

THE SUPREME COURT AND THE CONSTITUTION

An Introduction to Rights and Liberties

1. UNDERSTANDING THE U.S. SUPREME COURT
2. THE JUDICIARY: INSTITUTIONAL POWERS AND CONSTRAINTS
3. INCORPORATION OF THE BILL OF RIGHTS

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AN INTRODUCTION TO RIGHTS AND LIBERTIES

TWO BUILDING BLOCKS undergird virtually every book on rights, liberties, and justice in the United States: the U.S. Supreme Court and the amendments to the U.S. Constitution. No matter the approach these books take, their purpose is to help you understand how the Court has interpreted the Bill of Rights and other amendments to the Constitution.

Constitutional Law for a Changing America is no different. Although we also develop some unique themes, including the legal, economic, and political factors that explain why the Court reaches the decisions it does, our primary goal is to provide the narrative and opinion excerpts necessary for you to develop a clear understanding of the Supreme Court's approach to the Constitution's provisions concerning rights, liberties, and justice.

We devote Part I of the book to the two building blocks. In what follows, we consider the events leading up to the drafting of the Bill of Rights and some of the debates over its adoption. Chapter 1 looks at the Court, examining the procedures it uses to decide cases and its approaches to decision making. In the two subsequent chapters, we begin to put the two building blocks together by considering how the Court has interpreted its own power (Chapter 2) and how it has analyzed the general nature and applicability of the Bill of Rights (Chapter 3).

THE ROAD TO THE BILL OF RIGHTS

Before the adoption of the Declaration of Independence, the Continental Congress selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of

each of the thirteen colonies, this committee proposed a national charter, the Articles of Confederation, which Congress approved and submitted to the states for ratification in November 1777. Ratification was achieved in March 1781.

The Articles of Confederation was the nation's first written charter, but it scarcely changed the way the government operated; instead, it merely formalized practices that had developed prior to 1774. For example, rather than provide for a compact between the people and the government, the charter institutionalized "a league of friendship" among the states, and its guiding principle was state sovereignty. Having just fought successfully for independence from what they perceived as "repeated injuries and usurpations" by a distant, overbearing government, they were naturally wary of concentrating power. This is not to suggest that the charter failed to provide for a central government; it created a national governing apparatus with a one-house legislature but no formal federal executive or judiciary. The legislature had some power, most notably in the area of foreign affairs, but it derived its authority from the states that had created it, not from the people.

This new government lacked some vital features of a national legislature—it could not impose taxes or regulate commercial activity, for example—and the weaknesses in the system soon became apparent. Thus, the Congress issued a call for a convention to meet in May 1787 in Philadelphia "for the sole and express purpose of revising the Articles of Confederation." Within a month, however, the fifty-five delegates had dramatically altered their mission. Viewing the articles as unworkable, they decided to start afresh. What emerged just four months later, on September 17, was an entirely new government scheme embodied in the U.S. Constitution.

A Call for Explicit Limits

The framers were quite pleased with their handiwork; when the convention concluded, they “adjourned to City Tavern, dined together and took cordial leave of each other.”¹ Most of the delegates were more than ready to go home after the long, hot summer in Philadelphia, and they departed with confidence that the new document would receive speedy approval by the states. At first, their optimism appeared justified. As Table I-1 depicts, between December 7, 1787, and January 8, 1788, five states ratified the Constitution—three by unanimous votes. But after that auspicious beginning, the drive lost momentum. An opposition movement was marshaling arguments to persuade state convention delegates to vote against ratification. What these opponents, the Anti-Federalists, feared most was the Constitution’s new balance of power. They believed that strong state governments provided the best defense against an inordinate concentration of power in the national government. The Constitution, they believed, tipped the scales too far in favor of federal authority.

These fears were countered by the Federalists, who favored ratification. The Federalists’ arguments and writings took many forms, but among the most important was a series of eighty-five articles published in New York newspapers under the pen name “Publius.” Written by John Jay, James Madison, and Alexander Hamilton, *The Federalist Papers* continue to provide insight into the objectives and intent of the founders.²

Debates between the Federalists and their opponents were often highly philosophical, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were marked by the stuff of ordinary politics—deal making. Massachusetts provides a case in point. After three weeks of debate among delegates, Federalist leaders there realized that they would never achieve victory without the support of Governor John Hancock. They went to his house and proposed that he endorse ratification on the condition that a series of amendments be tacked on for consideration by Congress. The governor agreed, but in return he wanted to become president of the United States if Virginia failed to ratify or George Washington refused to serve. Or he would accept the vice presidency.

With the deal cut, Hancock went to the state convention to propose a compromise—the ratification of the Constitution with amendments. The delegates agreed, and Massachusetts became the sixth state to ratify.³

This compromise—the call for a bill of rights—caught on, and the Federalists began to advocate it wherever close votes were likely. As it turned out, they needed to do so quite often. As Table I-1 indicates, of the eight states ratifying after January 1788, seven recommended that the new Congress consider amendments. New York and Virginia probably would not have agreed to the Constitution without such additions, and Virginia even called for a second constitutional convention for that purpose. Other states began devising their own wish lists—enumerations of particular rights they wanted put into the document.

Whatever their specific interests might have been, most were in general agreement with Thomas Jefferson, who in a letter to Madison noted that, while “I like much the general idea of framing a government which should go on of itself peaceably,” he remained uneasy because of the absence of explicit limits on the power of the national government. He argued “a bill of rights is what the people are entitled to against every government on earth, general and particular, and what no just government should refuse, or rest on inference.” What Jefferson’s remark suggests is that although many people thought well of the new system of government, they were troubled by the lack of a declaration of rights. At the time, Americans clearly understood concepts of *fundamental* and *inalienable* rights. They shared the views expressed by the English philosopher John Locke, who believed that government did not grant rights; instead, there were natural rights, those that inherently belonged to individuals and that no government could deny. Even England, the country they fought to gain their freedom, had such guarantees. The Magna Carta of 1215 and the Bill of Rights of 1689 gave Britons the right to a jury trial, to protection against cruel and unusual punishments, and so forth. Moreover, after the American Revolution, almost every state constitution included a philosophical statement about the relationship between citizens and their government or a list of fifteen to twenty inalienable rights, such as religious freedom and electoral independence, or both. Small wonder that the call for such a statement or enumeration of rights became a battle cry. If the desire was so widespread, why did the framers fail

¹1787, compiled by historians of the Independence National Historical Park (New York: Exeter Books, 1987), 191.

²*The Federalist Papers* are available at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

³J. T. Keenan, *The Constitution of the United States: An Unfolding Story*, 2nd ed. (Chicago: Dorsey Press, 1988).

Table I-1 The Ratification of the Constitution

State	Date of Action	Decision	Vote
Delaware	December 7, 1787	Ratified	30–0
Pennsylvania	December 12, 1787	Ratified	46–23
New Jersey	December 18, 1787	Ratified	38–0
Georgia	January 2, 1788	Ratified	26–0
Connecticut	January 8, 1788	Ratified	128–40
Massachusetts	February 6, 1788	Ratified with amendments	187–168
Maryland	April 28, 1788	Ratified	63–11
South Carolina	May 23, 1788	Ratified with amendments	149–73
New Hampshire	June 21, 1788	Ratified with amendments	57–46
Virginia	June 26, 1788	Ratified with amendments	89–79
New York	July 26, 1788	Ratified with amendments	30–27
North Carolina	August 4, 1788	Rejected	75–193
	November 21, 1789	Ratified with amendments	194–77
Rhode Island	May 29, 1790	Ratified with amendments	34–32

Sources: Ratifying documents in the Avalon Project at Yale Law School (http://avalon.law.yale.edu/subject_menus/constpap.asp); Ralph Mitchell, *CQ's Guide to the U.S. Constitution*, 2nd ed. (Washington, DC: Congressional Quarterly, 1994), 28–30.

to include a bill of rights in the original document? Did they not anticipate the reaction?

Records of the 1787 constitutional debates indicate that, in fact, the delegates to the Constitutional Convention considered specific individual guarantees on at least four separate occasions.⁴ On August 20, Charles Pinckney submitted a proposal that included several guarantees, such as freedom of the press and the eradication of religious tests, but the various committees never considered his plan. On September 12, 14, and 16, just before the close of the convention, some delegates tried, again without success, to persuade the convention to enumerate specific guarantees. At one point, the Virginian George Mason—author of his own state's Declaration of Rights—said that a bill of rights “would give great quiet

to the people; and with the aid of the state delegations, a bill might be prepared in a few hours.” This motion was defeated unanimously by those remaining in attendance. On the convention's last day, Edmund Randolph made a desperate plea that the delegates allow the states to submit amendments and then convene a second convention. Although he favored a bill of rights, Pinckney responded, “Conventions are serious things, and ought not to be repeated.”

Why the majority of delegates showed little enthusiasm for these suggestions is a matter of debate. Some scholars say the pleas came too late, that the Constitution's framers wanted to complete their mission by September 15 and were simply unwilling to stay in Philadelphia any longer. Others disagree, arguing that the framers were more concerned with the structure of government than with individual rights and that the plan they devised—one based on enumerated, not unlimited, powers—would foreclose the need for a bill of rights. As Hamilton wrote, “The Constitution is

⁴The following information comes from Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, MN: Thomson/West, 2005), 316–317. This book reprints verbatim debates over the Constitution and the Bill of Rights.

itself . . . a BILL OF RIGHTS.”⁵ Under it the federal government could exercise only those functions specifically bestowed upon it; all remaining rights belonged to the people. Stated differently, by explicitly enumerating what the national government *could* do, the Constitution implicitly stated what it *could not*. Likewise, Hamilton pointed out that the Constitution did, in fact, contain some important limits on national power.⁶ For example, Article I, Section 9, prohibits bills of attainder, ex post facto laws, and the suspension of writs of habeas corpus.

Drafting and Ratifying

In the end, political reality caused many Federalists to change their views on including a bill of rights. They realized that if they did not accede to state demands, either the Constitution would not be ratified or a new convention would be necessary. Because neither alternative was particularly attractive, they agreed to amend the Constitution as soon as the new government came into power.

In May 1789, one month after the start of the First Congress, Madison announced to the House of Representatives that he would draft a bill of rights and submit it within the coming month. As it turned out, the task proved more difficult than Madison had anticipated; the state conventions had suggested to Congress more than two hundred amendments, some of which would have significantly decreased the power of the national government. After sifting through these lists, Madison at first thought it might be best to incorporate the amendments into the Constitution’s text, but he soon changed his mind. Instead, he presented the House with the following statement, echoing the views expressed in the Declaration of Independence: “That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.”⁷

The legislators rejected this proposal, preferring a catalogue of rights rather than a general statement. Madison returned to his task, eventually fashioning a list of seventeen amendments. When he took it back to the House, however, the list was greeted with suspicion and

opposition. Some members of Congress, even those who had argued for a bill of rights, now did not want to be bothered with the proposals, insisting that they had more important business to settle. One suggested that other nations would not see the United States “as a serious trading partner as it was still tinkering with its constitution instead of organizing its government.”⁸ Finally, in July 1789, after Madison had prodded and even begged, the House considered his proposals. A special committee scrutinized them and reported a few days later; and the House adopted, with some modification, Madison’s seventeen amendments. The Senate approved some and rejected others, so that by the time the Bill of Rights was submitted to the states on October 2, only twelve remained.⁹

Over the next two years, state legislatures considered the list of proposed amendments, ultimately ratifying ten of the twelve.¹⁰ On December 15, 1791, when Virginia’s ratification provided the necessary three-fourths support from the states, the Bill of Rights became part of the U.S. Constitution.

THE AMENDMENT PROCESS

It is remarkable that Congress proposed and the states ratified ten amendments to the Constitution in three years: since then, only seventeen others have been added. Such reticence would have pleased at least some of the Constitution’s drafters. They wanted to create a government that would have permanence; they wanted a system that would resist easy alteration. At the same time, they recognized the need for flexibility; they were well aware that one of the major limitations of the Articles of Confederation was its amending process, which required the unanimous approval of all thirteen states. The Philadelphia Convention imagined an

⁵Quoted in Farber and Sherry, *American Constitution*, 330.

⁹Among those rejected was the one Madison “prized above all others”: that the states would have to abide by many of the enumerated guarantees. See Chapter 3 on incorporation of the Bill of Rights.

¹⁰ The amendments that did not receive approval were the original Articles I and II. Article I dealt with the number of representatives in relation to state population. Article II prohibited changes in congressional salary from taking effect until after an election. Why the states originally refused to pass these amendments is something of a mystery, for few records of state ratification proceedings exist. Interestingly, the second proposal was ratified in 1992, more than two hundred years after it was first proposed, and it became the Twenty-seventh Amendment to the U.S. Constitution.

⁵*The Federalist Papers*, No. 84.

⁶*Ibid.*

⁷The full text of Madison’s statement is available in Neil H. Cogan, *Contexts of the Constitution: A Documentary Collection on Principles of American Constitutional Law* (New York: Foundation Press, 1999), 813–815.

amending procedure that would be “bendable but not trendable, tough but not insurmountable, responsive to genuine waves of popular desire, yet impervious to self-serving campaigns of factional groups.”¹¹

The specific mechanism they established in Article V was a two-stage process (*Table I-2*). Proposing a constitutional amendment is the first step. This may be done either by a two-thirds vote of both houses of Congress or by two-thirds of the states petitioning for a constitutional convention. To date, all proposed constitutional amendments have been the product of congressional action. A second constitutional convention has never been called.¹² The second step is ratification. Here, too, the framers offered two options. Proposed amendments may be ratified by three-fourths of the state legislatures or by three-fourths of special state ratifying conventions. Only the Twenty-first Amendment, which repealed Prohibition, was ratified by state conventions. The required number of state legislatures ratified all the others.

Responding to various political pressures, members of Congress have since proposed all manner of amendments—more than 11,000, in fact—but only thirty-three have been sent to the states for ratification.¹³ Twenty-seven were ratified; six were not, including the child labor amendment (proposed in 1924), which would have prohibited the “labor of persons under eighteen years of age,” and the equal rights amendment (ERA; proposed in 1972), which stated that “equality of rights under law shall not be denied or abridged by the United States or any State on account of sex.” In both instances, an insufficient number of states agreed to their ratification.¹⁴ Suggestions for new constitutional amendments, not surprisingly, continue to be advanced. In 2019, for

Table I-2 Methods of Amending the Constitution

Proposed by	Ratified by	Used for
Two-thirds vote in both houses of Congress	State legislatures in three-fourths of the states	Twenty-six amendments
Two-thirds vote in both houses of Congress	Ratifying conventions in three-fourths of the states	Twenty-first Amendment
Constitutional convention (called at the request of two-thirds of the states)	State legislatures in three-fourths of the states	Never used
Constitutional convention (called at the request of two-thirds of the states)	Ratifying conventions in three-fourths of the states	Never used

example, a U.S. senator proposed to abolish the Electoral College and allow for the direct popular election of the president. That same year, members of the House introduced amendments to prohibit the desecration of the American flag, to fix the size of the Supreme Court at nine justices, and to declare that “[t]he President shall have no power to grant to himself a reprieve or pardon for an offense against the United States.”

Unlike the Congress, the President and the Supreme Court are not participants in the process, but they can certainly have an influence. Presidents often instigate and support proposals for constitutional amendments. Indeed, from George Washington to Donald Trump, virtually every chief executive has wanted some alteration to the Constitution. In his first inaugural address, George Washington urged the adoption of a bill of rights. More than two hundred years later, presidents continue to call for the ratification of amendments. During his presidency, George W. Bush, in response to state court rulings allowing same-sex marriages, endorsed the Federal Marriage Amendment; his successor, Barack Obama, stated his opposition to any proposal to ban gays and

¹¹Keenan, *The Constitution of the United States*, 41.

¹²Still, attempts to call a constitutional convention have been made. Perhaps the most widely reported was the effort by Everett Dirksen, R-Ill. (Senate, 1951–1969), to convince the states to request a national convention for the purpose of overturning *Reynolds v. Sims*, the Supreme Court’s 1964 reapportionment decision. He failed, by one state, to do so. Another attempt by the states to initiate constitutional change is a proposed amendment to require a balanced federal budget. This effort remains stalled with six more states required to call a convention.

¹³U.S. Senate, “Measures Proposed to Amend the Constitution,” <https://www.cop.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>.

¹⁴See Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation* (Washington, DC: U.S. Government Printing Office, 2017), 49–51.

lesbians from marrying; and during his campaign, Donald Trump stated his support for an amendment limiting the terms of members of Congress.

In other instances, presidential politics have led to amendments. Prior to the presidential election of 1804, members of the Electoral College cast two votes, and the first- and second-place finishers became president and vice president, respectively. In 1796, that process resulted in John Adams, the candidate of the Federalist Party, being chosen as president and his opposition, the Democratic-Republican's Thomas Jefferson, being selected as his vice president. Four years later, that same procedure resulted in a tie that was broken by the House of Representatives in favor of Thomas Jefferson—after thirty-five votes. The Twelfth Amendment sought to avoid these complications by requiring electors to cast one vote for president and one for vice president. Similarly, after Franklin D. Roosevelt was elected to an unprecedented fourth term in 1944—and died shortly after his last inauguration—Congress introduced what became the Twenty-second Amendment, limiting presidential tenure to two terms.

For its part, the Supreme Court has tried to avoid being drawn into legal disputes about the amendment process; in *Coleman v. Miller* (1939) and *NOW v. Idabo* (1982) the justices sidestepped such questions.¹⁵ By contrast, the Court has played a role as an instigator of constitutional amendments. The Court's interpretation of laws enacted by Congress can be easily overcome by the passage of new legislation, but that is not the case when the justices interpret the meaning of the Constitution. Short of the justices changing their minds—or their replacement with new justices of a different mindset—the only way to overturn the Court's interpretation of the Constitution is by amending the Constitution itself. Occasionally, the Court's constitutional decisions have been sufficiently out of step with public preferences that they have resulted in amendments that overturned those decisions (see Table 1–3). Some of these amendments—prohibiting federal lawsuits against states by citizens of another state or guaranteeing eighteen-year-olds the right to vote, for example—were aimed specifically at overturning a decision of the justices. Others, like the Civil War Amendments, were not designed uniquely to reverse the Court but achieved that result, nonetheless.

¹⁵ Boldface type indicates that the opinions in the case can be found in the online archive at <https://edge.sagepub.com/conlaw>. For a complete list of cases in the archive, see the Online Case Archive Index in Appendix 4 of this volume.

Given the unpopularity of a number of the modern Court's rulings, there are continued campaigns within the halls of Congress to overturn some of the justices' more controversial policies. Congress has considered a number of proposed amendments, all of which target Court decisions: a human life amendment that would make abortion illegal, in response to *Roe v. Wade* (1973); a school prayer amendment that would allow students in public schools to engage in prayer, in response to *Engel v. Vitale* (1962) and *School District of Abington Township v. Schempp* (1963); a flag desecration amendment that would prohibit mutilation of the American flag, in response to *Texas v. Johnson* (1989); and a term limits amendment, to overturn the Supreme Court's ruling in *U.S. Term Limits v. Thornton* (1995). Proposals to ban same-sex marriage also came in response to several Supreme Court decisions.

CONSTITUTIONAL CHANGE AND THE SUPREME COURT

Quite apart from amending the nation's fundamental law, the meaning of the Constitution can also be changed through interpretation by the justices. As Chief Justice John Marshall famously noted, "It is emphatically the province and duty of the judicial department to say what the law is." When the justices issue decisions about the meaning of the Constitution, that is precisely what they are doing. Thus, when those decisions change, so too does the Constitution.

Part of what makes the Court's changing interpretations possible is the general language in which much of the Constitution is written. In a sense, the document contains more principles and structures than it does rules and procedures. One indicator of its lack of specificity is its length. The United States has one of the world's shorter constitutions, at less than 8,000 words. The constitutions of Australia, Canada, and Ireland are twice as long. Germany has a constitution that is four times the length of its U.S. counterpart, and Mexico's is seven times longer. Even a casual inspection of the U.S. Constitution reveals that it contains provisions that can be reasonably understood in multiple ways. True, some language—such as the requirement that the president be thirty-five years old or the provision that senators serve six-year terms—is not open to widely varying interpretations, but the meaning of other elements is not as obvious. For instance, phrases such as "necessary and proper," "due process of law," "establishment of

Table I-3 Five Amendments That Overturned Supreme Court Decisions

Amendment	Date Ratified	Supreme Court Decision Overturned
Eleventh	February 7, 1795	<i>Chisholm v. Georgia</i> (1793). In its first major decision, the Court authorized citizens of one state to sue another state in the Supreme Court. The decision angered advocates of states' rights.
Thirteenth	December 6, 1865	<i>Scott v. Sandford</i> (1857). The Court ruled that slaves are property with which Congress may not interfere and that neither slaves nor their descendants are citizens under the Constitution. Ratified in the wake of the Civil War, the Thirteenth and Fourteenth Amendments rectified the Court's decision.
Fourteenth	July 9, 1868	<i>Scott v. Sandford</i> (1857)
Sixteenth	February 3, 1913	<i>Pollock v. Farmers' Loan and Trust Co.</i> (1895). The Court declared the federal income tax unconstitutional, occasioning the adoption of the Sixteenth Amendment eighteen years later.
Nineteenth	August 18, 1920	<i>Minor v. Happersett</i> (1875). The Court held that, because the right to vote was not among the "privileges or immunities" of U.S. citizenship protected against state infringement by the Fourteenth Amendment, states could limit the right to vote to men. The continued efforts of the women's suffrage movement eventually led to the passage of the Nineteenth Amendment.
Twenty-sixth	July 1, 1971	<i>Oregon v. Mitchell</i> (1970). The Court ruled that Congress has the power to lower the voting age to eighteen only for federal, not state and local, elections. At a period when eighteen-year-olds were drafted to serve in the Vietnam War, Congress quickly responded to <i>Mitchell</i> , proposing the Twenty-sixth Amendment in March 1971.

Source: Adapted 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 1–1 and 7–1.

religion,” and “unreasonable searches and seizures” have quite open-ended meanings. Since there are not straightforward answers to questions about how to apply such words to specific cases, their meaning, as understood by the justices, has changed over time.

Consider, for example, the Supreme Court’s interpretation of the First Amendment’s protection of freedom of speech. In *Austin v. Michigan v. Chamber of Commerce* (1990), the justices ruled that prohibiting corporations from using their general treasury funds to engage in political expression did not violate the freedom of expression. Twenty years later in *Citizens United v. Federal Election Commission* (2010), the Court overruled *Austin*, holding that the First Amendment protected political speech by corporations. Or take the Fourteenth

Amendment, which guarantees that states cannot “deprive any person of life, liberty, or property, without due process of law.” Among the issues relating to that clause is the meaning of the word *liberty*. Exactly what freedom does it protect against arbitrary governmental interference? In *Bowers v. Hardwick* (1986), the justices were asked whether that liberty included the freedom of homosexuals to engage in sexual activity, and they ruled that it did not; states were free to outlaw such behavior. That decision was abandoned in *Lawrence v. Texas* (2003), when the Court ruled that the liberty in the Fourteenth Amendment protected the right of both heterosexuals and homosexuals to engage in consensual intimate conduct. Finally, examine the Court’s evolving interpretation of the Eighth Amendment’s language prohibiting “cruel

and unusual punishments.” Does it mean that states are forbidden from imposing the death penalty on offenders under the age of eighteen? In 1989, the answer provided in *Stanford v. Kentucky* was no. But in 2005, the answer given in *Roper v. Simmons* was yes.

What changed in the periods between these various sets of cases? Not the text of the Constitution; it was instead how the members of the Court interpreted its words. By reconsidering how to interpret the First, Eighth, and Fourteenth Amendments, the Supreme Court effectively altered the meaning of the Constitution. And these examples are hardly unique. In dozens of cases across the Court’s history, the justices have created this type of constitutional change. Indeed, some of them are discussed in subsequent chapters.

One of the first we will address is the subject of Chapter 3, the Court’s policy of requiring the states to

abide by the U.S. Bill of Rights. Those explicit limitations were meant to safeguard personal freedoms against tyranny by the *federal* government—the First Amendment, for example, states that “Congress shall make no law . . . abridging the freedom of speech”—but not long after the Bill of Rights was adopted, there were legal efforts to compel *state* governments to adhere to it, as well. For more than one hundred years, the Supreme Court resisted those efforts before it began to apply those guarantees to the states as well. Consequently, there has been a considerable alteration in the nature of national-state relations and an expansion of the constitutional protection of liberties. The importance of these changes should not be underestimated: redrawing the scope of liberties protected by the Constitution—a product of doctrinal shifts on the Supreme Court—has resulted in most of the cases you will read in this book.

UNDERSTANDING THE U.S. SUPREME COURT

THIS BOOK IS DEVOTED to providing an overview of how the U.S. Supreme Court has interpreted the Constitution. It is organized around a discussion of the principal issues that the justices have confronted, with a primary focus on the text of the Court's opinions. Making sense of these opinions often requires a blend of different types of knowledge; depending on the case, an understanding of some leading legal concepts, an awareness of history, a grasp of the mechanics of deliberative government, an appreciation of social conditions, and some familiarity with principles of economics can each offer insight into the justices' constitutional choices. One constant across all 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 2019 term,¹⁶ a total of 5,411 cases arrived at the Supreme Court's doorstep, but the justices decided only 53 with signed opinions.¹⁷ 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

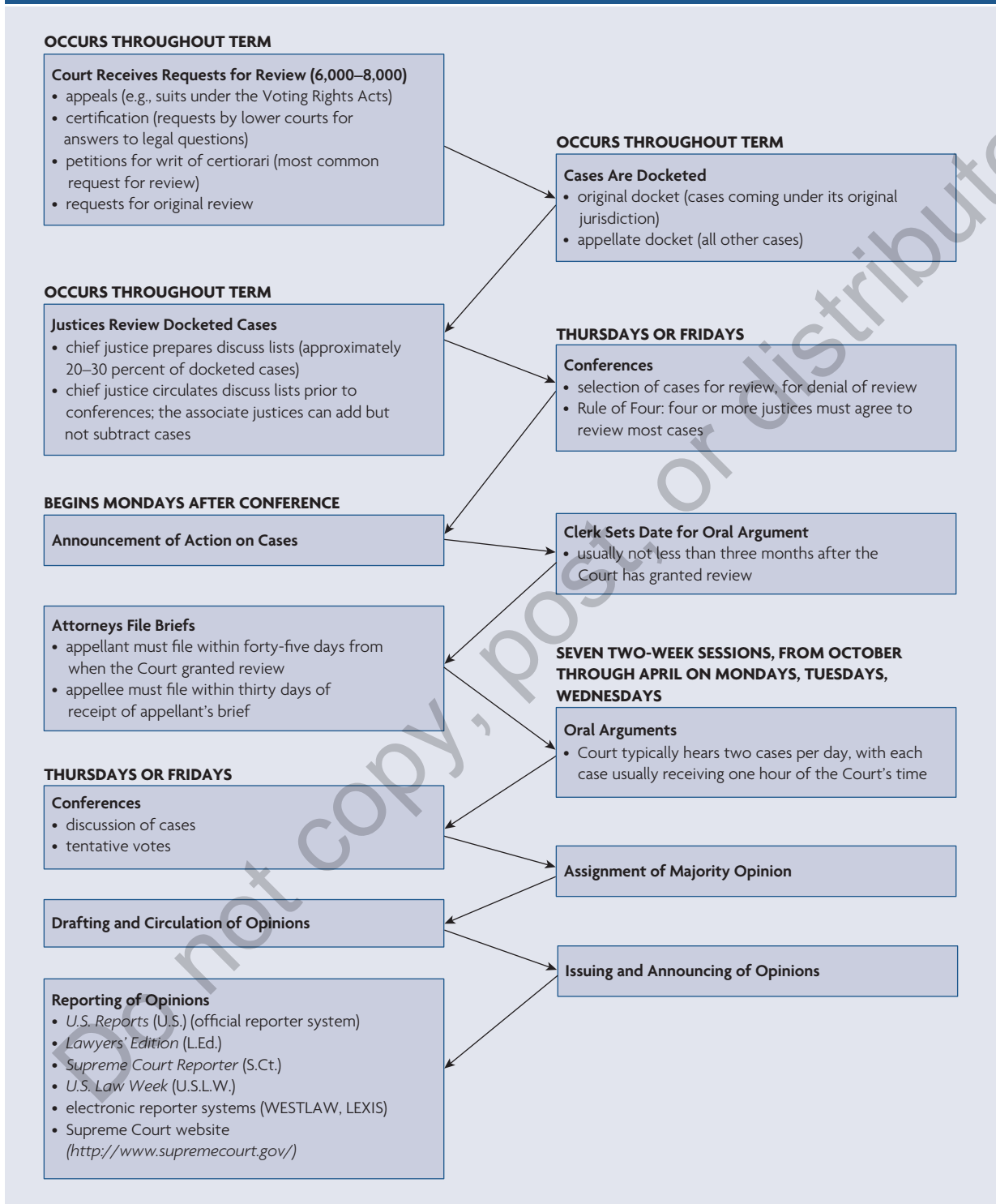
As the figures for the 2019 term indicate, the Court heard and decided slightly less than 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth 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 1930.¹⁸

¹⁶Because 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.

¹⁷Chief Justice John G. Roberts Jr., "2020 Year-End Report on the Federal Judiciary," <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf>.

¹⁸Data 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.

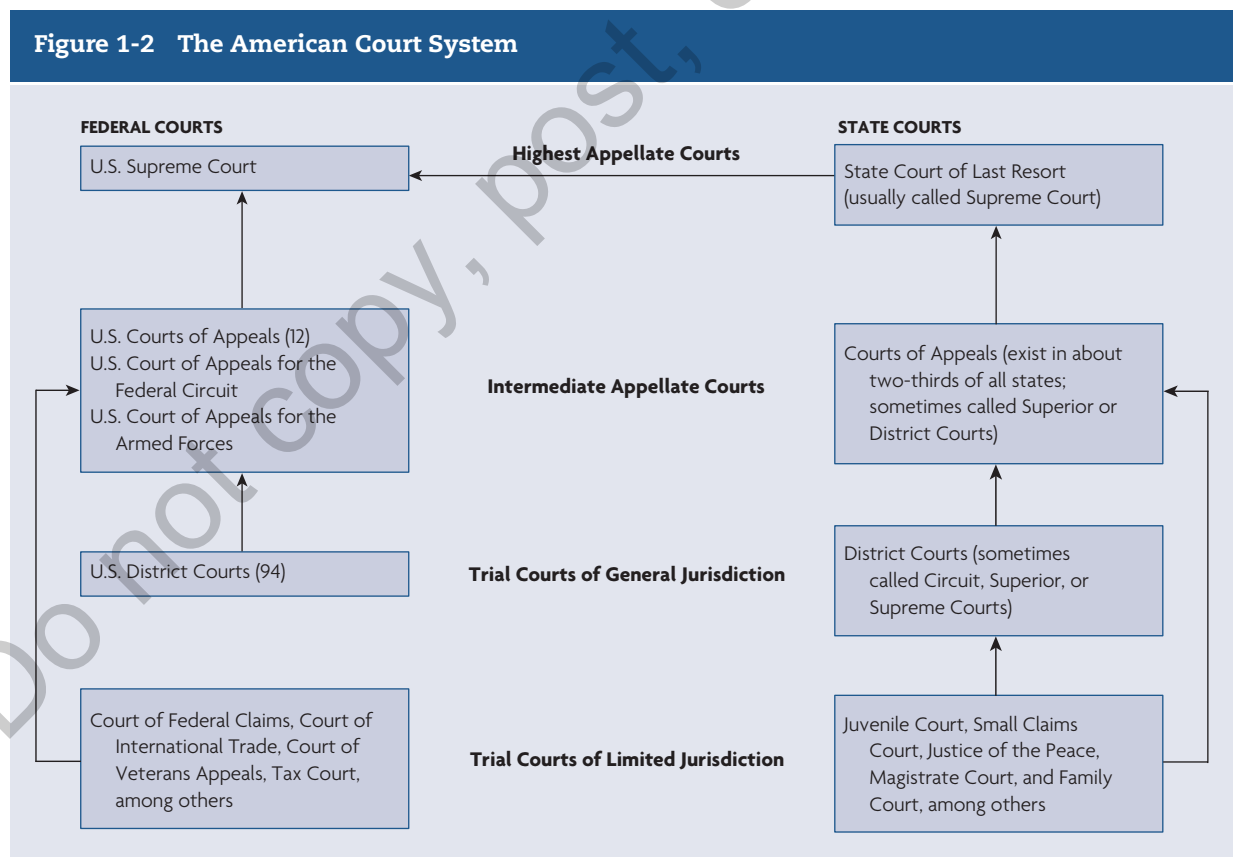
So, how cases get to the Supreme Court, how the justices select from among them, and what factors affect their choices are matters of some importance. In fact, they are fundamental to an understanding of judicial decision making and the role of the Court in American society.

How Cases Get to the Court: Jurisdiction and the Routes of Appeal. Cases come to the Court in one of four ways: either by a request for review under the Court’s original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (see Figure 1-2). 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



Source: Compiled by authors.

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

A second, but rarely used, route to the Court is certification. Under the Court’s appellate jurisdiction and by an act of Congress, lower appellate courts can file writs of certification asking the justices to respond to questions aimed at clarifying federal law. Because only judges may use this route, very few cases come to the Court this way. 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 six to eight thousand 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 70 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 conforms to the Court’s precise rules. Briefs must be “prepared in a 6[1/8]-by-9[1/4]-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines.” Exceptions are made for litigants who cannot afford to pay the Court’s administrative fees, currently \$300. The rules governing these petitions, known as *in forma pauperis* briefs, are somewhat looser, allowing indigents to submit briefs on 8[1/2]-by-11-inch paper. The Court’s major concern, or so it seems, is that the document “be legible.”¹⁹

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 (2020), 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.²⁰ 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 for making their own independent

¹⁹Rules 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/2019RulesoftheCourt.pdf>.

²⁰Supreme 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.					✓						✓				

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

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.

determinations about which cases they believe are worthy of a full hearing.

During this process, the chief justice plays a special role, serving as yet another checkpoint on petitions. Before the justices meet to make case selection decisions—which they do on Fridays when the Court is in session—the chief circulates a “discuss list” containing those cases he or she feels merit consideration; any justice may add cases to this list but may not remove any. About 20 to 30 percent of the cases that come to the Court make it to the list and are discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.²¹

This much we know. Because only the justices attend the Court’s conferences, we cannot say precisely what transpires. We can offer only a rough picture based on scholarly writings, the comments of justices, and our examination of the private papers of a few retired justices. These sources tell us that the discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating his vote. The associate justices, who sit at a rectangular table in order of seniority, then comment on each petition, with the most

senior justice speaking first and the newest member last. As Figure 1-3 shows, the justices record the certiorari votes—and, for cases they agree to decide on the merits, their subsequent votes on the outcome—in their personal records, called docket books. But, given the large number of petitions, the justices apparently discuss few cases in detail.

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

Considerations Affecting Case Selection Decisions.

The process described here is how the Court considers petitions, but why do the justices make the decisions that they do? Scholars have developed several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.²²

Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari

²¹For 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.

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.²³

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.²⁴ 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 too many.²⁵

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

²²Some 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.

²³Rule 10 also stresses the Court’s interest in resolving “important” federal questions.

²⁴See 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.

²⁵See Lawrence Baum, *The Supreme Court*, 13th ed. (Washington, DC: CQ Press, 2019), 99.

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.”²⁶

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.²⁷ 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.

What can we make of these findings? Most important is this: the justices may not be strongly influenced by the arguments contained in these briefs (If they were, why would *amicus* briefs opposing certiorari have the opposite effect?), but they seem to use them as cues. In other words, 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

²⁶Ryan 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.

²⁷Caldeira and Wright, “Organized Interests and Agenda Setting”; and Ryan C. Black and Ryan J. Owens, “Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence,” *Journal of Politics* 71 (2009): 1062–1075.

BOX 1-1

The Amicus Curiae Brief

The amicus curiae practice probably originates in Roman law. A judge would often appoint a consilium (officer of the court) to advise him on points where the judge was in doubt. That may be why the term *amicus curiae* translates from the Latin as “friend of the court.” But today it is the rare amicus who is a friend of the court. Instead, contemporary briefs almost always are a friend of a party, supporting one side over the other at the certiorari and merits stages. Consider one of the briefs filed in *United States v. Windsor* (2013), the cover of which is reprinted here. In that case, the American Psychological Association and other organizations filed in support of Edith Windsor. They, along with Windsor,

asked the Court to invalidate the Defense of Marriage Act (DOMA), which defined marriage under federal law as a “legal union between one man and one woman.” These groups were anything but neutral participants.

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

No. 12–307
In The
Supreme Court of the United States
UNITED STATES OF AMERICA, *Petitioner*
—v.—
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF
THE ESTATE OF THEA CLARA SPYER, ET AL.,
On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit
BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS,
THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN
PSYCHOANALYTIC ASSOCIATION, THE CALIFORNIA MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS AND ITS NEW YORK CITY AND STATE CHAPTERS, AND THE NEW YORK STATE
PSYCHOLOGICAL ASSOCIATION AS AMICI CURIAE ON THE MERITS IN SUPPORT OF AFFIRMANCE
NATHALIE F.P. GILFOYLE AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E. Washington, DC 20002
WILLIAM F. SHEEHAN *Counsel of Record* ANDREW HUDSONGOODWIN | PROCTER LLP
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Counsel for Amici Curiae

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.”²⁸

The Role of Attorneys

Once the Supreme Court agrees to decide a case, the clerk of the Court informs the parties. The parties present their sides 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 15,000 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.²⁹

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 to field questions from the justices, though sometimes the Court makes small exceptions to this rule. In the 2011 term, it made a particularly big one, hearing six hours of oral argument, over three days, on the Patient Protection and Affordable Care Act (also known as “Obamacare”), the health care law passed in 2010. This was unprecedented in the modern era, but not in the Court’s early years. In the past, because attorneys did

²⁸Quoted in H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991), 200.

²⁹Pamela C. Corley, “The Supreme Court and Opinion Content: The Influence of Parties’ Briefs,” *Political Research Quarterly* 61 (2008): 468–478.

not always prepare written briefs, the justices relied on oral arguments to learn about the cases and to help them marshal their arguments for the next stage. Orals were considered important public events, opportunities to see the most prominent attorneys of the day at work. Arguments often went on for days: *Gibbons v. Ogden* (1824), the landmark commerce clause case, was argued for five days, and *McCulloch v. Maryland* (1819), the litigation challenging the constitutionality of the national bank, took nine days to argue.

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

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

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

WHITE: What is your constitutional position there?

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

WHITE: Why? Why is that?

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

WHITE: Emotional response by whom?

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

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

WEDDINGTON: I would say constitutional—

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

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

In the Court's early years, there was little doubt about the importance of such exchanges, and of oral arguments in general, because, as noted earlier, the justices did not always have the benefit of written briefs. Today, however, some observers have questioned the effectiveness of oral arguments and their role in decision making. Chief Justice Earl Warren contended that they made little difference to the outcome. Once the justices have read the briefs and studied related cases, most have relatively firm views on how the case should be decided, and so these arguments change few minds. Justice William J. Brennan Jr., however, maintained that they are extremely important because they help justices to clarify core arguments. Recent scholarly work seems to come down on Brennan's side. According to a study by Timothy Johnson and his colleagues, the justices are more likely to vote for the side that performs more effectively at oral argument. Along somewhat different lines, a study by Epstein, Landes, and Posner shows that orals may be a good predictor of the Court's final votes: the side that receives more questions tends to lose.³⁰ One possible explanation is that the justices use oral argument as a way to express their opinions and attempt to influence their colleagues because formal deliberation (described below) is often limited and highly structured.

Even if oral arguments turn out to have little effect on the justices' decisions, we should not forget their symbolic importance: they are the only part of the Court's decision-making process that occurs in public and that you now have the opportunity to hear. Political scientist

³⁰Timothy 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.

Jerry Goldman has made the oral arguments of many cases available online at www.oyez.org. Throughout this book, you will find references to this website, indicating that you can listen to the arguments in the case you are reading.

The Supreme Court Decides: Some Preliminaries

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

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

The system works so well that, with only a few exceptions, the justices have not experienced information leaks—at least not prior to the public announcement of a decision. After that, 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 a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice John G. Roberts

Jr. initially voted to join the Court's four conservative justices to strike down the law but later changed his vote to join the four liberals to uphold it.³¹

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

The level and intensity of discussion, as the justices' notes from conference deliberations reveal, differ from case to case. In some, it appears that the justices had very little to say. The chief presented his views, and the rest noted their agreement. In others, every Court member had something to add. Whether the discussion is subdued or lively, it is unclear to what extent conferences affect the final decisions. It would be unusual for a justice to enter the conference room without having reached a tentative position on the cases to be discussed; after all, he or she has read the briefs and listened to oral arguments. But the conference, in addition to oral arguments, provides an opportunity for the justices to size up the positions of their colleagues. This sort of information, as we shall see, may be important as the justices begin the process of crafting and circulating opinions.

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

In making these assignments, the chief justice (or the senior associate in the majority) takes a number of

³¹Jan 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/>.

factors into account.³² First and perhaps foremost, the chief tries to equalize the distribution of the Court's workload. This makes sense: the Court will not run efficiently, given the burdensome nature of opinion writing, if some justices are given many more assignments than others. The chief may also consider the justices' particular areas of expertise, recognizing that some justices are more knowledgeable than others about particular areas of the law. By encouraging specialization, the chief may also be trying to increase the quality of opinions and reduce the time required to write them.

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of *Brown v. Board of Education* (1954), and Roberts did the same in the health care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, "[T]here are occasions when an opinion should carry extra weight which pronouncement by the Chief Justice gives."³³ 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. 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

³²See, 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.

³³Felix Frankfurter, "The Administrative Side of Chief Justice Hughes," *Harvard Law Review* 63 (1949): 4.

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."³⁴

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 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

³⁴Memorandum from Justice Brennan to Justice White, December 9, 1976, re: 75–104, *United Jewish Organizations of Williamsburg v. Carey*.

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.³⁵ 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 is that some scholars express agreement with the justices, arguing that Court members cannot follow their own personal preferences, the whims of the public, or other non-legally relevant factors “if they are to have the continued respect of their colleagues, the wider legal community, citizens, and leaders.” Rather, they “must be principled in their decision-making process.”³⁶

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.³⁷ 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 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 intent 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

³⁵Lee 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).

³⁶Ronald 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.

³⁷For 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
<p>Originalism <i>Original Intent.</i> Asks what the framers wanted to do.</p>	<p>“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.”</p>
<p><i>Original Meaning.</i> Considers what a clause meant (or how it was understood) to those who enacted it.</p>	<p>“‘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.”</p>
<p>Textualism. Places emphasis on what the Constitution says.</p>	<p>“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.”</p>
<p>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.</p>	<p>“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.”</p>
<p>Stare Decisis. Looks to what courts have written about the clause.</p>	<p>“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.”</p>
<p>Pragmatism. Considers the effect of various interpretations, suggesting that courts should adopt the one that avoids bad consequences.</p>	<p>“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.”</p>
<p>Polling Other Jurisdictions. Examines practices in the United States and even abroad.</p>	<p>“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.”</p>

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*.

taxation.”³⁸ 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.³⁹ 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.”⁴⁰

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.⁴¹ Consider speech advocating the violent overthrow of the government. Suppose the government enacted a law prohibiting such expression and arrested members of a radical political party for violating it. Justices could scrutinize this law in several ways. A liberal might conclude, solely because of his or her liberal values, that the First Amendment prohibits a ban on such expression. Conservative jurists might reach the opposite conclusion. Neither would be proper jurisprudence in the opinion of those who advocate an original intent approach because both are value-laden and ideological preferences should not creep into the law. Rather, justices should examine the framers’ intent as a way to keep the law value-free. Applying this approach to free speech, one adherent argues, leads to a clear, unbiased result:

³⁸Example cited by Boris I. Bittker in “The Bicentennial of the Jurisprudence of Original Intent: The Recent Past,” *California Law Review* 77 (1989): 235.

³⁹Given 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.

⁴⁰Edwin Meese III, address before the American Bar Association, Washington, DC, July 9, 1983.

⁴¹See, for example, Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 1–35.

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.⁴²

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 follow consistently.

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 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.⁴³

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.⁴⁴ This is the “originalist” aspect of his method of interpreting the Constitution.

⁴²*Ibid.*, 31.

⁴³Antonin Scalia, “A Theory of Constitutional Interpretation,” remarks at the Catholic University of America, Washington, D.C., October 18, 1996.

⁴⁴See Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989): 849–865.

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.”⁴⁵

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.⁴⁶

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 Black people, Marshall did not find “the wisdom, foresight, and sense of justice exhibited by the framers particularly profound.”⁴⁷

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

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

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.⁴⁸

⁴⁵Randy E. Barnett, “The Original Meaning of the Commerce Clause,” *University of Chicago Law Review* 68 (2001): 105.

⁴⁶William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), 1172–1173.

⁴⁷Thurgood Marshall, “Reflections on the Bicentennial of the United States Constitution,” *Harvard Law Review* 101 (1987): 1.

⁴⁸William J. Brennan Jr., address to the Text and Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985.

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.”⁴⁹

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.”⁵⁰ 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.⁵¹

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

⁴⁹C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs, NJ: Prentice Hall, 1984), 37.

⁵⁰Jeffrey 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.

⁵¹*Youngstown Sheet & Tube Co. v. Sawyer* (1952).

variety of dictionaries that were available during the founding era—some general and some legal, sometimes with contrary definitions. Even conscientious efforts to divine the meaning of a word or phrase as it was used in the late eighteenth century could yield inconclusive results.

Textualism

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

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

And it is these distinctions—between original intent and even meaning versus pure textualism—that can lead to some radically different results. To use the example of speech aimed at overthrowing the U.S. government, originalists would hold that the meaning or intent behind the First Amendment prohibits such expression. Those who consider themselves *pure* literalists, by contrast, might scrutinize the words of the First Amendment—“Congress shall make no law . . . abridging the freedom of speech”—and construe them literally: *no law* means *no law*. Therefore, any statute infringing on speech, even 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.⁵²

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

Despite the seeming logic of his justifications and the high regard many scholars have for Black, his brand of jurisprudence has been vulnerable to attack. Some assert that it led him to take some rather odd 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

⁵²Hugo L. Black, *A Constitutional Faith* (New York: Knopf, 1969), 45–46.

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 for Black to hold that, say, a book consisting entirely of depictions of explicit sexual activity is constitutionally protected expression while wearing a jacket that contains a single four-letter word is not?

Segal and Spaeth raise yet a third problem with literalism: it presupposes a precision in the English language that does not exist.⁵³ Many words, including those used by the framers, have multiple meanings.⁵⁴ To take one leading example, *McCulloch v. Maryland* (1819) asked the Court to determine whether Congress had the power to establish a national bank, a power the Constitution did not explicitly grant to Congress. Chief Justice Marshall, however, concluded that Congress had implicit power to create the bank by way of the necessary and proper clause, found in Article 1, Section 8, of the Constitution, which authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution [Congress’s explicit] Powers. . . .” Marshall considered the multiple meanings of the word *necessary*. He acknowledged that the word is often used to mean “essential” or “indispensable,” but he emphasized that it can also mean “useful.” He wrote, “To employ the means necessary to an end is generally understood as employing any means calculated to produce the end” Since a bank is a useful means to help Congress carry out its explicit power to collect and dispense revenue, it is constitutional. That is certainly a plausible interpretation of the word *necessary*, but it scarcely the only one—as those opposing the bank argued.

Finally, even when the words are crystal clear, pure textualism may not be on firm ground. Despite the precision of some constitutional provisions—such as the minimum age of thirty-five for the president—they are loaded with “reasons, goals, values, and the like.”⁵⁵ Law

⁵³Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 54.

⁵⁴Anyone 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.

⁵⁵Frank Easterbrook, “Statutes’ Domains,” *University of Chicago Law Review* 50 (1983): 536.

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.”⁵⁶ 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.”⁵⁷

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,”⁵⁸ 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.

There are many famous examples of structural analyses, especially, as you would expect, in separation of powers and federalism cases. Charles Black, a leading proponent of structuralism, points to *McCulloch v. Maryland* (1819), which again serves as a useful illustration. Among the questions the Court addressed was whether a state could tax a federal entity—the Bank of the United States. Even though states have the power

to tax, Chief Justice John Marshall for the Court said it could not be taxed because the states could use this power to extinguish the bank. If states could do this, they would damage what Marshall believed to be “the warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy.”⁵⁹

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.”⁶⁰ 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,

⁵⁶Mark Tushnet, “A Note on the Revival of Textualism,” in *Southern California Law Review* 58 (1985): 686.

⁵⁷*Towne v. Eisner* (1918).

⁵⁸Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe Jr., *Constitutional Theory: Arguments and Perspectives*, 3rd ed. (Newark, NJ: LexisNexis, 2007), 321.

⁵⁹Charles L. Black Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969), 15.

⁶⁰Bobbitt, *Constitutional Fate*, 84.

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.”⁶¹ 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 172 precedents, or, on average, about 2.6 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.⁶² 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 75 percent of sixty-four cases decided since 1972.⁶³ Scholarly work considering precedent in search and seizure litigation has produced similar findings.⁶⁴

⁶¹ *United States v. Underwriters Association* (1944).

⁶² See Jack Knight and Lee Epstein, “The Norm of Stare Decisis,” *American Journal of Political Science* 40 (1996): 1018–1035.

⁶³ Tracey E. George and Lee Epstein, “On the Nature of Supreme Court Decision Making,” *American Political Science Review* 86 (1992): 323–337.

⁶⁴ Jeffrey A. Segal, “Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1984,” *American Political Science Review* 78 (1984): 891–900.

Table 1-2 Precedents Overruled, 1953–2019 Terms

Court Era (Terms)	Number of Terms	Number of Overruled Precedents	Average Number of Overrulings per Term
Warren Court (1953–1968)	16	46	2.9
Burger Court (1969–1985)	17	56	3.3
Rehnquist Court (1986–2004)	19	45	2.4
Roberts Court (2005–2019)	15	25	1.7

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

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

First, 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, it turned out, that was not the case. Of the eighteen justices included in the study, only two occasionally subjugated their preferences to precedent.⁶⁵

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

⁶⁵Jeffrey 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.

fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.⁶⁶

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.

⁶⁶Justice 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.

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.⁶⁷ 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) later overruled *Wolf* 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 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, if justices are searching for original intent or understanding, it is difficult to imagine the relevance of what was in the minds of people in the eighteenth century to 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 the South African Constitution prohibited the state from imposing capital punishment. Rejection of U.S. practice was made all the more interesting in light of a speech Justice Harry Blackmun delivered only a year before *Makwanyane*.⁶⁸ 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.

⁶⁷We 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).

⁶⁸“Justice Blackmun Addresses the ASIL Annual Dinner,” *American Society of International Law Newsletter*, March 1994.

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*,⁶⁹ 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 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.”⁷⁰

SUPREME COURT DECISION MAKING: REALISM

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

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

⁶⁹Stephen Breyer, *The Court and the World* (New York: Knopf, 2016).

⁷⁰*Thompson v. Oklahoma* (1987); see also Scalia’s dissent in *Atkins v. Virginia* (2002).

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.⁷¹ 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.”⁷²

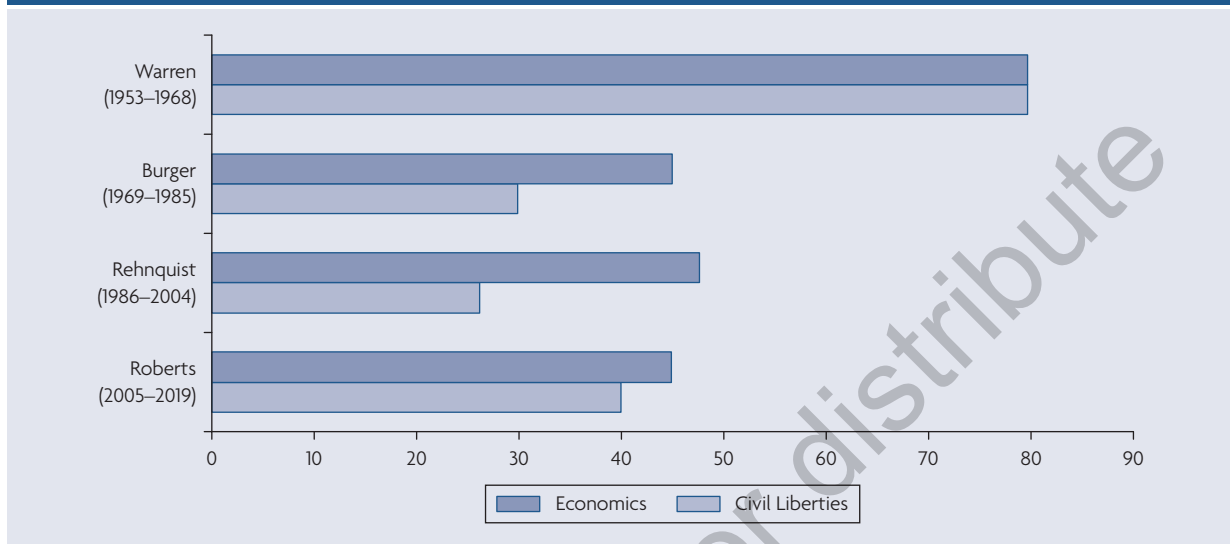
Pritchett’s findings touched off an explosion of research on the influence of attitudes on Supreme Court decision making.⁷³ Much of this scholarship describes

⁷¹C. 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.

⁷²Pritchett, *The Roosevelt Court*, xiii.

⁷³The classic works in this area are Glendon Schubert, *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965); and David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (New York: Freeman, 1976). For a lucid modern-day treatment, see Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, chaps. 3 and 8.

Figure 1-4 Percentage of Cases in Which Each Chief Justice Voted in the Liberal Direction, 1953–2019 Terms



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

how liberal or conservative the various justices have been and attempts to predict their voting behavior based on their ideological preferences. To understand some of these differences, consider Figure 1-4, which presents the voting records of the present chief justice, John G. Roberts Jr., and his three immediate predecessors: Earl Warren, Warren E. Burger, and William H. Rehnquist. The data report the percentage of times each voted in the liberal direction in two different issue areas: civil liberties and economic liberties.

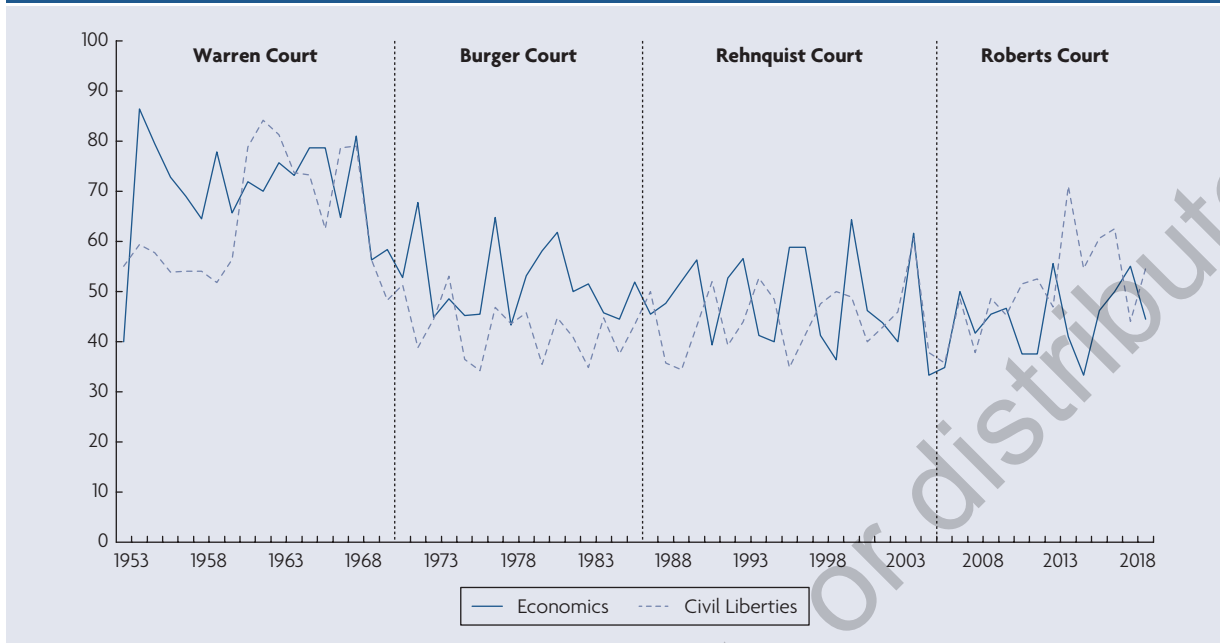
The data show dramatic differences among these four important jurists, especially in cases involving civil liberties. Cases in this category include disputes over issues such as the First Amendment freedoms of religion, speech, and press; the right to privacy; the rights of the criminally accused; and 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. Here, too, the four justices show different ideological positions. Warren

is the most liberal of the four, ruling in favor of government regulatory activity in roughly 80 percent of the cases, while Burger, Rehnquist, and Roberts supported such government activity in less than half. The data depicted in Figure 1-4 are typical of the findings of most attitudinal studies: within given issue areas, individual justices tend to show consistent ideological predispositions.

Moreover, we often hear that a particular Court is ideologically predisposed toward one side or the other. For example, on May 29, 2002, the *New York Times* ran a story claiming that "Chief Justice William Rehnquist and his fellow conservatives have made no secret of their desire to alter the balance of federalism, shifting power from Washington to the states." Three years later, in September 2005, it titled the chief justice's obituary "William H. Rehnquist, Architect of Conservative Court, Dies at 80." After President George W. Bush appointed Rehnquist's replacement, John G. Roberts Jr., and a new associate justice, Samuel Alito, the press was quick to label both "reliable members of the conservative bloc." And just as Obama-era appointees Sonia Sotomayor and Elena Kagan are widely regarded as liberal, so too are Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—appointed by Republican president Donald Trump—seen as quite conservative in orientation. Sometimes an entire Court era is described in terms of its political preferences, such as the "liberal" Warren

Figure 1-5 Court Decisions on Economics and Civil Liberties, 1953–2019 Terms



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

Court or the “conservative” Rehnquist Court. The data in Figure 1-5 confirm that these labels have some basis in fact. Looking at the two lines from left to right, from the 1950s through the early 2000s, note the mostly downward trend, indicating the increased conservatism of the Court in economics and civil liberties cases.

How valuable are the ideological terms used to describe particular justices or Courts in helping us understand judicial decision making? On one hand, knowledge of justices’ ideologies can lead to fairly accurate predictions about their voting behavior. Suppose that the Roberts Court (prior to Justice Scalia’s death) had handed down a decision dealing with the death penalty and that the vote was 5–4 in favor of the criminal defendant. The most conservative members of that Court on death penalty cases were Chief Justice Roberts and Justices Scalia, Thomas, and Alito—they almost always voted against the defendant in death penalty cases. If we had predicted that Roberts, Scalia, Thomas, and Alito cast the dissenting votes in our hypothetical death penalty case, we almost certainly would have been be right.⁷⁴

⁷⁴We 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.

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 indeed. 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 is to say little about the policies governing abortion in the United States. If it did, this book would be nothing more than a list of cases labeled liberal or conservative—such labels would give us no sense of more than two hundred years of constitutional interpretation.

Finally, we must understand that ideological labels are occasionally time dependent, that they are bound to particular historical eras. In *Muller v. Oregon* (1908), the Supreme Court upheld a state law that set a maximum number on the hours women (but not men) could work. How would you, as a student in the twenty-first century, view such an opinion? You might well classify it as conservative because it seems to patronize and

protect 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.⁷⁵ 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 absolutely necessary. The benefit of the doubt should be given to actions taken by elected officials. Courts should impose remedies that are narrowly tailored to correct a specific legal wrong.

Based on these definitions, we might expect to find activist justices more willing than their opposites to strike down legislation. Therefore, a natural question to ask is this: To what extent have specific jurists practiced judicial activism or restraint? The data in Table 1-3 address this question by reporting the votes of justices serving on the Roberts Court for some period between the 2005 and 2019 terms (and who are still on the Court) in cases in

⁷⁵See James L. Gibson, “Judges’ Role Orientations, Attitudes, and Decisions,” *American Political Science Review* 72 (1978): 917.

Table 1-3 Percentage of Votes to Invalidate Laws as Unconstitutional, 2005–2019 Terms

Justice	Federal Laws	State and Local Laws
Kagan	76.9	70.8
Roberts	75.0	71.4
Thomas	75.0	54.3
Alito	65.0	61.8
Breyer	65.7	65.7
Sotomayor	64.7	69.2

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

Note: The figures shown indicate the percentage of cases in which each justice voted with the majority to invalidate laws as unconstitutional. Twenty cases struck down federal laws and thirty-five cases struck state and local laws. Some justices may not have participated in all cases. We include only justices currently on the Court, though we exclude Neil Gorsuch and Brett Kavanaugh because they each participated in fewer than ten of the cases in both categories. The Court’s newest member, Justice Amy Coney Barrett, did not join the Court until the 2020 term.

which the majority declared federal, state, or local legislation unconstitutional. Note that the two justices most willing to invalidate laws are Kagan and Roberts, justices of quite different ideological orientation. Likewise, those more reluctant to strike laws are both liberal (Breyer and Sotomayor) and conservative (Alito). 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, 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 a strong 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. To say that *Roe v. Wade* was an activist decision because it struck down abortion laws nationwide is to say nothing about the policy content of the opinion.

Strategic Approaches

Strategic accounts of judicial decisions rest on a few simple propositions: justices may be primarily seekers of legal policy (as the attitudinal adherents claim) or they may be motivated by jurisprudential principles (as approaches grounded in law suggest), but they are not unconstrained actors who make decisions based solely on their own ideological attitudes or jurisprudential desires. Rather, justices are strategic actors who realize that their ability to achieve their goals—whatever those goals might be—depends on a consideration of the preferences of other relevant actors (such as their colleagues and members of other political institutions), the choices they expect others to make, and the institutional context in which they act. Scholars term this approach “strategic” because the ideas it contains are derived from the rational choice paradigm, on which strategic analysis is based and as it has been advanced by economists and political scientists working in other fields. Accordingly, we can restate the strategic argument in this way: we can best explain the choices of justices as strategic behavior and not merely as responses to ideological or jurisprudential values.⁷⁶

Such arguments about Supreme Court decision making seem to be sensible: a justice can do very little alone. It takes a majority vote to decide a case and a

⁷⁶For more details on this approach, see Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998).

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.⁷⁷

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.⁷⁸

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

Vote shifts are just one manifestation of the interdependence of the Court’s decision-making process.

⁷⁷Walter 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. Jahngig 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).

⁷⁸Forrest Maltzman and Paul J. Wahlbeck, “Strategic Considerations and Vote Fluidity on the Burger Court,” *American Political Science Review* 90 (1996): 581–592.

Another is the revision of opinions that occurs in almost every Court case.⁷⁹ 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.⁸⁰

External Factors

In addition to internal bargaining, strategic approaches (as well as others) 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

⁷⁹Epstein and Knight, *The Choices Justices Make*, chap. 3.

⁸⁰See Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985), chap. 7.

straying too far from what the public wants. But federal judges—including Supreme Court justices—are not dependent on pleasing the public to stay in office, and they do not serve in the same kind of representative capacity that legislators do.

Does that mean that the justices are not affected by public opinion? Some scholars say they are, and offer three reasons for this claim.⁸¹ 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.⁸² The third reason relates to the Court as an institution. Put simply, the justices have no mechanism for enforcing their decisions. Instead, they depend on other political officials to support their positions and on general public compliance, especially when controversial Court opinions have ramifications beyond the particular concerns of the parties to the suit.

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

⁸¹See, 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.

⁸²*Trop v. Dulles* (1958).

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."⁸³ 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). The entry of conservative justices, they argue, created the illusion that the Court was echoing public opinion; it was not that sitting justices modified their voting patterns to conform to the changing views of the public.

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)."⁸⁴ 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."⁸⁵

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."⁸⁶ In other words, the political environment has an effect on Court behavior. In fact, many observers assert that the Court is responsive to the influence of partisan politics, both internally and externally.

On the inner workings of the Court, social scientists long have argued that political creatures inhabit the Court, that justices are not simply neutral arbiters of the law. Since 1789, the beginning of constitutional government in the United States, those who have ascended to the bench have come from the political institutions of government or, at the very least, have affiliated with particular political parties. Judicial scholars recognize that justices bring with them the philosophies of those partisan attachments. Just as the members of the present Court tend to reflect the views of the Republican Party or Democratic Party, so, too, did the justices who came from the ranks of the Federalists and Jeffersonians. As one might expect, justices who affiliate with the Democratic Party tend to be more 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.

⁸³Helmut Norpoth and Jeffrey A. Segal, "Popular Influence in Supreme Court Decisions," *American Political Science Review* 88 (1994): 711–716.

⁸⁴Lee 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.

⁸⁵Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 168.

⁸⁶Jonathan Casper, *The Politics of Civil Liberties* (New York: Harper & Row, 1972), 293.

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.⁸⁷

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. Although the policy preferences of an administration are inevitably reflected in the arguments of the SG, part of the reason for the SG's success is that he or she also takes consistent positions that favor long-term stability in the law; the office historically defends the constitutionality of federal law, regardless of the law's ideological content, for instance. Similarly, in pending cases, new solicitors general are usually reluctant to change the legal arguments of their predecessors. The Trump administration raised eyebrows when its solicitor general, Noel Francisco, often disregarded that tradition.

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.⁸⁸ 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

⁸⁷See Epstein et al., *Supreme Court Compendium*, tables 7-14 and 7-15.

⁸⁸See Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369–398.

terrorism (see *Chapter 2 for more details*). Still, there is good evidence that the justices are close students of how they are regarded by Congress and are sensitive to legislative displeasure.⁸⁹ 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.⁹⁰ 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.⁹¹ 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.⁹² And 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.⁹³ But it is not only cases of civil liberties and rights that attract interest group attention. In the 2012 challenge to the constitutionality of the Patient Protection and Affordable Care Act, the Court received more than one hundred amicus briefs. In addition to participating as amici, groups in record numbers are sponsoring cases—that is, providing litigants with attorneys and the money necessary to pursue their cases.

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

The second question is this: Can groups influence the outcomes of Supreme Court decisions?⁹⁴ This question has no simple answer. When interest groups

⁸⁹Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2010).

⁹⁰See Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008).

⁹¹See Epstein et al., *The Supreme Court Compendium*, Table 7-20.

⁹²We adopt some of this material from Pritchett et al., *Courts, Judges, and Politics*, chap. 6.

⁹³Nina 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>.

⁹⁴We adopt some of this material from Murphy et al., *Courts, Judges, and Politics*, chap. 6.

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."⁹⁵ 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.⁹⁶

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.

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

⁹⁶Lee Epstein and C. K. Rowland, "Debunking the Myth of Interest Group Invincibility in the Court," *American Political Science Review* 85 (1991): 205–217.

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*.⁹⁷ The first set of numbers is the volume number; the U.S. is the form of citation for *U.S. Reports*; and the second set of numbers is the starting page of the case.

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)

⁹⁷In 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
<i>U.S. Reports</i> , 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.
<i>United States Supreme Court Reports, Lawyers' Edition</i> , 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.
<i>Supreme Court Reporter</i> , Thomson Reuters	S. Ct.	Contains official reports of opinions of the Court. Contains annotated reports and indexes of case names. Includes opinions of justices in chambers. Appears semimonthly.
<i>U.S. Law Week</i> , Bloomberg BNA	U.S.L.W.	Weekly periodical service contains full text of Court decisions. Includes four indexes: topical, table of cases, docket number table, and proceedings section. Contains summary of cases filed recently, journal of proceedings, summary of orders, arguments before the Court, argued cases awaiting decisions, review of Court's work, and review of Court's docket.

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

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

These days, however, many students turn to electronic sources to locate Supreme Court decisions. Several companies maintain databases of the decisions of federal and state courts, along with a wealth of other information. In some institutions these services—Lexis and Westlaw—are available only to law school students. If you are in another academic unit, check with your librarians to see if your school provides access to other students, perhaps through Nexis Uni (a subset of the LexisNexis service and formerly known as Academic Universe). Also, the Legal Information Institute (LII) at Cornell Law School (<https://www.law.cornell.edu/supremecourt/text>), FindLaw (<https://caselaw.findlaw.com/court/us-supreme-court>), and now the Supreme

Court itself (<http://www.supremecourt.gov>)—to name just three—house Supreme Court opinions and offer an array of search capabilities. You can read the opinions online, have them e-mailed to you, or download them immediately.

Locating Other Information on the Supreme Court and Its Members

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

- *The Supreme Court Compendium: Data, Decisions, and Developments*, 7th edition, contains information on the following dimensions of Court activity: the Court's development, review process, opinions and decisions, judicial

background, voting patterns, and impact.⁹⁸ 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.⁹⁹
- *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.¹⁰⁰

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.

⁹⁸Epstein et al., *Supreme Court Compendium*.

⁹⁹David Savage, *Guide to the U.S. Supreme Court*, 5th ed. (Washington, DC: CQ Press, 2010).

¹⁰⁰Kermit 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*, 13th ed. (Washington, DC: CQ Press, 2019), 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); Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010); and Lee Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (New York: Cambridge University Press, 2019).

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, UK: Cambridge University Press, 2012); Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (Charlottesville: University Press of Virginia, 1993); Timothy R. Johnson, *Oral Arguments and the United States Supreme Court* (Albany: State University of New York Press, 2004); and Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008).