Constitutional Law for a Changing America

Twelfth Edition

In honor of our parents
Ann and Kenneth Spole
Toddy McGuire
Josephine and George Walker

Constitutional Law for a Changing America

Rights, Liberties, and Justice

Twelfth Edition

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PREFACE

MORE THAN three decades have passed since *Constitutional Law for a Changing America: Rights, Liberties, and Justice* 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 interested in the judicial process, 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, what happened to the "Scottsboro boys"?—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 the twelfth edition, we have strengthened the distinctive features of the earlier versions by maintaining a focus on enduring issues of constitutional law while incorporating new cases that can reflect changes in the Court's thinking or changes in the composition of the Court itself. As with each edition, all chapters have been thoroughly revised and updated to include important opinions handed down through the most recent term, in this case, the 2023 term. Thus, in Chapter 3, for example, we review recent changes in the justices' approach to the free exercise of religion. Likewise, we expand our discussion of the establishment clause by examining the evolution and demise of the *Lemon* test, with a focus on *Kennedy v. Bremerton School District*, the ruling that announced the abandonment of that long-debated doctrine. In Chapter 6, we include a decision concerning the Court's recent interest in compelled speech; *303 Creative LLC v. Elenis* examines a clash between public accommodation laws that forbid discrimination and the expressive rights of creative business enterprises that are unwilling to create messages—in this case, wedding websites for

same-sex couples—with which they disagree. The justices' gradually expanding doctrine on the right to keep and bear arms is illustrated in Chapter 9. This chapter now includes *New York Pistol & Rifle Association, Inc. v. Bruen*, a decision striking New York's requirement that an individual seeking a permit to carry a concealed weapon demonstrate a justifiable need.

Of course, the most salient decisions on abortion and affirmative action receive substantial attention. Chapter 10 has been substantially revised to take account of the decision in *Dobbs v. Jackson Women's Health Organization* to abandon its longtime precedent on abortion *Roe v. Wade*. Similarly, Chapter 14 devotes a good deal of attention to the Court's rejection of the use of race as a factor in college admissions. The practice of giving weight to the race of applicants had been approved by the Court since the late 1970s, but many of the justices had long been troubled by it. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, a majority of the Court invalidated the reliance upon race by both Harvard and the University of North Carolina.

As for the cases, we reviewed each and every excerpted opinion to ensure, among other matters, that they appropriately highlight the key issues. That means that some cases are expanded to include more of the Court's opinion, while other opinions may be condensed. Indeed, we sometimes decide to revisit completely an important case; Chapter 7 on freedom of the press, for instance, now includes a classic case of prior restraint, *Nebraska Press Association v. Stuart*. 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. The "Aftermath" boxes remain an important device for conveying the real-world consequences of the Court's decisions. 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.

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 and less compelling arguments. 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 has invited 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, 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 Judith Baer and Leslie Goldstein for their help with the revision of the discrimination chapter in previous editions and their answers to innumerable e-mail messages; to Jack Knight for his comments on the drafts of several chapters; and to the late 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. Following in their footsteps, Scott offered similarly splendid guidance. We are thrilled that Anna is now running the show; her energy and dedication to the project are exactly what any book moving into its twelfth edition needs! 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, Michelle Ponce. 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 Aparajita Srivastava, our production editor, and Cassie Carey, an editorial assistant who worked on photo acquisition and other forms of author support. Both 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

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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 upon 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 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 2022 term,[1] a total of 4,159 cases arrived at the Supreme Court's doorstep, but the justices decided only 66 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? Those the Court agrees to resolve?

Deciding to Decide: The Supreme Court's Caseload

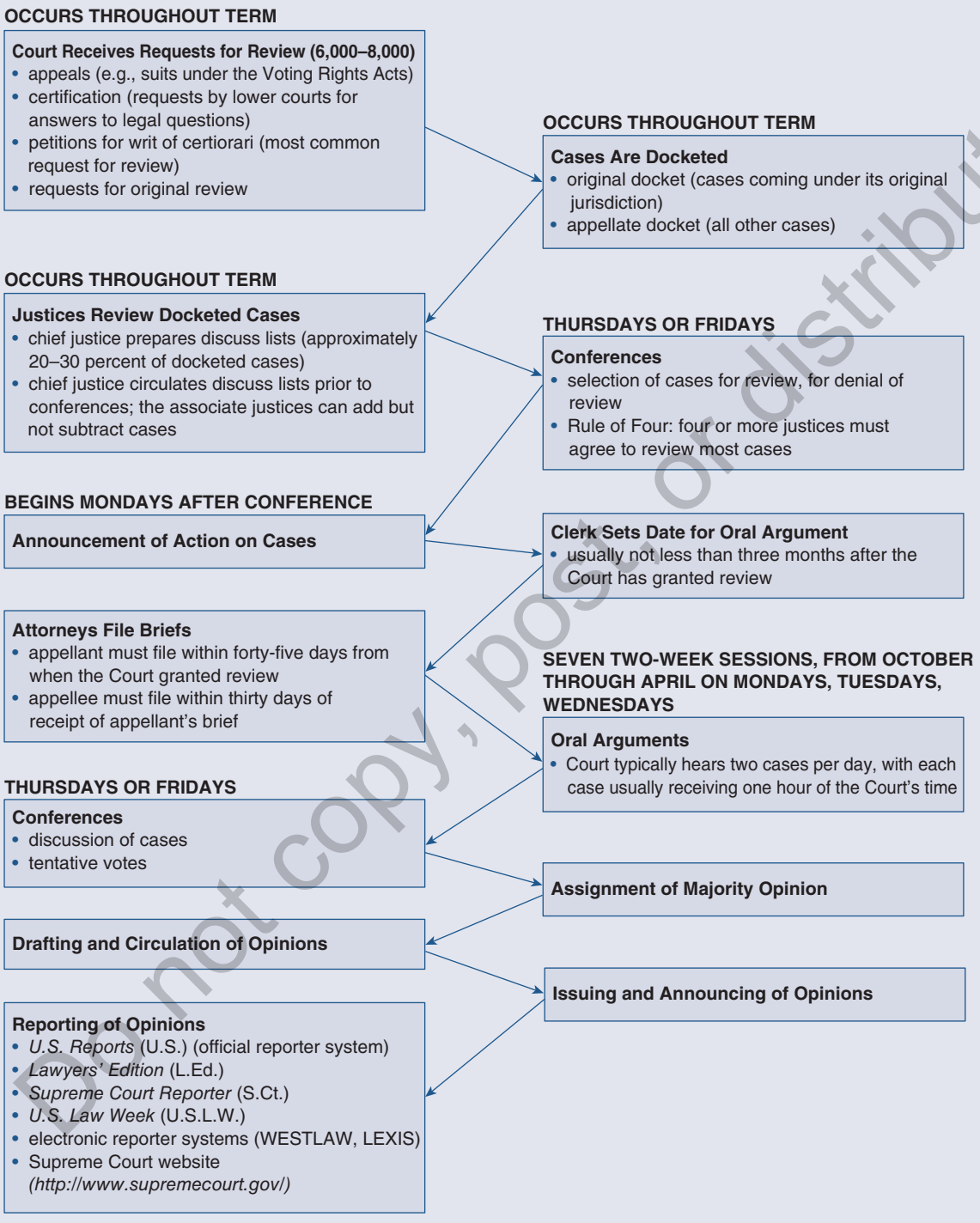
As the figures for the 2022 term indicate, the Court heard and decided slightly more than 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth 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 for review had risen to 6,302—nearly nine times greater than in 1930.[3]

[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]Chief Justice John G. Roberts Jr., "2023 Year-End Report on the Federal Judiciary," https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

[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 1-1 The Processing of Cases



Source: Compiled by authors.

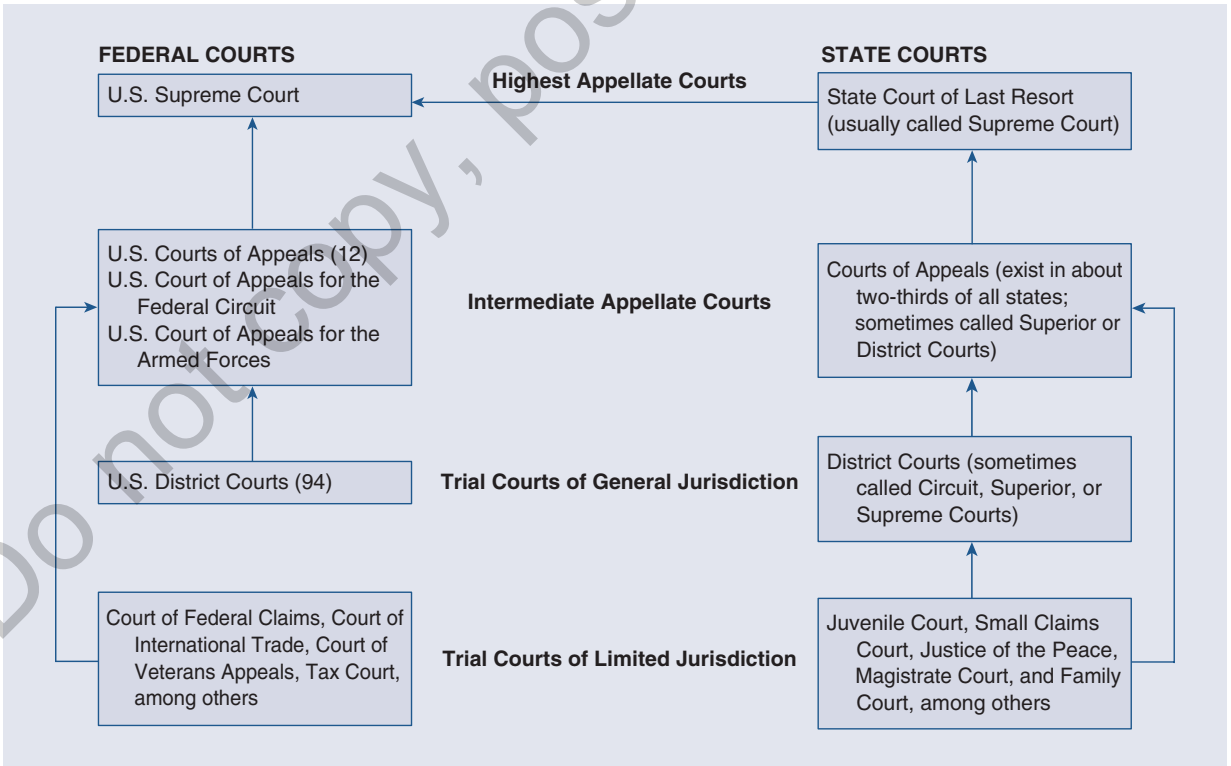
How do cases get to the Supreme Court? How do the justices decide which will get a formal review and which will be rejected? What affects their choices? Let us consider each of these questions, for they are fundamental to an understanding of judicial decision making.

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 1-2*). 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 their dispute: appeal as a matter of right, certification, or certiorari. Cases falling into the first category (normally called "on appeal") involve issues Congress

Figure 1-2 The American Court System



Source: Compiled by authors.

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. 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 five thousand or more 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 about six to eight thousand petitions 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 is in proper form and conforms to the Court's precise rules. Briefs must be "prepared in 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."[4]

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.[5] Upon receiving the preliminary or pool memos, the 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

[4]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.

[5]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://epstein.wustl.edu/blackmun.php.

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.					✓							✓			

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; AFF = affirm the decision of the court below.

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

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 percent to 30 percent of the cases that come to the Court make it to the list and are actually discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.[6]

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 petitions in which certiorari is granted (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.

Considerations Affecting Case Selection Decisions. The process described here is how the Court considers petitions, but why do the justices make the decisions

[6]For information on the discuss list, see Gregory A. Caldeira and John R. Wright, "The Discuss List: Agenda Building in the Supreme Court," *Law and Society Review* 24 (1990): 807–836.

that they do? Scholars have developed several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.[7]

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.[8]

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.[9] 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.[10]

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 percent 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."[11]

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.[12] 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 the Court will hear the case.

This suggests that the Court reacts to the presence of amicus briefs, rather than what they have to

[7]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.

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

[9]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.

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

[11]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.

[12]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

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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 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."[13]

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 13,000 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: 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.[14]

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.

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

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

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

to field questions from the justices.[15] In some important cases, the Court will allocate additional time for arguments. 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, 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. Oral arguments 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 above, the justices did not always have the benefit of written briefs. Today, however, some 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 side that receives more questions tends to lose.[16] One possible explanation

[15]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 the length of some arguments.

[16]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.

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 the following, 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 and political advantage.

The 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), involving the constitutionality of the health care law passed in 2010, provides an 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.[17]

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. Among other things, we have learned that the chief justice presides over the deliberations. He calls up the case for discussion and then presents his views about the issues and how the case should be decided. The remaining justices state their views and vote in order of seniority.

We also know that the level and intensity of discussion differ from case to case. The justices' notes from conference deliberations reveal that, in some cases, members of the Court 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 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.

[17]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/.

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.[18] 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 about particular areas of the law than others. 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."[19] 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 Brennan to 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."[20]

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 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

[18]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.

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

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

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.[21] 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 nonlegally relevant factors.[22]

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 polling other jurisdictions.[23] Using the Second Amendment as an example, Table 1-1 provides a brief summary of these methods, after which we supply more details on each one.

The Second Amendment of the U.S. Constitution reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller* (2008) *(excerpted in Chapter 9)*, the U.S. Supreme Court ruled that the amendment protects the right of individuals who are not affiliated with any state-regulated militia to keep handguns and other firearms in their homes for their own private use.

Legal briefs filed with the Court, as well as media and academic commentary on the case, employed diverse methods of constitutional interpretation. Notice that no

[21]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).

[22]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: University of Chicago Press, 1999), 176.

[23]For overviews (and critiques) of these and other approaches, see Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," *UCLA Law*, http://www2.law.ucla.edu/volokh/2amteach/interp.htm; 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

Method	Example
Originalism *Original Intent.* Asks what the framers wanted to do.	"The framers would have been shocked by the notion of the government taking away our handguns." OR "The framers would have been shocked by the notion of people being entitled to own guns in a society where guns cause so much death and violence."
Original Meaning. Considers what a clause meant (or how it was understood) to those who enacted it.	"'Militia' meant 'armed adult male citizenry' when the Second Amendment was enacted, so that's how we should interpret it today." OR "'Arms' meant flintlocks and the like when the Second Amendment was enacted, so that's how we should interpret it today."
Textualism. Places emphasis on what the Constitution says.	"The Second Amendment says 'right of the people to keep and bear arms,' so the people have a right to keep and bear arms." OR "The Second Amendment says 'A well regulated militia . . . ,' so the right is limited only to the militia."
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.	"Article 1, Section 8, of the Constitution lists the powers of Congress. Included among them are the powers to provide for calling 'forth the militia to execute the laws of the union, suppress insurrections and repel invasions' and 'for organizing, arming, and disciplining, the militia.' Because these clauses suggest the federal government controls the militia, reading the Second Amendment as a grant of power to the states would be inconsistent with them." OR "The Constitution sets up a government run by constitutional democratic processes, with various democratic checks and balances, such as federalism and elections. To read the Second Amendment as facilitating violent revolution is inconsistent with this structure."
Stare Decisis. Looks to what courts have written about the clause.	"Courts have held that the Second Amendment protects weapons that are part of ordinary military equipment, and handguns certainly qualify." OR "Courts have held that the Second Amendment was meant to keep the militia as an effective force, and they can be nicely effective just with rifles."
Pragmatism. Considers the effect of various interpretations, suggesting that courts should adopt the one that avoids bad consequences.	"The Second Amendment should be interpreted as protecting the right to own handguns for self-defense because otherwise only criminals will have guns and crime will skyrocket." OR "The Second Amendment should be interpreted as not protecting the right to own handguns for self-defense because otherwise we'll never solve our crime problems."
Polling Jurisdictions. Examines practices in the United States and even abroad.	"The legislatures of all fifty states are united in their rejection of bans on private handgun ownership. Every state in the Union permits private citizens to own handguns. Practices in other countries are immaterial to the task of interpreting the U.S. Constitution." OR "The largest cities in the United States have local laws banning handguns or tightly regulating their possession and use, and many industrialized countries also ban handguns or grant permits in only exceptional cases."

Sources: We adopt much of the material in this table from Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," *UCLA Law,* http://www2.law.ucla.edu/volokh/2amteach/interp.htm. Other material comes from the briefs filed in *District of Columbia v. Heller.*

method seems to dictate a particular outcome; rather, lawyers for either side of the lawsuit could plausibly employ a variety of approaches to support their side.

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."[24] 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.[25] 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."[26]

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.[27] 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 that 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.[28]

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 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 consistently follow.

The last justification applies with equal force to a second form of originalism: *original meaning or understanding*. Justice Antonin 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

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

[25]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.

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

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

[28]Ibid., 31.

> 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.[29]

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.[30] 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."[31]

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.[32]

Chief Justice William H. Rehnquist's opinion in *Nixon v. United States* (1993) 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 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."[33]

Marshall has not been the only critic of originalism (whatever the form); the approach has generated

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

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

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

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

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

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.[34]

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."[35]

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."[36] 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.[37]

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 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.

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

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

[36]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.

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

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, on the other hand, 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.[38]

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 armbands 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 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

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

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. Many words in the written law—including those used by the framers in the Constitution—can have multiple meanings.[39] For instance, the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." A majority of the Supreme Court ruled that, in a case of alleged child abuse, the "confrontation" requirement could be satisfied by allowing the alleged victim to testify outside the courtroom via closed-circuit television. In dissent, Justice Scalia argued that the clause requires a physical presence in the courtroom, that is, a face-to-face confrontation.[40] Under a literalist approach, which interpretation is correct?

Elsewhere in the Constitution, the Elections Clause requires that the time, place, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof." After the voters in Arizona adopted a ballot proposition to create an independent commission to draw its legislative districts, the state legislature went to court, claiming that the state's voters had unconstitutionally deprived the legislature of a power entrusted to it by the Constitution. Writing for the Court, Justice Ginsburg explained that the phrase "Legislature thereof" had a broad meaning, that it referred to the sovereignty of states and their right to make election laws free from congressional control. In dissent, Chief Justice Roberts asserted that the word "legislature" should be read simply to mean the state's actual representative body of legislators. How can justices read the Constitution and reach different conclusions about the meaning of the word "legislature"?[41]

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.

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

[40]*Maryland v. Craig* (1990).

[41]*Arizona State Legislature v. Arizona Independent Redistricting Comm'n* (2015).

[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, for example, points to *McCulloch v. Maryland* (1819). 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 by individuals. You will also spot structural arguments relating to the democratic process. We provide an example in Table 1-1, 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 death penalty litigation. Put differently, using precedent from past cases, the researchers could correctly categorize the outcomes (for or against the death penalty) in

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

[47]Bobbitt, *Constitutional Fate*, 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).

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 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, 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.

Second, 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. 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).

A scholarly study of the role of precedent in Supreme Court decision making offers a third 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 that, it turned out, was not the case. Of the eighteen justices included in the study, only two occasionally subjugated their preferences to precedent.[52]

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 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 Powell 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

[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]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.

> 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.[53]

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, 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 the 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?

Polling 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.[54] The Supreme Court has frequently used such evidence. 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 Felix 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 call the roll. 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) overruled *Wolf* a few years later and held that state courts must *exclude* all unconstitutionally obtained evidence, the justices again returned to survey the field. 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

[53]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 Lee Epstein, William M. Landes, and Adam Liptak, "The Decision to Depart (or Not) from Constitutional Precedent," *NYU Law Review* 90 (2015): 1115–1159.

[54]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).

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. Polls are 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 their 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*.[55] 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, and one that has caused debate among the justices. In his book *The Court and the World*,[56] Justice Stephen Breyer contends that the cases before his 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 Antonin 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."[57]

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 upon the law. The approaches we consider below—recall, 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, tend to have strong and pervasive political biases and partisan attachments.

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

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

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

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 forces. 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.[58] 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."[59]

Pritchett's findings touched off an explosion of research on the influence of attitudes on Supreme Court decision making.[60] 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 Roberts, and his three immediate predecessors: Earl Warren, Warren Burger, and William 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 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.

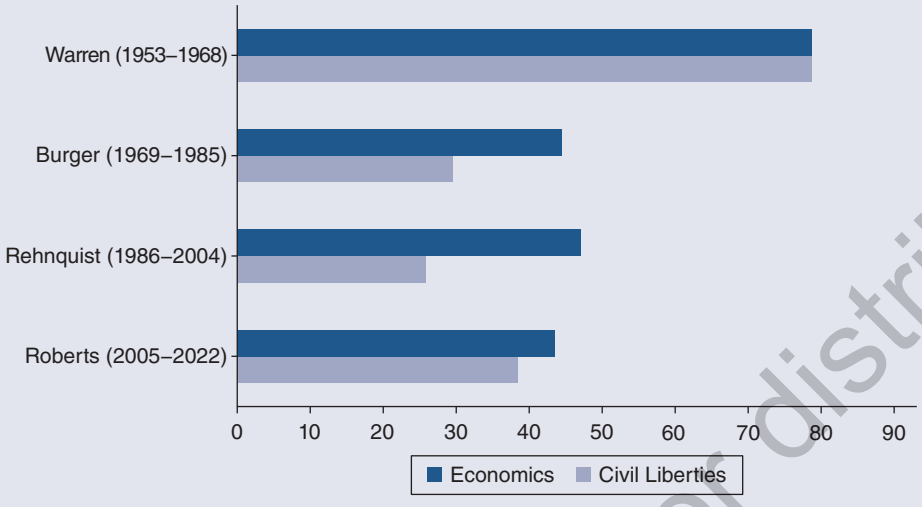
Economics cases involve challenges to the government's authority to regulate the economy. The liberal position supports an active role by the government in controlling business and economic activity, and a conservative position opposes such government intervention. Here, too, the four justices show different ideological positions. Warren is the most liberal of the four, ruling in favor of government regulatory activity in more than 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.

[58]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.

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

[60]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* (San Francisco: 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).

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 an editorial 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."[61] Three years later, in September 2005, it titled the chief justice's obituary "William H. Rehnquist, Architect of Conservative Court, Dies at 80."[62] 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 them as "reliable member[s] of the conservative bloc."[63] 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 as the Court's "three-member liberal wing."[64] Likewise, it has characterized the most recent Republican appointees—Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—as responsible for "ignit[ing] a new era" that is "the culmination of years of work to solidify a conservative majority."[65] Indeed, it is common to describe a particular era of the Court 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

[61]"A Narrow View of Federal Power," *New York Times*, May 29, 2002, p.A20

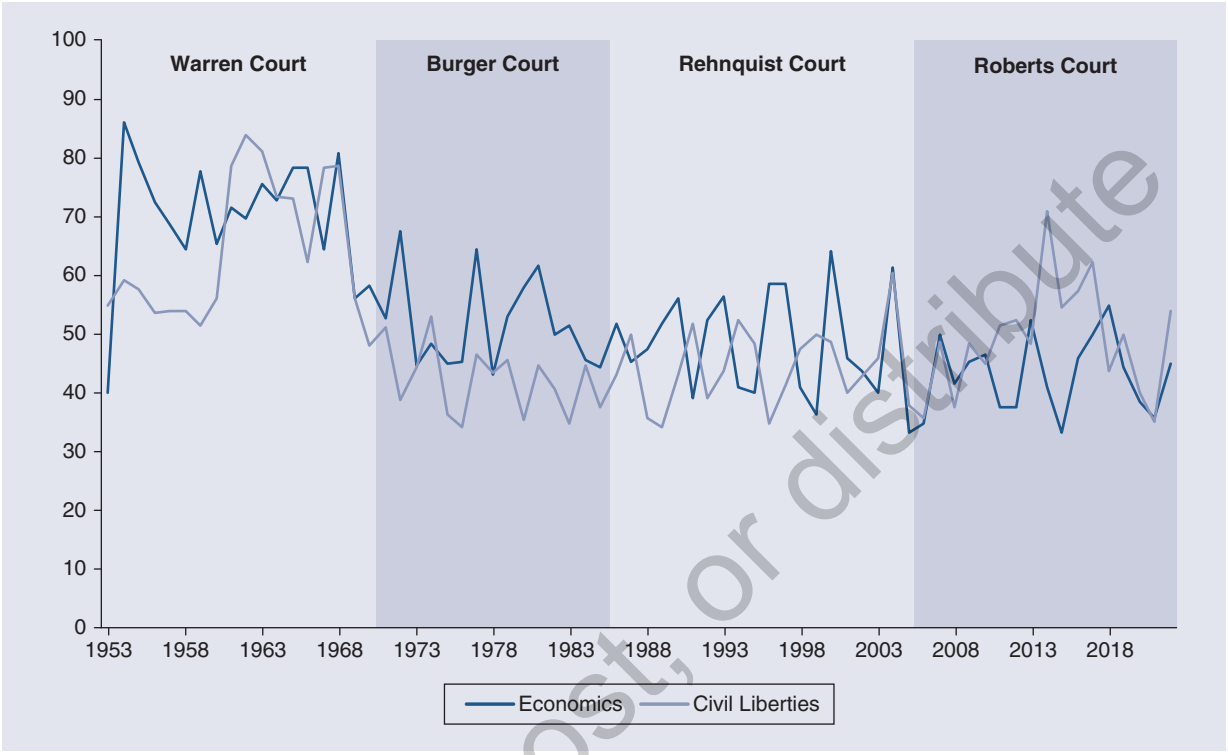
[62]Linda Greenhouse, "William H. Rehnquist, Architect of Conservative Court, Dies at 80," *New York Times* Sept. 5, 2005, p.A16.

[63]Linda Greenhouse, "Even in Agreement, Scalia Puts Roberts to Lash," *New York Times*, June 28, 2007, p.A1.

[64]Adam Liptak, "Returning After 22 Years, Jackson Enters a Maelstrom," *New York Times*, July 18, 2022, p.A12.

[65]Robert Barnes, "With Sweep and Speed, Supreme Court's Conservatives Ignite a New Era," *Washington Post*, July 2, 2022, https://www.washingtonpost.com/politics/2022/07/02/supreme-court-conservative-majority/.

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).

fairly accurate predictions about their voting behavior. Suppose that the Roberts Court (prior to Justice Scalia's death) 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 vote 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 would almost certainly be right.[66]

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

[66]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.

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.

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, and 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.[67] 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 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. There is certainly variation among the justices in their readiness to strike down legislation, and at first glance that variation might seem to be explained by ideology: conservatives justices seem more disposed toward the use of judicial review than liberal ones. But a closer look reveals a more complex picture. All of these justices are willing to strike down federal laws, joining their colleagues in most cases. Note that Justices Alito and Kagan—justices of quite different ideological orientation—vote to strike down laws in both categories at virtually identical rates. Likewise, when it comes to invalidating state and local laws, Justice Thomas looks a lot more like the liberal Justice Sotomayor than his conservative counterpart, Justice Kavanaugh. Although the justices do differ, it is clear that, regardless of where they might fall on the ideological spectrum, they all show a willingness to join their colleagues in casting aside laws whose validity they question.

These patterns are suggestive: judicial activism and restraint do not necessarily equal judicial liberalism and conservatism. An activist judge need not be liberal,

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

Justice	Federal Laws	State and Local Laws
Kavanaugh	—	100
Gorsuch	—	86.7
Roberts	80	76.7
Thomas	76	60.5
Kagan	72.2	65.6
Alito	72	66.7
Sotomayor	54.5	64.7

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. We include only justices currently on the Court who voted in at least ten such cases. Thus, we exclude Amy Coney Barrett and Ketanji Brown Jackson because they each participated in fewer than ten of the cases in both categories. (Some justices in the table may not have participated in all cases.)

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

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

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 relationship between ideology and judicial role.

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.

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.[68]

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, a number of 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.[69]

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.[70]

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

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

[69]Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: 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).

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

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.

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.[71] 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 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.[72]

External Factors

In addition to internal bargaining, some explanations of decision making also take account of 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 upon 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.[73] 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.[74] 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

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

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

[73]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.

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

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 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."[75] 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)."[76] 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."[77]

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."[78] In other words, the political environment has an effect on Court behavior. In fact, many 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 Supreme Court have typically had strong connections to political institutions. Of course, the justices do not serve under party labels. But just as

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

[76]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.

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

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

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 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.

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. 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.[79]

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. The transition from George H. W. Bush's administration to Bill Clinton's administration provides an interesting illustration. Bush's SG had filed amicus curiae briefs—many of which took a conservative position—in a number of cases the Court heard during the 1993–1994 term. Drew S. Days III, Clinton's first SG, rewrote at least four of those briefs to reflect the new administration's more liberal posture. Thus, for example, Days argued that the Civil Rights Act of 1991 should be applied retroactively, whereas the Bush administration had suggested that it should not be. In another case, Days claimed trial attorneys could not systematically challenge prospective jurors on the basis of sex; his predecessor had argued that such dismissals were constitutional.

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.[80] 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 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

[79]See Epstein et al., *Supreme Court Compendium*, tables 7-14 and 7-15.

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

evidence that the justices are close students of how they are regarded by the Congress and are sensitive to legislative displeasure.[81] 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.[82] 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 2015, on average.[83] Some cases, particularly those involving controversial issues such as abortion and affirmative action, 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.[84] Eighty-eight amicus briefs were submitted in ***Fisher v. University of Texas***, a 2013 affirmative action case. In *Obergefell v. Hodges* (2015), the decision upholding the right to same-sex marriage, the Court received a record 148 amicus briefs.[85] And the abortion rights case, *Dobbs v. Jackson Women's Health Organization* (2022), nearly equaled that record, drawing more than one hundred forty amicus briefs. 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 ("Obamacare"), 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 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 *(excerpted in Chapter 13)*.

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

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

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

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

[85]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.

The second question is this: Can groups influence the outcomes of Supreme Court decisions?[86] 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."[87] 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, he 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.[88]

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; 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 *Texas v. Johnson* (1989) in Chapter 6. Directly under the case name is a citation: 491 U.S. 397, which means that *Texas v. Johnson* appears in volume 491, page 397, of *U.S. Reports*.[89] The first set of numbers is the volume number;

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

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

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

[89]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 West	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: Two Centuries of 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).

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.

Texas v. Johnson also can be found in the three other reporters. The citations are as follows:

Lawyers' Edition: 105 L. Ed. 2d 342 (1989)

Supreme Court Reporter: 109 S. Ct. 2533 (1989)

U.S. Law Week: 57 U.S.L.W. 4770 (1989)

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 (http://www.findlaw.com/casecode/supreme.html), 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: Two Centuries of 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.[90] 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.[91]
- *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.[92]

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.

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 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.

[90]Epstein et al., *Supreme Court Compendium*.

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

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

ANNOTATED READINGS

Lawrence Baum's *The Supreme Court*, 15th ed. (Thousand Oaks, CA: CQ Press, 2023), 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: 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. 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); and Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010).

Noteworthy political science studies of judicial decision making (including case selection) are C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948); Glendon Schubert, *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965); Walter J. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991); Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002); Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009); Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton, NJ: Princeton University Press, 2011); Richard L. Pacelle Jr., Brett W. Curry, and Bryan W. Marshall, *Decision Making by the Modern Supreme Court* (New York: Cambridge University Press, 2011); and 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).

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: 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).

CHAPTER TWO

THE JUDICIARY

Institutional Powers and Constraints

CONCERNED ABOUT the proliferation of child pornography, especially on the Internet, Congress passed the Child Pornography Prevention Act of 1996. The law forbade "any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition covered a wide range of depictions, including "virtual child pornography," computer-generated images that do not show actual children but that Congress reasoned could threaten children in other, less direct, ways. For example, pedophiles could use virtual child pornography to encourage children to participate in sexual activity. Six years after the legislation was passed, in ***Ashcroft v. Free Speech Coalition*** (2002), the U.S. Supreme Court struck down the law as a violation of the First Amendment.

What the Court did was an uncommon, but not unexpected, act. For more than two centuries, federal courts have exerted the power of judicial review, the power to review acts of government to determine their compatibility with the U.S. Constitution. And even though the Constitution does not explicitly give them such power, the courts' authority to do so has rarely been challenged. Today, we take for granted the notion that federal courts may review government actions and strike them down if they violate constitutional mandates.

Nevertheless, when courts exert this power, as the U.S. Supreme Court did in *Ashcroft*, they provoke controversy. Look at it from this perspective: Congress, composed of officials we *elect*, passed the Child Pornography Prevention Act, which was then rendered invalid by a Supreme Court of *unelected* judges. Such an occurrence strikes some people as odd, perhaps even antidemocratic. Why should we Americans allow a branch of government over which we have no electoral control to review and nullify the actions of the government officials we elect to represent us?

As we shall see throughout this book, the alleged antidemocratic nature of judicial review is just one of many controversies surrounding the practice. To appreciate them fully, it is important to have a firm grasp of the development of judicial review in the United States. Many of the early justifications for its practice are still fueling disputes.

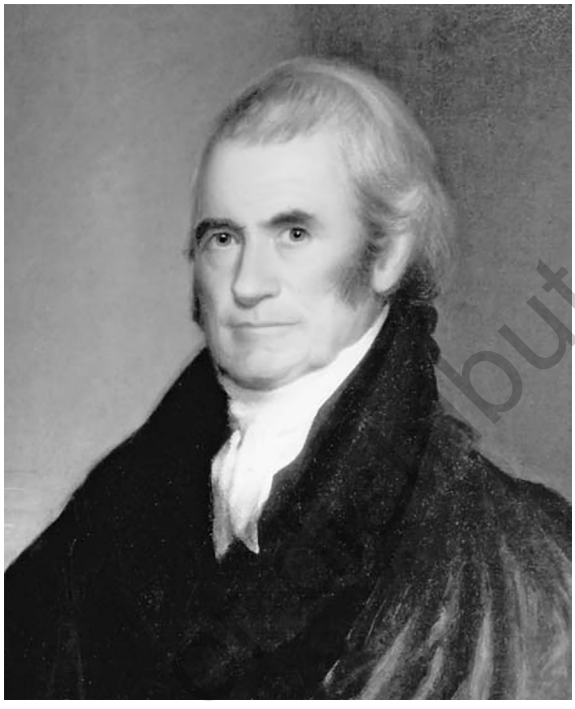
Judicial review is the primary weapon that federal courts have to keep the other branches of government in check. To be sure, the power to invalidate the actions of other officials is potentially awesome in scope, but it would be wrong to conclude that this authority is unrestricted. In fact, there are very real limits that constrain the use of judicial power. In the second part of this chapter, we explore those limits. An appreciation of both aspects of judicial power is necessary to understand the cases in this chapter and those to come.

JUDICIAL REVIEW

Despite evidence that the framers intended for federal courts to have the potent authority of judicial review, it is not mentioned in the Constitution. Early in U.S. history, justices of the Supreme Court claimed it for themselves. In ***Hylton v. United States*** (1796), Daniel Hylton challenged the constitutionality of a 1793 federal tax on carriages. According to Hylton, the act violated the constitutional mandate that direct taxes must be apportioned on the basis of population. With only three justices participating, the Court upheld the act. But, by even considering the tax's validity, the Court assumed it could review an act of Congress.

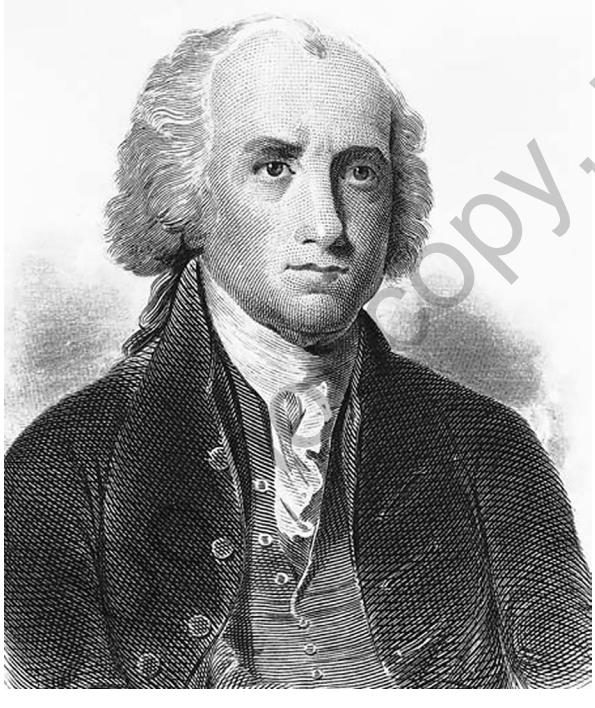
Courtesy of the Library of Congress Prints & Photographs Division

William Marbury



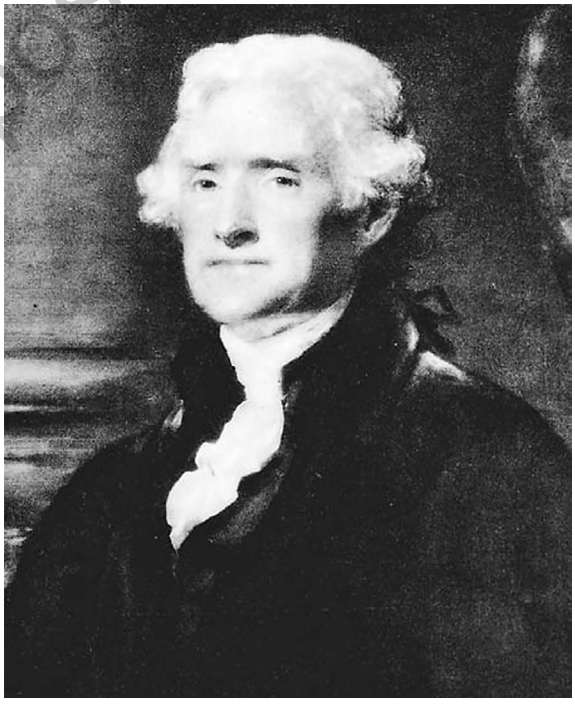
Courtesy of the Library of Congress Prints & Photographs Division

John Marshall



Courtesy of the Library of Congress Prints & Photographs Division

James Madison



Courtesy of the Library of Congress Prints & Photographs Division

Thomas Jefferson

Not until 1803, however, did the Court invoke judicial review to strike down legislation it deemed incompatible with the U.S. Constitution.[1] That decision came in the landmark case *Marbury v. Madison*. How does Chief Justice John Marshall justify the Court's power to strike down legislation when the newly framed Constitution failed to enumerate it?

Marbury v. Madison

5 U.S. (1 CR.) 137 (1803)
http://caselaw.findlaw.com/us-supreme-court/5/137.html
Vote: 4 (Chase, Marshall, Paterson, Washington)
0

OPINION OF THE COURT: *Marshall*

NOT PARTICIPATING: *Cushing, Moore*

FACTS:

When voting in the presidential election of 1800 was over, it was apparent that President John Adams, the Federalist candidate, had lost after a long and bitter campaign, but it was not clear who won. Under the framers' original plan, members of the electoral college cast two votes; the person with the most votes became president, and the second-place finisher became vice president.[2] In 1800 the voting resulted in a tie between Republican candidate Thomas Jefferson and his running mate, Aaron Burr, and the election had to be settled in the House of Representatives, which in February 1801 elected Jefferson. This meant that the Federalists no longer controlled the presidency. They also lost their majority in Congress. Prior to the election, the Federalists controlled more than 56 percent of the 106 seats in the House and nearly 70 percent of the 32 seats in the Senate. After the election, those percentages declined to 35 percent and 44 percent, respectively.[3]

With these losses in the elected branches, the Federalists took steps before they left office to maintain control of the third branch of government, the judiciary. The lame-duck Congress enacted the Circuit Court Act of 1801, which created six new circuit courts and several district courts to accommodate the new states of Kentucky, Tennessee, and Vermont. These new courts required judges and support staff, such as attorneys, marshals, and clerks. As a result, during the last six months of his term in office, Adams made more than two hundred nominations, with sixteen judgeships approved by the Senate during his last two weeks in office.

An even more important opportunity arose in December 1800 when the third chief justice of the United States, Federalist Oliver Ellsworth, resigned so that Adams—not Jefferson—could name his replacement. Adams offered the post to John Jay, who had served as the first chief justice before leaving to take what was in those days a more prestigious job—the governorship of New York. When Jay refused, Adams turned to his secretary of state, John Marshall, an ardent Federalist. The Senate confirmed Marshall in January 1801, but he also continued to serve as secretary of state.

In addition, the Federalist Congress passed the Organic Act of 1801, authorizing Adams to appoint forty-two justices of the peace for the District of Columbia. It was this seemingly innocuous law that set the stage for the drama of *Marbury v. Madison.*

In the waning days of the Adams administration, there was a rush to complete what came to be known the "midnight appointments," and in the confusion, Marshall, the outgoing secretary of state, failed to deliver some of the commissions of office to several of these newly confirmed appointees. When the new administration came into office, James Madison, the new secretary of state, acting under orders from Jefferson, refused to deliver at least five commissions.[4] Some years later, Jefferson explained the situation this way:

> I found the commissions on the table of the Department of State, on my entrance into office, and I forbade their delivery. Whatever is in the Executive offices is certainly

[1]In the decade leading up to *Marbury*, the Supreme Court considered the constitutionality of congressional legislation in several cases. In *U.S. v. Yale Todd* (1794), a dispute over the procedures by which veterans of the Revolutionary War could obtain benefits under the Invalid Pensions Act, the Court actually seems to have declared an act of Congress unconstitutional. Because the decision was not officially published, however, little is known about the Court's rationale in the case. See Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019).

[2]The Twelfth Amendment, ratified in 1804, changed the procedures to require electors to cast one vote for president and one vote for vice-president.

[3]Data are from the House's and Senate's websites, http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ and https://www.senate.gov/history/partydiv.htm.

[4]Historical accounts differ, but it seems that Jefferson decreased the number of Adams's appointments to justice of the peace positions to thirty from forty-two. Twenty-five of the thirty appointees received their commissions, but five—including William Marbury—did not. See Francis N. Stites, *John Marshall* (Boston: Little, Brown, 1981), 84.

> deemed to be in the hands of the President, and in this case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State.[5]

As a result, in 1801 William Marbury and three others who were denied their commissions went *directly* to the Supreme Court (that is, they invoked the Court's original jurisdiction rather than beginning the case in a lower court) and asked it to issue a writ of mandamus ordering Madison to deliver the commissions. A writ of mandamus is a judicial order compelling a public official to carry out a legally mandated action. Marbury believed he could take his case directly to the Court because Section 13 of the 1789 Judiciary Act gives the Court the power to issue writs of mandamus to anyone holding federal office:

> The Supreme Court . . . shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

In this volatile political climate, Marshall, now serving as chief justice, was perhaps in the most tenuous position of all. He had been a supporter of the Federalist Party, which now looked to him to "scold" the Jefferson administration for withholding these commissions. Marshall, however, wanted to avoid a confrontation between the Jefferson administration and the Supreme Court, which not only seemed imminent but also could end in disaster for the struggling nation. In fact, Jefferson and his party were so annoyed with the Court for agreeing to hear the *Marbury* dispute that they began to consider impeaching Federalist judges—with two justices (Samuel Chase and Marshall himself) high on their lists. Note, too, the year in which the Court handed down the decision in *Marbury.* The case was not decided until two years after Marbury filed suit because Congress and the Jefferson administration had abolished the 1802 term of the Court.

ARGUMENTS:

For the applicant, William Marbury:

- After the president has signed a commission for an office, and it comes to the secretary to be sealed, the president has done with it, and nothing remains but that the secretary perform those ministerial acts that the law imposes upon him. It immediately becomes his duty to seal, record, and deliver it on demand. In such a case the appointment becomes complete by the signing and sealing, and the secretary does wrong if he withholds the commission.
- Congress has expressly given the Supreme Court the power of issuing writs of mandamus.
- Congress can confer original jurisdiction in cases other than those mentioned in the Constitution. The Supreme Court has entertained jurisdiction on mandamus in several cases. See, e.g., *United States v. Lawrence*, 3 U.S. 42 (1795). In this case and in others, the power of the Court to issue writs of mandamus was taken for granted in the arguments of counsel on both sides. Hence it appears there has been a legislative construction of the Constitution upon this point, and a judicial practice under it, since the formation of that government.

For Secretary of State James Madison:

(Madison and Jefferson intentionally did not show up in order to emphasize their position that the proceedings had no legitimacy. So it seems that Madison was unrepresented and no argument was made on his behalf.)

MR. CHIEF JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded. . . .

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of enquiry is,

1. Has the applicant a right to the commission he demands?. . . .

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law

[5]Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, 1922), 244.

continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property. . . .

It is . . . decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. . . .

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States." . . .

The transmission of the commission, is a practice directed by convenience, but not by law. . . . If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry. . . .

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. . . .

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the Executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . .

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. . . .

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress. . . .

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned. But that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted. . . .

It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not must always depend on the nature of that act.

If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction.

In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . . To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. . . .

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are

only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the president; the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3. He is entitled to the remedy for which he applies. This depends on,
    1. The nature of the writ applied for. And,
    2. The power of this court. . . .

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and

original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would

be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the Framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that *constitution* forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme law* of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to

be essential to all written constitutions, that a law repugnant to the constitution is void, and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

Scholars differ about Marshall's opinion in *Marbury*, but even his critics acknowledge Marshall's shrewdness. By ruling against Marbury—who never did receive his judicial appointment *(see Box 2-1)*—Marshall avoided a potentially devastating clash with Jefferson. But, by exerting the power of judicial review, Marshall sent the president a clear signal that the Court would be a major player in the American government.

Marbury helped to establish Marshall's reputation as perhaps the greatest justice in Supreme Court history, and it was just the first in a long line of seminal Marshall decisions. More relevant here is *Marbury*'s primary holding: that the federal courts have the power to review government actions and invalidate those that are incompatible with the Constitution.[6] In Marshall's view, such authority—the power of judicial review—while not explicit in the Constitution, fits with the Constitution's system of checks and balances and so with the framers' vision. How else could the Court ensure that the Constitution remained "the supreme Law of the Land"?

[6]In *Marbury*, the Court addressed only the power to review acts of Congress. The following year, in *Little v. Barreme* (1804), the justices claimed the same power over the president. But could the Court exert judicial review over the states? According to Section 25 of the 1789 Judiciary Act, it could. Congress gave the Court appellate jurisdiction to cover appeals from a state's highest court if that court upheld a state law against challenges of unconstitutionality or denied some claim based on the U.S. Constitution, federal laws, or treaties. In *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821), the justices upheld Section 25 of the Judiciary Act.

BOX 2-1

Aftermath . . . *Marbury v. Madison*

From meager beginnings, William Marbury gained political and economic influence in his home state of Maryland and became a strong supporter of John Adams and the Federalist Party. Unlike others of his day who rose in wealth through agriculture or trade, Marbury's path to prominence was banking and finance. No one could doubt his admiration for the economic policies of the Federalists; he named his last son Alexander Hamilton Marbury, after the treasury secretary who charted a path of economic growth under President Washington. At age thirty-eight he saw his appointment to be a justice of the peace as a public validation of his rising economic status and social prestige. Marbury never received his judicial position; instead, he returned to his financial activities, ultimately becoming the president of a bank in Georgetown. He died in 1835, the same year as Chief Justice John Marshall.

Other participants in the famous decision played major roles in the early history of our nation. Thomas Jefferson, who refused to honor Marbury's appointment, served two terms as chief executive, leaving office in 1809 as one of the nation's most revered presidents. James Madison, the secretary of state who carried out Jefferson's order depriving Marbury of his judgeship, became the nation's fourth president, serving from 1809 to 1817. Following the *Marbury* decision, Chief Justice Marshall led the Court for an additional thirty-two years. His tenure was marked with fundamental rulings expanding the power of the judiciary and enhancing the position of the federal government relative to the states. He is rightfully regarded as history's most influential chief justice.

Although the *Marbury* decision established the power of judicial review, it is ironic that the Marshall Court never again used its authority to strike down a piece of congressional legislation. In fact, it was not until *Scott v. Sandford* (1857), more than two decades after Marshall's death, that the Court once again invalidated a congressional statute.

Sources: John A. Garraty, "The Case of the Missing Commissions," in *Quarrels That Have Shaped the Constitution*, rev. ed., ed. John A. Garraty (New York: Harper & Row, 1987); and David F. Forte, "Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace," *Catholic University Law Review* 45 (1996): 349–402.

Kevin McGuire

Although he never received his commission as a justice of the peace, William Marbury remained an affluent businessman. He lived in this home on what is today M Street in the Georgetown neighborhood of Washington, DC. It currently serves as the Embassy of Ukraine.

Even though universal acceptance of judicial review built only gradually during the nineteenth century,[7] Marshall's opinion makes a plausible argument, and current justices more than occasionally invoke the logic of *Marbury* to invalidate laws, as many of the cases in this book make clear. Moreover, it is not only justices serving in the contemporary era who continue to cite *Marbury* with approval. Many countries, including Australia, France, Germany, Italy, and Spain, have written judicial review into their constitutions, refusing to leave its establishment to chance.

Even so, *Marbury* still prompts debates among scholars and other commentators. Table 2-1 summarizes the key points of contention, many of which will resurface in the pages to come.[8] These controversies are important because they place judicial review into a theoretical context for discussion. But the questions they raise probably never will be resolved: as one side finds support for its position, the other side always does too.

Also worthy of consideration are several questions arising from the way the Court actually has exercised the power of judicial review: the number of times it has invoked the power to strike laws and the significance of those decisions. Investigation of these issues can help us achieve a better understanding of judicial review and place it in a realistic context. First, how often has the Court overturned a federal, state, or local law or ordinance? The data seem to indicate that the Court has made frequent use of the power, striking down close to fifteen hundred government acts since 1790. Many of those decisions are of recent vintage; between 1980 and 2022 the Court issued 83 decisions striking down all or parts of federal statutes and 234 invalidating state or local laws.[9] As political scientist Lawrence Baum notes, however, those acts are but a "minute fraction" of the laws enacted at various levels of government. Since 1790, for example, Congress has passed more than sixty thousand laws, and the Court has struck down far less than 1 percent of them.[10]

Second, how significant are the laws the Court strikes down? With respect to federal laws, the historical record shows that the justices rarely strike down important features of landmark legislation. Consequential components of major laws have, of course, been subject to judicial review; the Court has invalidated a grant of the line-item veto to the president, federal restrictions on the possession of firearms, a legislative mechanism for balancing the budget, and a wide swath of campaign finance regulations—to name just a few recent cases. These decisions, however, are not typical. More often, the justices invalidate less significant federal policy.[11] In terms of sheer numbers, the Supreme Court has struck down state and local laws much more often than federal ones, but again those numbers represent only a small percentage of such statutes and ordinances. True, though many of these cases concern issues at the center of American law and politics;[12] decisions striking down, say, the use of race in college admission or restrictions on same-sex

[7]Mark A. Graber, "Establishing Judicial Review? *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51 (1998): 221–239.

[8]Some critics attack specific aspects of the ruling. Jefferson argued that once Marshall ruled that the Court did not have jurisdiction, he should have dismissed it. Another criticism is that Section 13 of the 1789 Judiciary Act—which *Marbury* held unconstitutional—did not "even remotely suggest an expansion of the Supreme Court's original jurisdiction"; Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 23. If this is so, then Marshall "had nothing to declare unconstitutional!" A counterargument is that Section 13 was seen as expanding the Court's original jurisdiction, or else why did Marbury bring his suit directly to the Court? And why did his attorney specifically note that the act was constitutional?

[9]Calculated from data in the U.S. Supreme Court Database, http://supremecourtdatabase.org.

[10]Lawrence Baum makes this point in *The Supreme Court*, 9th ed. (Washington, DC: CQ Press, 2007), 164-170.

11Whittington, 2019, 300-314.

[12]Stefanie A. Lindquist and Frank Cross, *Measuring Judicial Activism* (New York, Oxford University Press), 65-70.

Table 2-1 Major Controversies over Judicial Review

Controversy	Supporting Judicial Review	Opposing Judicial Review
Framers' Intent: Did the framers intend the federal courts to exercise judicial review?	The framers knew about judicial review. Evidence shows that the concept was adopted in England in the 1600s. Moreover, between 1776 and 1787, eight of the thirteen colonies incorporated judicial review into their constitutions, and by 1789 various state courts had struck down as unconstitutional eight acts passed by their legislatures.	Even though some states adopted judicial review, their courts rarely exercised the power. When they did, the public outrage that followed provides some indication that the practice was not widely accepted.
	The framers left judicial review out of the Constitution because they did not want to heighten controversy over Article III review, not because they opposed the practice.	The participants at the Constitutional Convention rejected the proposed Council of Revision, which would have enabled Supreme Court justices and the president to veto legislative acts.
	The framers implicitly accepted judicial review. Historians have established that more than half of the delegates to the Constitutional Convention approved of it. In *Federalist* No. 78, Hamilton argued that one branch of government must safeguard the Constitution and that the courts were best suited for that task.	
Judicial Restraint: Should unelected courts defer to the elected institutions of government?	The government needs an umpire who will act neutrally and fairly in interpreting the constitutional strictures.	Unelected judges should defer to the wishes of elected officials, who represent the best interests of the people and who can be removed from office when they do not.
Democratic Checks: Are there sufficient checks on courts to prevent them from using judicial review in a way repugnant to the best interests of the people?	Acting in different combinations, Congress, the president, and the states can, for example, ratify a constitutional amendment to overturn a decision, change the size of the Court, or remove the Court's appellate jurisdiction.	The problem with these checks, some analysts say, is that they are rarely invoked: only five amendments have overturned Court decisions, the Court's size has not been changed since 1869, and only rarely has Congress removed the Court's appellate jurisdiction.
	Although Congress rarely takes direct action against the Court, the fact that the legislature has weapons to use against the judiciary may influence the justices, who might try to accommodate the wishes of Congress rather than risk the reversal of a ruling. It is the existence of congressional threat—not its actual use—that may affect how the Court rules in a given case, which may explain why the justices rarely strike down congressional acts.	

(Continued)

Table 2-1 (Continued)

Controversy	Supporting Judicial Review	Opposing Judicial Review
Role of Courts in a Democratic Society: Do courts need the power of judicial review to protect minority interests?	The Court must have the power of judicial review if it is to fulfill its most important constitutional assignment: protection of minority rights. Because legislatures and executives are popularly elected, they reflect the interests of the majority. So that the majority cannot tyrannize a minority, it is necessary for the one branch of government that lacks any electoral connection to have the power of judicial review.	Courts have not always used judicial review to protect minorities: some of the acts they strike down are those that harmed a "privileged class." For example, in ***City of Richmond v. J. A. Croson Co.*** (1989) and *Adarand Constructors v. Peña* (1995), the justices struck down programs designed to help minority interests.

Source: We adopt this framework from David Adamany, "The Supreme Court," in *The American Courts: A Critical Assessment*, ed. John B. Gates and Charles A. Johnson (Washington, DC: CQ Press, 1991).

marriage were challenges to state laws. But a closer look reveals that most invalidations of state and local laws do not reverberate widely through American society.

Despite the ambiguous record, we can reach two conclusions about the Court's use of judicial review. One is that as "important as judicial review has been, it has not given the Court anything like a dominant position in the national government."[13] The other is that the Court's *use* of judicial review may not be what is significant. Rather, like the president's ability to veto congressional legislation, its power may lie in the threat of its invocation. In either case, it has provided federal courts with their most significant political weapon.

CONSTRAINTS ON JUDICIAL POWER

Given all the attention paid to judicial review, it is easy to forget that the power of courts to exercise it and courts' judicial authority, more generally, have substantial limits. Article III—or the Court's interpretation of it—places three major constraints on the ability of federal tribunals to hear and decide cases: (1) courts must have authority to hear a case (jurisdiction), (2) the case must be appropriate for judicial resolution (justiciability), and (3) the appropriate party must bring the case (standing to sue). Following is a brief review of the doctrine surrounding these constraints. As you read, bear in mind that the Court serves as its own arbiter of its limits; as they do in any other area of federal law, the justices have the final word on how the Constitution circumscribes power. Because the Court engages in its own form of self-regulation, these limits can be quite fluid: some Courts tend toward loose construction of the rules, while others are anxious to enforce them with vigor. What factors might explain these different tendencies? Or, to put it another way, to what extent do these constraints actually limit the Court's authority?

Jurisdiction

According to Chief Justice Salmon P. Chase, "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[14] In other words, a court cannot hear a case unless it has the authority—the jurisdiction—to do so.

Article III, Section 2, defines the jurisdiction of U.S. federal courts. Lower courts have the authority to hear disputes involving particular parties and subject matter. The U.S. Supreme Court's jurisdiction is divided into original and appellate: the former are classes of cases that may originate in the Court; the latter are those it hears after a lower court.

To what extent does jurisdiction constrain the federal courts? *Marbury v. Madison* provides some answers, although contradictory, to this question.

[13]Baum, 2007, 170

[14]*Ex parte McCardle* (1869).

Chief Justice Marshall informed Congress that it could not alter the original jurisdiction of the Court. Having reached this conclusion, perhaps Marshall should have merely dismissed the case on the ground that the Court lacked authority to hear it, but that is not what he did.

Marbury remains an authoritative ruling on original jurisdiction. The issue of appellate jurisdiction may be a bit more complex. Article III explicitly states that for those cases over which the Court does not have original jurisdiction, it "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." In other words, the exceptions clause seems to give Congress authority to alter the Court's appellate jurisdiction—including to subtract from it.

Would the justices agree? In *Ex parte McCardle*, the Court addressed this question, examining whether Congress can use its power under the exceptions clause to *remove* the Court's appellate jurisdiction over a particular category of cases.

Ex parte McCardle

74 U.S. (7 WALL.) 506 (1869)
http://caselaw.findlaw.com/us-supreme-court/74/506.html
Vote: 8 (Chase, Clifford, Davis, Field, Grier, Miller, Nelson, Swayne) 0

OPINION OF THE COURT: *Chase*

FACTS:

After the Civil War, the Radical Republican Congress imposed a series of restrictions on the South.[15] Known as the Reconstruction laws, they in effect placed the region under military rule. Journalist William McCardle opposed these measures and wrote editorials urging resistance to them. He was arrested for publishing allegedly "incendiary and libelous articles" and held for a trial before a military tribunal, established under Reconstruction.

Because he was a civilian, not a member of any militia, McCardle claimed that he was being illegally held. He petitioned the U.S. circuit court in Mississippi for a writ of habeas corpus (an order issued to determine whether a person held in custody is lawfully detained or imprisoned) under an 1867 act that enabled federal judges "to grant habeas corpus to persons detained in violation" of the U.S. Constitution. When this effort failed, McCardle appealed to the U.S. Supreme Court, which had gained appellate jurisdiction in such cases with passage of the 1867 law.

In early March 1868, *McCardle* "was very thoroughly and ably [presented] upon the merits" to the U.S. Supreme Court. It was clear to most observers that "no Justice was still making up his mind": the Court's sympathies, as was widely known, lay with McCardle.[16] But before the justices could issue their decision, Congress, on March 27, 1868, repealed the 1867 Habeas Corpus Act and removed the Supreme Court's authority to hear appeals arising from it. This action was meant to punish the Court or to send it a strong message. In 1866, two years before *McCardle,* the Court had invalidated President Abraham Lincoln's use of military tribunals in certain areas.[17] Congress did not want to see the Court take similar action in this dispute. Congress was so adamant on this issue that after President Andrew Johnson vetoed the 1868 repealing act, the legislature overrode the veto.

The Court responded by redocketing the case for oral arguments in March 1869. During the arguments and in its briefs, the government contended that the Court no longer had authority to hear the case and should dismiss it.

ARGUMENTS:

For the appellant, William McCardle:

- According to the Constitution, the judicial power extends to "the laws of the United States." The Constitution also vests that judicial power in one Supreme Court. The jurisdiction of this Court, then, comes directly from the Constitution, not from Congress.
- Suppose that Congress never made any exceptions or any regulations regarding the Court's appellate jurisdiction. Under the argument that Congress must define when, where, and how the Supreme Court shall exercise its jurisdiction, what becomes of the "judicial power of the United States" given to this Court? It would cease to exist. But the Court is coexistent and coordinate with Congress

[15]For more information on *McCardle*, see Thomas G. Walker and Lee Epstein, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts*, ed. Lee Epstein (Washington, DC: CQ Press, 1995), 315–346.

[16]Charles Fairman, *Reconstruction and Reunion*, vol. 7 of *History of the Supreme Court of the United States* (New York: Macmillan, 1971), 456.

[17]That action came in *Ex parte Milligan* (1866).

and must be able to exercise judicial power even if Congress passed no act on the subject.

- This case had been argued in this Court. Congress has interfered with a case on which this Court has passed, or is passing, judgment. This amounts to an exercise by the Congress of judicial power.

For the appellee, U.S. Government:

- The Constitution gives Congress the power to "except" any or all of the cases mentioned in the jurisdiction clause of Article III from the appellate jurisdiction of the Supreme Court. It was clearly Congress's intention in the repealer act to exercise its power to "except."
- The Court has no authority to pronounce any opinion or render any judgment in this cause because the act conferring the jurisdiction has been repealed and so jurisdiction ceases.
- No court can act in any case without jurisdiction, and it does not matter at what period in the progress of the case the jurisdiction ceases. After it has ceased no judicial act can be performed.

THE CHIEF JUSTICE DELIVERED THE OPINION OF THE COURT.

The first question necessarily is that of jurisdiction, for if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. From among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction. . . .

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . .

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer. . . .

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

As we can see, the Court acceded and declined to hear the case. *McCardle* suggests that Congress has the authority to remove the Court's appellate jurisdiction as it deems necessary. As Justice Felix Frankfurter put it in 1949, "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice* [before a judge]."[18] Justice Owen J. Roberts, who apparently agreed with Frankfurter's assertion, proposed an amendment to the Constitution that would have deprived Congress of the ability to remove the

[18] *National Mutual Insurance Co. v. Tidewater Transfer Co.* (1949).

Court's appellate jurisdiction.[19] In 1962, however, Justice William O. Douglas remarked, "There is a serious question whether the *McCardle* case could command a majority view today."[20] And even Chief Justice Chase himself suggested limits on congressional power in this area. After *McCardle* had been decided, he noted that use of the exceptions clause was "unusual and hardly to be justified except upon some imperious public exigency."[21]

To this day, then, *McCardle*'s status remains an open question.[22] To Frankfurter, Roberts, and others in their camp, the *McCardle* precedent, not to mention the text of the exceptions clause, makes it quite clear that Congress can remove the Court's appellate jurisdiction. To Douglas and other commentators, *McCardle* is something of an oddity that does not square with American traditions: before *McCardle*, Congress had never stripped the Court's jurisdiction, and since *McCardle*, Congress has taken this step only rarely and did not take it in the wake of some of the Court's most controversial decisions, such as *Roe v. Wade* and *Brown v. Board of Education*.[23] Then there is the related argument about the separation of powers: taken to its extreme, jurisdiction stripping could render the Court virtually powerless. Would the framers have created an institution only to allow Congress to destroy it? Many scholars say no.

Justiciability

According to Article III, the judicial power of the federal courts is restricted to "cases" and "controversies." Taken together, these words mean that litigation must be justiciable—appropriate or suitable for a federal tribunal to hear or to solve. As Chief Justice Earl Warren asserted, cases and controversies

> are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.[24]

Although Warren also suggested that "justiciability is itself a concept of uncertain meaning and scope," he elucidated several types of cases or characteristics of litigation that would render it nonjusticiable. In this section, we treat five: advisory opinions, collusive suits, mootness, ripeness, and political questions. In the following section, we deal with another concept related to justiciability—standing to sue.

Advisory Opinions. A few states and some foreign countries require judges of the highest court to advise the executive or legislature, when requested to do so, as to their views on the constitutionality of a proposed policy. Since the time of Chief Justice Jay, however, federal judges in the United States have refused to issue advisory opinions. They do not render advice in hypothetical suits because if litigation is abstract, there is no real controversy to resolve. The language of the Constitution does not prohibit advisory opinions, but the framers rejected a proposal that would have permitted the other branches of government to request judicial rulings "upon important questions of law, and upon solemn occasions." Madison was critical of the proposal on the grounds that the judiciary should have jurisdiction only over "cases of a Judiciary Nature."

The Supreme Court agreed with Madison. In July 1793, Secretary of State Thomas Jefferson asked the justices if they would be willing to address questions concerning the appropriate role America should play in the ongoing British-French war. Jefferson wrote that President George Washington "would be much relieved if he found himself free to refer questions

[19]See Owen J. Roberts, "Now Is the Time: Fortifying the Supreme Court's Independence," *American Bar Association Journal* 35 (1949): 1. The Senate approved the amendment in 1953, but the House tabled it. Cited in Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury, NY: Foundation Press, 1991), 45.

[20]*Glidden Co. v. Zdanok* (1962).

[21]*Ex parte Yerger* (1869).

[22]For a review of various answers, see Tara Leigh Grove, "The Structural Safeguards of Federal Jurisdiction," *Harvard Law Review* 124 (2011): 869–940.

[23]Recent examples involve Congress limiting jurisdiction in quite limited circumstances. For instance, Congress prohibited the Court from reviewing cases involving a tract of land set aside for a tribe of Indians in Michigan. That withdrawal of jurisdiction was upheld in *Patchak v. Zinke* (2018).

[24]***Flast v. Cohen*** (1968).

[involving the war] to the opinions of the judges of the Supreme Court in the United States, whose knowledge . . . would secure us against errors dangerous to the peace of the United States."[25] Less than a month later, in a written response sent directly to the president, the justices denied Jefferson's request:

> We have considered [the] letter written by your direction to us by the Secretary of State [regarding] the lines of separation drawn by the Constitution between the three departments of government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

With these words, the justices sounded the death knell for advisory opinions: such opinions, issued outside the context of actual litigation, would violate the separation of powers principle embedded in the Constitution. The subject has resurfaced only a few times in U.S. history; in the 1930s, for example, President Franklin D. Roosevelt considered a proposal that would require the Court to issue advisory opinions on the constitutionality of federal laws. But Roosevelt quickly gave up on the idea at least in part because of its dubious constitutionality.

Nevertheless, scholars still debate the Court's 1793 letter to Washington. Some agree with the justices' logic, but others assert that other more institutional concerns were at work—perhaps the Court was concerned about being thrust into disputes prematurely. Whatever the reason, all subsequent Courts have followed that 1793 precedent: requests for advisory opinions to the *U.S. Supreme Court* present nonjusticiable disputes.[26]

But justices have found other ways of offering advice.[27] For example, they have sometimes offered political leaders informal suggestions in private conversations or correspondence.[28] They also often give advice in an institutional but indirect manner. Justice Willis Van Devanter had a hand in drafting the Judiciary Act of 1925, which granted the Court wide discretion in controlling its docket, and Chief Justice William Howard Taft and several associate justices openly lobbied for its passage, "patrolling the halls of Congress," as Taft put it. In 1937, when the Senate was considering President Roosevelt's Court-packing plan, opponents arranged for Chief Justice Charles Evans Hughes to send a letter to Senator Burton K. Wheeler, D-Mont., advising him that raising the number of justices would impede rather than facilitate the Court's work and that the justices' sitting in separate panels to hear cases—a procedure that increasing the number of justices was supposed to allow—would probably violate the constitutional command that there be "one supreme Court." More recent chief justices have sent annual reports on the state of the judiciary to Congress explaining not only what kinds of legislation they deemed good for the courts but also the likely impact of proposed legislation on the federal judicial system. On the current bench, Justices Alito and Sotomayor have been particularly candid in public appearances, expressing their views on issues that continue to come before the Court.

Finally, judges have occasionally used their opinions to provide advice to decision makers. In *Regents of the University of California v. Bakke* (1978) *(excerpted in Chapter 14)*, for example, the Court held that a state medical school's version of affirmative action—one that set aside seats in the incoming class for minority applicants—had deprived a white applicant of equal protection of the laws by rejecting him in favor of minority applicants whom the school ranked lower on all the relevant academic criteria. But, in his opinion, Justice Lewis F. Powell Jr. went beyond merely articulating the reasons why the medical school's model was invalid; indeed, he proffered the advice that the kind of affirmative action program operated by Harvard University would be constitutionally acceptable.

[25]For the full text of Jefferson's request and the justices' response, see Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, prepared for publication from the 1958 tentative edition by and containing an introductory essay by William N. Eskridge Jr. and Philip P. Frickey (Westbury, NY: Foundation Press, 1994), 630.

[26]We emphasize the Supreme Court because some state courts do, in fact, issue advisory opinions.

[27]We adopt some of the material to follow from Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Courts, Judges, and Politics* (New York: McGraw-Hill, 2006), chap. 6.

[28]See, for example, Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven, CT: Yale University Press, 1997).

Collusive Suits. Justiciability also precludes collusive suits. That is, the Court will not decide cases in which the litigants (1) want the same outcome, (2) evince no real adversity between them, or (3) are merely testing the law. Why the Court deems collusive suits nonjusticiable is well illustrated in Chicago & Grand Trunk Railway. Co. v. Wellman (1892). At issue here was a Michigan law that set maximum passenger fares for railroad companies. On the day the law went into effect, a lawsuit was filed by a passenger who was refused a ticket at the state-mandated price. The railroad company, which wanted to charge its previously higher rate, argued that the Constitution gave the state no power to regulate railroad ticket prices. As the Michigan Supreme Court observed, however, the passenger and the railroad were actually working together, conspiring to create a lawsuit in order to challenge the law. The U.S. Supreme Court agreed and refused to rule on the validity of the regulation. As Justice David J. Brewer explained,

> The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, . . . the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not. . . . It is legitimate only in the last resort, and as a necessity in the determination by real, earnest and vital, controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Justice Brewer's rationale is quite clear. The separation of powers does not permit those who lose in the legislature simply to turn to courts for a different outcome by creating a lawsuit.

The Court has not always followed the *Wellman* precedent, however. Several landmark decisions were the result of collusive suits, including *Pollock v. Farmers' Loan and Trust Co.* (1895), in which the Court declared the federal income tax unconstitutional. The litigants in this dispute, a bank and a stockholder in the bank, both wanted the same outcome—the demise of the tax. **Carter v. Carter Coal Co.** (1936) is also exemplary. Here the Court agreed to resolve a dispute over a major piece of New Deal legislation even though the litigants, a company president and the company, which included the president's father, both wanted the same outcome—the legislation to be declared unconstitutional.

Why did the justices resolve these disputes? One answer is that the Court might overlook some element of collusion if the suit presents a real controversy or the potential for one. But some analysts see it differently. The temptation to set "good" public policy (or strike down "bad" public policy), they say, is sometimes too strong for the justices to follow their own rules. Then again, some commentators argue that they should resist. In 1913, the country ratified the Sixteenth Amendment to overturn *Pollock*, and the Court itself limited *Carter Coal* in the 1941 case of *United States v. Darby*.

Mootness. In general, the Court will not decide cases in which the controversy is no longer live by the time it reaches the Court's doorstep. ***DeFunis v. Odegaard*** (1974) provides an example. Rejected for admission to the University of Washington Law School, Marco DeFunis Jr. sued the school, alleging that it had engaged in reverse discrimination because it had denied him a place but accepted statistically less qualified minority students. In 1971, a trial court found merit in his claim and ordered that the university admit him. While DeFunis was in his second year of law school, the state supreme court reversed the trial judge's ruling. He then appealed to the U.S. Supreme Court. By that time, DeFunis had registered for his final quarter in school. In a per curiam opinion, the Court refused to rule on the merits of DeFunis's claim, asserting that it was moot:

> Because [DeFunis] will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.

In his dissent, Justice William J. Brennan Jr. noted that DeFunis could conceivably not complete his studies that quarter, and so the issue was not necessarily moot. This suggests that the rules governing mootness

are a bit fuzzier than the *DeFunis* majority opinion characterized them.

To see this possibility, consider the well-known case of *Roe v. Wade* (1973) *(excerpted in Chapter 10)*, in which the Court legalized abortions performed during the first two trimesters of pregnancy. Norma McCorvey, also known as Jane Roe, was pregnant when she filed suit in 1970. When the Court handed down the decision in 1973, she had long since given birth and put her baby up for adoption. But the justices did not declare this case moot. Why not? What made *Roe* different from *DeFunis*?

The justices provided two legal justifications. First, DeFunis brought the litigation on his own behalf, while *Roe* was a class action—a lawsuit brought by one or more persons who represent themselves and all others similarly situated. Second, DeFunis had been admitted to law school, and he would "never again be required to run the gauntlet." Roe could become pregnant again—that is, pregnancy is a situation "capable of repetition, yet evading review." Are these reasonable points? Or is it possible, as some suspect, that the Court developed them to enable the justices to address particular legal issues?

At the same time, when it seems clear that a decision in a case will have no practical significance, the justices do not hesitate to say so. In *New York State Rifle & Pistol Association v. City of New York* (2020), the Court granted certiorari to review a New York City rule that prohibited firearms from being transported to a second home or shooting range outside the city. The Court seemed poised to issue a new ruling on the Second Amendment right to keep and bear arms, but after the justices granted review, the state legislature amended its gun laws and allowed firearms to be taken outside of the city by its residents. The justices ruled that the case was moot, since the state had provided "the precise relief that petitioners requested."

Ripeness. Ripeness is the flip side of mootness. Whereas moot cases are brought too late, "unripe" cases are those that are brought too early. That is, under existing Court interpretation, a case is nonjusticiable if the controversy is premature—has insufficiently jelled—for review. *Trump v. New York* (2020) provides an example. This case involved a challenge to an order from the president to the Secretary of Commerce to exclude from the U.S. Census the number of unauthorized aliens in each state. The census, however, does not collect information on immigration status, and at the time of the President's order, the census had already been underway for several months. Nevertheless, a group of state and local governments, concerned about the possible loss of congressional representation and reduction in federal funds, sued to prevent the implementation of the president's order. The Supreme Court declined to evaluate whether the president had the authority to impose the order, since it was not clear that Secretary of Commerce could even carry it out. The Court explained,

> At present, this case is riddled with contingencies and speculation that impede judicial review. . . . Any prediction how the Executive Branch might eventually implement this . . . policy is "no more than conjecture" at this time. To begin with, the policy may not prove feasible to implement in any manner whatsoever . . . . Uncertainty . . . pervades which (and how many) aliens the President will exclude from the census if the Secretary manages to gather . . . suitable [information]. We simply do not know whether and to what extent the President might direct the Secretary to "reform the census" to implement his general policy with respect to apportionment. . . . [Plaintiffs] insist that the record already establishes a "substantial risk" of reduced representation and federal resources. That conclusion, however, involves a significant degree of guesswork. . . . [T]he Secretary has not altered census operations in a concrete manner that will predictably change the count. The count here is complete; the present dispute involves the apportionment process, which remains at a preliminary stage. The Government's eventual action will reflect both legal and practical constraints, making any prediction about future injury just that—a prediction.

Of course, the justices did not rule that a challenge to the president's order excluding unauthorized aliens from the census could *never* be brought before the Court. Instead, the justices determined that the case had been brought prematurely, based on concerns about events that had not yet occurred—and that might not ever occur.

In addition, the ripeness requirement mandates that a party exhaust all available administrative and lower court remedies before seeking review by the Supreme Court. Until these opportunities have been explored fully, the case is not ready for the justices to hear.

Political Questions. Another type of nonjusticiable suit involves what is deemed a political question. Chief Justice Marshall stated in *Marbury v. Madison*,

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

In other words, the Court recognizes that there is a class of questions the Court will not address because they are better solved by other branches of government, even though they may be constitutional in nature.

But what exactly constitutes a political question? In the case of ***Baker v. Carr*** (1962), Justice Brennan set out the following elements:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Note that Brennan's statement contains two major prongs. First, the Court will look to the Constitution to see if there is a "textually demonstrable commitment" to another branch of government. Does the Constitution explicitly reserve the resolution of a question to Congress or the president? Second, the justices consider whether particular questions should be left to another branch of government as a matter of prudence. This is where factors such as the lack of judicially discoverable standards, embarrassment, and so forth come into play.

Nixon v. United States (1993) provides an example of both. The case involved a federal judge who challenged the method the Senate used to try him, after the House had impeached him. There the Court held that impeachment procedures are not subject to judicial review because, first, Article I of the Constitution assigns the task of impeachment to Congress, and, second, judicial intrusion into impeachment proceedings could create confusion. Imagine the kinds of problems that would emerge if, say, U.S. presidents could challenge their impeachment in the federal courts. Would they still be president as their case made its way through the courts or would their successor be the president? This is not a scenario for which the Court wants to take responsibility.

While *Baker* established a relatively clear doctrinal base for determining political questions, the doctrine itself remains controversial. Some commentators say that the Court has a responsibility to address constitutional questions; that failure to do so is antithetic to *Marbury v. Madison*–type review. Others, however, suggest that the federal courts should continue to avoid cases raising political questions.[29] For their part, the justices have sometimes attempted to resolve an issue, only to conclude later that it has evaded the development of clear legal standards. Most recently, in *Rucho v. Common Cause* (2019) *(excerpted in Chapter 15)*, the Court ruled that the issue of drawing legislative districts for partisan advantage could not be resolved successfully by judges.

Standing to Sue

Another constraint on federal judicial power is the requirement that the party bringing a lawsuit have

[29]One illustration of this debate occurred in ***Zivotofsky v. Clinton*** (2012). At issue in this case was a dispute over whether the passport of a U.S. citizen born in Jerusalem could list "Jerusalem, Israel" as the place of birth rather than "Jerusalem." Under a State Department policy of long standing, the answer was no, only Jerusalem could be listed, but under a federal law the answer was yes. The lower courts dismissed the case, holding that it presented a nonjusticiable political question. They reasoned that Article II, which says that the president "shall receive ambassadors and other public ministers," gives the executive the exclusive power to recognize foreign sovereigns and that the exercise of that power cannot be reviewed by the courts. Eight of the nine justices disagreed, explaining that the political question doctrine is a "narrow exception" to the basic rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" In dissent, Justice Stephen Breyer argued that the Court should dismiss the case on political question grounds because of the "serious risk that intervention will bring about 'embarrassment,' show lack of 'respect' for the other branches, and potentially disrupt sound foreign policy decisionmaking."

"standing to sue." Many people care a great deal about issues that might come before the Court, but having an interest in an issue does not, by itself, enable one to go to court. If the party bringing the litigation is not the appropriate party, the courts will not resolve the dispute. For example, the Supreme Court has ruled that a divorced father does not have standing to claim that his school-age daughter's recitation of the words "under God" in the Pledge of Allegiance is an establishment of religion under the First Amendment. Since the mother had sole legal custody of her daughter after the divorce, the father had no basis for litigating on his child's behalf.[30]

According to the Court's interpretation of Article III, standing requires that (1) the party must have suffered a concrete injury or be in imminent danger of suffering such a loss; (2) the injury must be "fairly traceable" to the challenged action of the defendant (usually the government in constitutional cases); and (3) the party must show that a favorable court decision is likely to provide redress.[31] Failure to satisfy one of these conditions can prevent the justices from reaching the merits of a case. The Court refused to rule, for instance, on whether the state of Delaware could limit its judgeships to members of a major political party. In *Carney v. Adams* (2020), the justices decided that a political independent who claimed only that he was "ready and willing" to apply for a judicial vacancy had not suffered an actual injury; instead, he merely presented a more abstract complaint about the law. In general, these standing requirements are designed, as Justice Brennan noted in *Baker*, "to assure . . . concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."

In many disputes, the litigants have little difficulty meeting the standing requirements mandated by Article III. A citizen who has been denied the right to vote on the basis of race, a criminal defendant sentenced to death, and a church member jailed for religious proselytizing would have sufficient standing to challenge the federal or state laws that may have deprived them of their rights. But what about parties who wish to challenge a government action on the ground that they are taxpayers or that they care about the environment? Such claims raise important questions: Does the mere fact that one pays taxes provide a sufficient basis for standing? Does one's interest in the government's treatment of natural resources entitle a person to challenge environmental policy in court?

In general, the answer is no. In addition to the three constitutionally derived requirements, the Court has articulated several prudential considerations to govern standing. Among the most prominent are those that limit generalized grievance suits—mostly those brought by parties whose only injury is as taxpayers who want to prevent the government from spending money.[32]

Constraints on Judicial Power and the Separation of Powers System

The jurisdiction, justiciability, and standing requirements place considerable constraints on the exercise of judicial power. Yet, these doctrines come largely from the Court's own interpretation of Article III and its view of the proper role of the judiciary—the constraints are largely self-imposed. In *Ashwander v. Tennessee Valley Authority* (1936), Justice Louis D. Brandeis took the opportunity in a concurring opinion to provide a summary of the principles of judicial self-restraint as they pertain to constitutional interpretation *(see Box 2-2)*. His goal was to delineate a set of rules that the Court should follow to avoid unnecessarily reaching decisions on the constitutionality of laws. In the course of outlining these "avoidance principles," he considered many of the constraints on judicial decision making we have reviewed in this section. More to the point, these "*Ashwander* principles" serve as perhaps the best single statement of how the Court limits its own powers—and especially its exercise of judicial review.

It would be a mistake, however, to conclude that the use of judicial power is limited only by self-imposed constraints. Rather, members of the executive and legislative branches also have expectations concerning the appropriate limits of judicial authority. If the justices are perceived as exceeding their role by failing to restrain the use of their own powers, a reaction from the

[30] *Elk Grove Unified School Dist. v. Newdow* (2004).

[31] See, for example, *Lujan v. Defenders of Wildlife* (1992), which lays out these three elements. See also ***Raines v. Byrd*** (1997), which defines an injury relevant for redress from the Court as personal rather than institutional.

[32] The exception, based on the establishment clause, is quite narrow. See *Flast v. Cohen* (1968) and ***Hein v. Freedom from Religion Foundation, Inc.*** (2007).

BOX 2-2

Justice Brandeis, Concurring in *Ashwander v. Tennessee Valley Authority*

In 1936, Justice Louis D. Brandeis delineated, in a concurring opinion in *Ashwander v. Tennessee Valley Authority*, a set of Court-formulated rules to avoid unnecessarily reaching decisions on the constitutionality of laws. A portion of his opinion setting forth those rules, minus case citations and footnotes, follows:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."
2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."
3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.
5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. . . .
6. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."
7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

political branches may occur. Congress could pass statutes or propose constitutional amendments to counteract decisions of the Court. The legislature might also alter the Court's appellate jurisdiction or fail to provide the Court with its requested levels of funding; and the political branches might react by being slow to implement and enforce Court rulings. Even the mere threat of such actions can get the Court's attention. Finally, the president and the Senate could use their powers in the judicial selection process to fill Court vacancies