freedom to exercise it, they also face considerable institutional obstacles. It is to the subjects of judicial power and constraints that we now turn.

ANNOTATED READINGS

Lawrence Baum's *The Supreme Court*, 14th ed. (Thousand Oaks, CA: CQ Press, 2022) and Linda Greenhouse's *The Supreme Court: A Very Short Introduction* (New York: Oxford University Press, 2012) provide modern-day introductions to the Court and its work. For insightful historical-political analyses, see Robert G. McCloskey's *The American Supreme Court* (Chicago, IL: University of Chicago Press, 2004) and Barry Friedman's *The Will of the People* (New York: Farrar, Straus & Giroux, 2009). Several justices have written books outlining their approaches to interpreting the Constitution. See Stephen Breyer's *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005) and his *The Court and the World* (New York: Knopf, 2016) and Antonin Scalia's *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), which includes responses from prominent legal scholars. See also Justice Gorsuch's *A Republic, If You Can Keep It* (New York: Crown Forum, 2019) and *Over Ruled: The Human Toll of Too Much Law* (New York: Harper, 2024). For other studies of approaches to constitutional interpretation, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); Leslie Friedman Goldstein, *In Defense of the Text* (Savage, MD: Rowman & Littlefield, 1991); Pamela S. Karlan, *A Constitution for All Times* (Cambridge, MA: MIT Press, 2013); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999); Richard H. Fallon Jr., *Implementing the Constitution* (Cambridge, MA: Harvard University Press, 2001); Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008); Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010); and Lee Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (New York: Cambridge University Press, 2019).

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On the work of interest groups and attorneys (including the solicitor general), see Ryan C. Black and Ryan J. Owens, *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions* (Cambridge, UK: Cambridge University Press, 2012); Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (Charlottesville: University Press of Virginia, 1993); Timothy R. Johnson, *Oral Arguments and the United States Supreme Court* (Albany: State University of New York Press, 2004); and Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008).