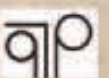


Constitutional Law for a Changing America

Institutional Powers and Constraints

9
edition

LEE EPSTEIN
THOMAS G. WALKER



Copyright ©2017 by SAGE Publications, Inc.

This work may not be reproduced or distributed in any form or by any means without express written permission of the publisher.

1

Understanding the U.S. Supreme Court

THIS BOOK IS DEVOTED to narrative and opinion excerpts showing how the U.S. Supreme Court has interpreted many of the amendments to the Constitution. As a student approaching civil rights, civil liberties, and justice, perhaps for the first time, you may think it is odd that the subject requires more than 800 pages of text. After all, in length, the U.S. Constitution and the amendments to it could fit easily into many Court decisions. Moreover, the document itself—its language—seems so clear.

First impressions, however, can be deceiving. Even apparently clear constitutional scriptures do not necessarily lend themselves to clear constitutional interpretation. For example, according to the First Amendment, “Congress shall make no law . . . prohibiting the free exercise” of religion. Sounds simple enough, but could you, based on those words, answer the following questions, all of which have been posed to the Court?

- May a state refuse to give unemployment benefits to an individual who quits her job because her employer wants her to work on Saturday, the day of rest in her religion?
- May the military retain a policy that forbids Jews in service from wearing yarmulkes?
- May a city prohibit the sacrificing of animals for religious purposes?

What these and other questions arising from the different guarantees contained in the Constitution

illustrate is that a gap sometimes exists between the document’s words and reality. Although the language seems explicit, its meaning can be elusive and difficult to interpret. Accordingly, justices have developed various approaches to resolving disputes.

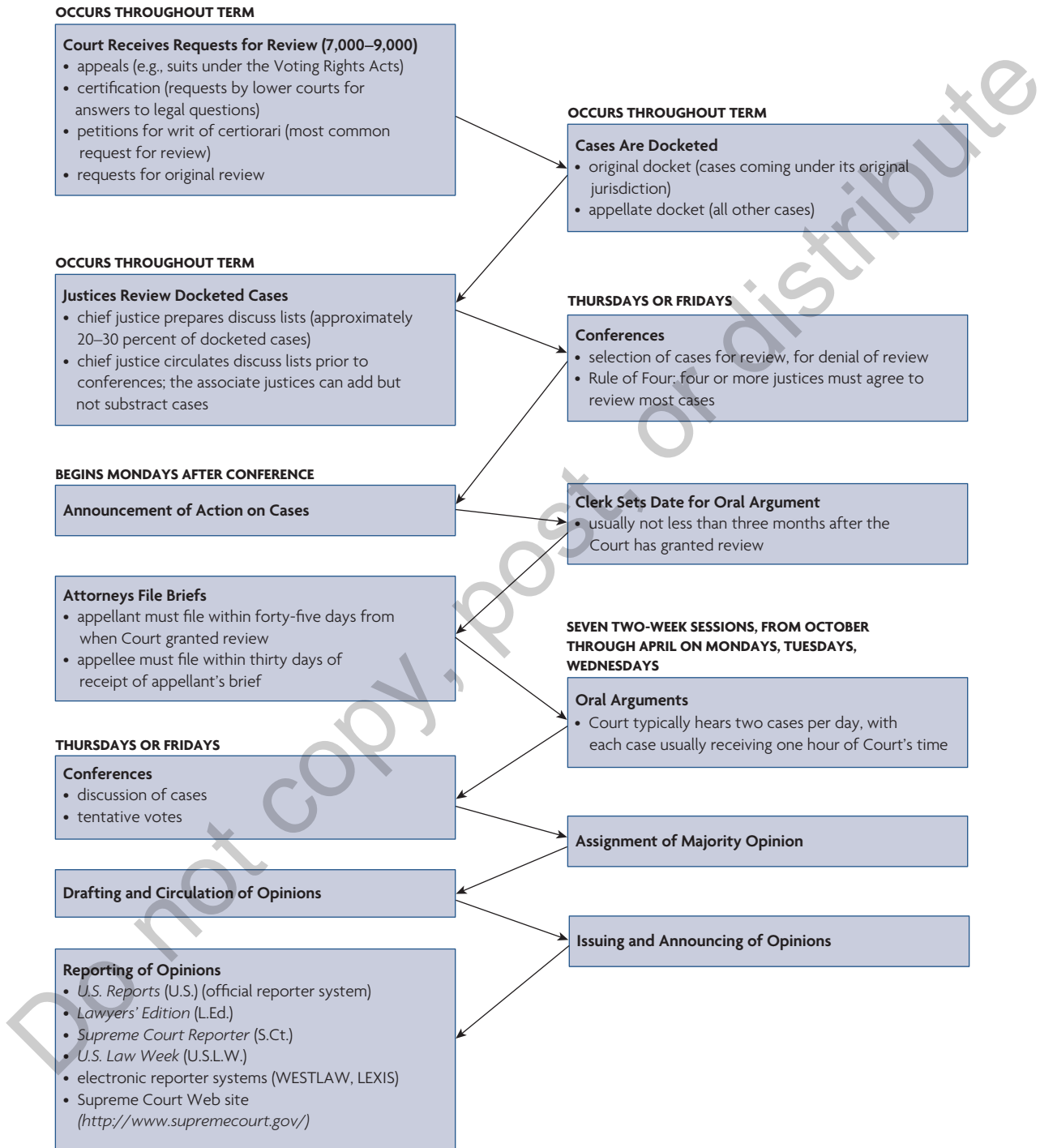
But, as Figure 1-1 shows, a great deal happens before the justices actually decide cases. We begin our discussion with a brief overview of the steps depicted in the figure. Next, we consider explanations for the choices justices make at the final and most important stage, the resolution of disputes.

PROCESSING SUPREME COURT CASES

During the 2013–2014 term, nearly 7,400 cases arrived at the Supreme Court’s doorstep, but the justices decided only sixty-seven with signed opinions.¹ 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? We address these and other questions by describing how the Court processes its cases.

1. Data from the Chief Justice’s 2014 Year-End Report on the Federal Judiciary, available at <http://www.supremecourt.gov/public/info/year-end/2014year-endreport.pdf>.

FIGURE 1-1 The Processing of Cases



SOURCE: Compiled by authors.

Deciding to Decide: The Supreme Court's Caseload

As the figures for the 2013–2014 term indicate, the Court heard and decided 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 1930.²

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

How Cases Get to the Court: Jurisdiction and the Routes of Appeal. Cases come to the Court in one of four ways: either by a request for review under the Court's original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (see Figure 1-1). Chapter 2 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that have not been heard by any other court. 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 congressional legislation permits lower courts to exercise concurrent authority over most cases meeting Article III requirements, the Supreme Court does not have exclusive jurisdiction over them. Consequently, the Court normally accepts, on its original jurisdiction, only those cases in which one state is suing another (usually over a disputed boundary) and sends the rest back to the lower courts for an initial ruling. That is why, in recent years, original jurisdiction cases make up only a tiny fraction of the Court's overall docket—between one and five cases per term.

2. Data are from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th ed. (Thousand Oaks, CA: CQ Press, 2015), tables 2-5 and 2-6.

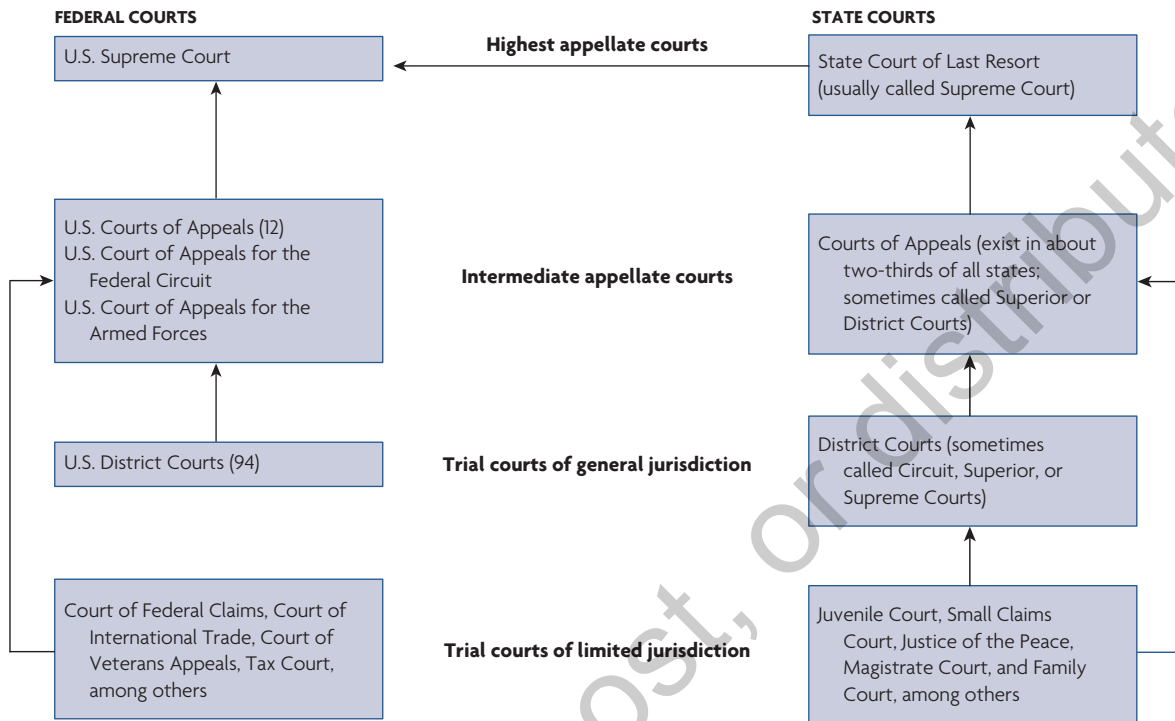
Most cases reach the Court under its **appellate jurisdiction**, meaning that a lower federal or state court has already rendered a decision and one of the parties is asking the Supreme Court to review that decision. As Figure 1-2 shows, such cases typically come from one of the U.S. courts of appeals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

To invoke the Court's appellate jurisdiction, litigants can take one of three routes, depending on the nature of their dispute: **appeal** as a matter of right, certification, or certiorari. Cases falling into the first category (normally called "on appeal") involve issues Congress 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 supposed 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 desiring 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 eight thousand or so cases that arrive each year come as requests for certiorari. The Court, exercising its ability to choose the 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.

FIGURE 1-2 The American Court System



SOURCE: Compiled by authors.

In sum, Article III of the U.S. Constitution enables the Supreme Court to decide cases that have not been heard by any other court, but the vast majority of disputes that reach the justices have already been resolved by another judicial body. The United States’ approach is not the only way to design a legal system. For example, in a society that has created a single constitutional court, that tribunal may have a judicial monopoly on interpreting matters of constitutional law; it may be the only forum in which citizens can bring constitutional claims (*see Box 1-1*).

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 the approximately seventy or so cases to review 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.

Many scholars and lawyers have tried to determine what makes a case “certworthy”—that is, worthy of review by the Supreme Court. Before we look at some of their findings, let us consider the case selection process itself. The original pool of about seven to eight thousand petitions faces several checkpoints along the way (*see Figure 1-1*), which significantly



BOX 1-1 THE AMERICAN LEGAL SYSTEM IN GLOBAL PERSPECTIVE

The American legal system can be described as *dual, parallel*, and (for the most part) *three tiered*. It is dual because one federal system and fifty state systems coexist, each ruling on disputes falling under its particular purview. This duality does not mean, however, that state courts never hear cases involving claims made under the U.S. Constitution or that federal courts necessarily shun cases arising out of state law. In fact, the U.S. Supreme Court can review cases involving federal questions on which state supreme courts have ruled and can strike down state laws if they are incompatible with the U.S. Constitution. Similarly, many cases arising from state law and heard in state courts also contain federal issues that must be resolved.

Differences exist among the states' court systems, but most today roughly parallel the federal system. Trial courts—the lowest rungs on the ladder—are the entry points into the system. In the middle of the ladder are appellate courts, those that upon request review the records of trial court proceedings. Finally, both systems have supreme courts, bodies that provide final answers to legal questions in their own domains.

Although a supreme court sits atop each ladder, the U.S. Supreme Court plays a unique role—it is the apex of both state and federal court systems. Because it can hear cases and ultimately overturn the rulings of federal and state court judges, it is presumably *the* authoritative legal body in the United States.

Some nations have created legal systems that, to greater or lesser extents, resemble the American system. For example, Japan, whose constitutional document was largely drafted by Americans, also has a three-tiered structure. Cases begin at the district (trial) court level, move to high courts (Japan's version of midlevel appellate courts) and, finally, to the Supreme Court. But other nations—first Austria, Germany, and Italy, and later Belgium, Portugal, South Africa, Spain, and most of the countries of Central and Eastern Europe—took a much

different approach. In these countries, the highest court is not a supreme court but a single constitutional court, which has a judicial monopoly on interpreting matters of constitutional law. These constitutional courts are not part of the “ordinary” court system; litigants do not typically petition the justices to review decisions of lower courts. Rather, when judges confront a law whose constitutionality they doubt, they are obliged to send the case directly to the constitutional court. This tribunal receives evidence on the constitutional issue, sometimes gathers evidence on its own, hears arguments, perhaps consults sources that counsel overlooked, and hands down a decision. But, unlike in the United States, the constitutional court does not decide the case because it has not heard a case; it has only addressed a question of constitutional interpretation. Although the court publishes an opinion justifying its ruling and explaining the controlling principles, the case still must be decided by regular tribunals. In some countries—for example, Germany, Italy, and Russia—public officials also may bring suits in their constitutional courts challenging the legitimacy of legislative, executive, or judicial acts, and, under some circumstances, private citizens may initiate similar litigation. Where judicial action is challenged, the constitutional court in effect reviews a decision of another court, but the form of the action is very different from an appeal in the United States.

This type of court system is often called “centralized” because the power of judicial review—that is, the power to review government acts for their compatibility with the nation's constitution and strike down those acts that are not compatible—rests in one constitutional court; other courts are typically barred from exercising judicial review, although they may refer constitutional questions to the constitutional tribunal. In contrast, the U.S. system is deemed “decentralized” because ordinary courts—not just supreme courts—can engage in judicial review. We shall return to this distinction in Chapter 2 (see Box 2-1).

reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari

arrives, the clerk's office examines it to make sure it is in proper form and conforms to the Court's precise rules. Briefs must be “prepared in a 6 1/8- by 9 1/4-inch booklet, . . . typeset in a Century family 12-point

FIGURE 1-3 A Page from Justice 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.

type with 2-point or more leading between lines.” Exceptions are made for litigants who cannot afford to pay the Court’s fees. The rules governing these petitions, known as *in forma pauperis* briefs, are somewhat looser, allowing indigents to submit briefs on 8½-by-11-inch paper. The Court’s major concern, or so it seems, is that the document “be legible.”³

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. On the current (2015) Court, all the justices but Samuel Alito use the “certiorari pool system,” in which clerks from the different chambers collaborate in reading and then writing memos on the petitions.⁴ 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 determinations

3. Rules 33 and 39 of the Rules of the Supreme Court of the United States. All Supreme Court rules are available at <http://www.supremecourt.gov/ctrules/ctrules.aspx>.

4. Supreme Court justices are authorized to hire four law clerks each. Typically, these clerks are outstanding recent graduates of the nation’s top law schools. Pool (or preliminary) memos, as well as other documents pertaining to the Court’s case selection process, are available at <http://epstein.wustl.edu/blackmun.php>.

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, the chief circulates a “discuss list” containing those cases he feels the Court should consider; any justice (in order of seniority) may add cases to this list but may not remove any. About 20 percent to 30 percent of the cases that come to the Court make it to the list and are actually discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.⁵

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

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

each petition, with the most senior justice speaking first and the newest member last. The associate justices usually provide some indication of how they will vote on the merits of the case if it is accepted. Indeed, as Figure 1-3 shows, the justices record certiorari and merits votes in their 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 in which probable jurisdiction is noted, the clerk informs participating attorneys, who then have specified time limits in which to turn in their written legal arguments (briefs), and the case is scheduled for oral argument.

Considerations Affecting Case Selection Decisions.

This 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.⁶

Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process. Under Rule 10, the Court emphasizes “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.⁷

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, a

major concern of Rule 10, 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.⁸ On the other hand, although the Court may use the existence of actual conflict as a threshold consideration (cases that do not present conflict *may* be rejected), it does not accept all cases with conflict because there are too many.⁹

In short, Rule 10’s stress on conflict in the lower courts may act as a constraint on the justices’ behavior, but it does necessarily further our understanding of what occurs in cases meeting the criteria. That is why scholars have looked to *political* factors that may influence the Court’s case selection process. Three are particularly important. The first is the U.S. solicitor general (SG), the attorney who represents the U.S. government before the Supreme Court. Simply stated, when the SG files a petition, the Court is very likely to grant certiorari. In fact, the Court accepts about 70 percent to 80 percent of the cases in which the federal government is the petitioning party.

Why is the solicitor general so successful? One 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 know the “rules of the game” and can use them to their advantage. For example, they know how to structure their petitions to attract the attention and interest of the justices. Finally, a recent study on the topic emphasizes less the SG’s experience and more the professionalism of the SG and the lawyers working in his or her office. As the authors put it, they are

6. Some scholars have noted a third set: procedural considerations. These emanate from Article III, which—under the Court’s interpretation—places constraints on the ability of federal tribunals to hear and decide cases. Chapter 2 considers these constraints, which include justiciability (the case must be appropriate for judicial resolution in that it presents 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.

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

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

9. In fact, during any given term, the Court rejects hundreds of cases in which real conflicts exist. See Lawrence Baum, *The Supreme Court*, 10th ed. (Washington, DC: CQ Press, 2009), 92–93.

“consummate legal professionals whose information justices can trust.”¹⁰

The second political factor is the **amicus curiae** (friend of the court) brief. These briefs are usually filed by interest groups and other third parties after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage (*see Box 1-2*). Research by political scientists shows that amicus briefs significantly enhance a case’s chances of being heard, and multiple briefs have a greater effect.¹¹ Another 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 briefs in opposition to 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 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. Researchers tell us 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, while those of the moderately conservative Court during the years of Chief Justice Warren Burger (1969–1986) took liberal results to reverse. It would be difficult to believe that the current justices would be any less likely than their predecessors to vote on the basis of their ideologies. Scholarly studies also suggest that justices engage in strategic voting behavior at the cert stage. In other

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

11. Caldeira and Wright, “Organized Interests and Agenda Setting”; 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.

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.”¹²

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 side of the dispute to the justices in written and oral arguments.

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

As is the case for cert petitions, the Court maintains specific rules covering the presentation and format of merits briefs. For example, the briefs of both parties must be submitted in forty copies and may not exceed 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

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


BOX 1-2 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 are exempt from this requirement). If the parties refuse to give their consent, the group can file a motion with the Court asking for its permission. The Court today almost always grants these motions.

No. 12-307
In The
Supreme Court of the United States
UNITED STATES OF AMERICA, *Petitioner*
—v.—

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

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

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

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

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

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

decide the case outcome. A well-crafted brief can place into the hands of the justices arguments, legal references, and suggested remedies that later may be incorporated into the opinion.

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 1-2*). 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 have the opportunity to 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, the health care law passed in 2010. This was unprecedented in the modern era, but not in the Court's early years. In the past, because attorneys did not always prepare written briefs, the justices relied on oral arguments to learn about the cases and to help them marshal their arguments for the next stage. Orals were considered important public events, opportunities to see the most prominent attorneys of the day at work. Arguments often went on for days: *Gibbons v. Ogden* (1824), the landmark commerce clause case, was argued for five days, and *McCulloch v. Maryland* (1819), the litigation challenging the constitutionality of the national bank, took nine days to argue.

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

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

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

WHITE: What is your constitutional position there?

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

WHITE: Why? Why is that?

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

WHITE: Emotional response by whom?

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

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

WEDDINGTON: I would say constitutional—

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

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

In the Court's early years, there was little doubt about the importance of such exchanges, and of oral arguments in general, because, as noted above, the justices did not always have the benefit of written briefs. Today, however, some have questioned the effectiveness of oral arguments and their role in decision making. Chief Justice Earl Warren contended that they made little difference to the outcome. Once the justices have read the briefs and studied related cases, most have relatively firm views on how the case should be decided, and orals 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 with the better showing at orals. 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.¹³ 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.

The debate will likely continue. Even if oral arguments turn out to have little effect on the justices' decisions, we should not forget their symbolic importance: they are the only part of the Court's decision-making process that occurs in public and that you now have the opportunity to hear. Political scientist Jerry Goldman has made the oral arguments of many cases available online at <http://www.oyez.org>. Through out this book you will find references to this Web site, 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. Below, 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

13. Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs, II, “The Influence of Oral Arguments on the U.S. Supreme Court,” *American Political Science Review* 100 (2006): 99–113; 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.

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 Roberts 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.¹⁴

So, while 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 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

14. Jan Crawford, “Roberts Switched Views to Uphold Health Care Law,” CBS News, *Face the Nation*, July 1, 2012, http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody.

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 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 many factors into account.¹⁵ 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 take into account the justices’ particular areas of expertise, recognizing that some justices are more knowledgeable about particular areas of the law than others. By encouraging specialization, the chief may also be trying to increase the quality of opinions and reduce the time required to write them.

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of *Brown v. Board of Education* (1954), and Roberts did the same in the health care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, “[T]here are occasions when an opinion should carry extra weight which pronouncement by the Chief Justice gives.”¹⁶ 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. The reasoning seems to be this: if the writer in a close case drafts an opinion with which other members of the majority are uncomfortable, the opinion may drive justices to the other side, causing the majority to become a minority. A chief justice may try to minimize this risk by asking justices squarely in the middle of the majority coalition to write.

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

Once the justices receive the first draft of the opinion, they have many options. First, they can join the opinion, meaning that they agree with it and want no changes. Second, they can ask the opinion writer to make changes, that is, *bargain* with the writer over the content of and even the disposition—to reverse or affirm the lower court ruling—offered in the draft. The following memo sent from Brennan to White is exemplary: “I’ve mentioned to you that I favor your approach to this case and want if possible to join your opinion. If you find the following suggestions . . . acceptable, I can join you.”¹⁷

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, will 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.

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

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

17. Memorandum from Justice Brennan to Justice White, December 9, 1976, re: 75-104, *United Jewish Organizations of Williamsburgh v. Carey*.

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

SUPREME COURT DECISION MAKING: LEGALISM

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

As you might imagine, the responses to these questions are many, but they can be categorized into two groups. One focuses on the role of law, broadly defined, and legal methods in determining how justices interpret the Constitution, emphasizing, among other things, the importance of its words, American history and tradition, and precedent (previously decided constitutional rulings). Judge Richard Posner and his coauthors have referred to this as a legalistic theory of judicial decision making.¹⁸ 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 of 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

18. 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).

decisions often reflect the justices’ own politics or the political views of those around them.

To the extent that approaches grounded in law originated to answer the question of how justices *should* decide pending disputes, we understand why the difference between the two groups is often cast in terms of “should” versus “do.” But, for several reasons, we ask you to think about whether, in fact, the justices actually do use these “should” approaches to reach decisions and not merely to camouflage their politics. 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.”¹⁹

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 here 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, textualism, original meaning, polling other jurisdictions, **stare decisis** analysis, appeals to tradition, and pragmatism.²⁰

Table 1-1 provides a brief summary of each, using the Second Amendment as an example (in what

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

20. For overviews (and critiques) of these and other approaches, see Eugene Volokh, “Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument,” available at <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.”</p> <p>OR</p> <p>“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>Original Meaning. 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.”</p> <p>OR</p> <p>“‘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.”</p> <p>OR</p> <p>“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.”</p> <p>OR</p> <p>“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.”</p> <p>OR</p> <p>“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.”</p> <p>OR</p> <p>“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 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.”</p> <p>OR</p> <p>“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>

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

directly follows, we supply more details). 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 like their Constitution “dead”—that is, they attempt to interpret it 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 general, and was made use of to vest in Congress plenary authority in all cases of taxation.”²¹ 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.²² But why? What possible relevance could the framers’ intentions have for today’s

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

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

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.”²³

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.²⁴ Consider speech advocating the violent overthrow of the government. Suppose the government enacted a law prohibiting such expression and arrested members of a radical political party for violating it. Justices could scrutinize this law in several ways. A liberal might conclude, solely because of his or her liberal values, that the First Amendment prohibits a ban on such expression. Conservative jurists might reach the opposite conclusion. Neither would be proper jurisprudence in the opinion of those who advocate an original intent approach because both are value laden and ideological preferences should not creep into the law. Rather, justices should examine the framers’ intent as a way to keep the law value-free. Applying this approach to free speech, one adherent argues, leads to a clear, unbiased result:

Speech advocating violent overthrow is . . . not [protected] “political speech” . . . as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority.²⁵

Finally, supporters of this mode of analysis argue that it fosters stability in law. They maintain that the law today is far too fluid, that it changes with the ideological whims of the justices, creating havoc for those who must interpret and implement Court decisions. Lower court judges, lawyers, and even ordinary citizens

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

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

25. *Ibid.*, 31.

do not know if today's rights will still exist tomorrow. Following a jurisprudence of original intent would eliminate such confusion because it provides a principle that justices can consistently follow.

The last justification applies with equal force to a second form of originalism: *original meaning or understanding*. Justice Scalia has 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.²⁶

By "textualist," Justice Scalia means that he looks at the words of whatever constitutional provision he is interpreting and then interprets them in line with what they would have ordinarily meant to the people of the time when they were written.²⁷ This is the "originalist" aspect of his method of interpreting the Constitution. So, while intentionalism focuses on the intent behind phrases, an understanding or meaning 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."²⁸

Even so, as we suggested above, 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.²⁹

Chief Justice Rehnquist's opinion in *Nixon v. United States* (1993) provides a particularly good illustration of the value of this approach. 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 it and reported to the full body. 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 limits on campaign spending to the appropriate balance of power between the states and the federal government.

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, in light of the 1787 Constitution's treatment of

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

27. See Scalia's "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849–865.

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

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

women and blacks, Marshall did not find “the wisdom, foresight, and sense of justice exhibited by the framers particularly profound.”³⁰

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.³¹

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.”³²

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.”³³ 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. 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.³⁴

Likewise, it may be just as difficult for justices to establish the original meaning of the words as it is for them to establish the original intent behind them. Attempting to understand what the framers meant by each word can be a far more daunting task in the run-of-the-mill case than it was for Rehnquist in *Nixon*. It might even require the development of a specialized dictionary, which could take years of research to compile and still not have any value—determinate or otherwise. Moreover, scholars argue, even if we could create a dictionary that would help shed light on the meanings of particular words, it would tell us little about the significance of such constitutional phrases as “due process of law” and “cruel and unusual punishment.”³⁵ Some say the same of other sources to

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

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

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

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

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

35. Crosskey did, in fact, develop “a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas.” He believed that such a work was “needed for a true understanding of the Constitution.” But some scholars have been skeptical of the understandings to which it led him, as many were highly “unorthodox.”

which the justices could turn, such as the profusion of pamphlets (heavily outnumbering the entire population) that argued for and against ratification of the new Constitution. But this mass of literature demonstrates not one but maybe dozens of understandings of what it all meant. In other words, the documents often fail to provide a single clear message.

Textualism

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

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

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

Bittker, “The Bicentennial of the Jurisprudence of Original Intent,” 237–238. Some applauded Crosskey's conclusions. Charles E. Clark, for example, in “Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins,” *University of Chicago Law Review* 21 (1953): 24, called it “a major scholastic effort of our times.” Others were appalled. See Julius Goebel Jr., “Ex Parte Clio,” *Columbia Law Review* 54 (1954): 450. Goebel wrote, “[M]easured by even the least exacting of scholarly standards, [the work] is in the reviewer's opinion without merit.”

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 look to the Constitution and ask what it says about the matter at hand, though Hugo Black is most closely associated with this view—at least in its pure form. During his thirty-four-year tenure on the Court, Justice 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.³⁶

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 that activities such as flag burning and the wearing of armbands, even if calculated to

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

express political views, fell outside the protections of the First Amendment.

Moreover, literalists maintain that their approach is superior to the doctrine of original intent. They say that some provisions of the Constitution are so transparent that were the government to violate them, justices could “almost instantaneously and without analysis identify the violation”; they would not need to undertake an extensive search to uncover the framers’ understanding.³⁷ Often-cited examples include the “mathematical” provisions of the Constitution, such as the commands that the president’s term be four years and that the president be at least thirty-five years old.

Despite the seeming logic of these justifications and the high regard many scholars have for Black, many have actively attacked his brand of jurisprudence. 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 opinion, Black clung to the view that no publication could be banned on the grounds that it was obscene.

A second objection is that literalism can result in inconsistent outcomes. Is it really sensible for Black to hold that obscenity is constitutionally protected while other types of expression, such as desecration of the flag, are not?

Segal and Spaeth raise yet a third problem with literalism: it presupposes a precision in the English language that does not exist. Not only may words, including those used by the framers, have multiple meanings, but also the meanings themselves may be contrary. For example, the common legal word *sanction*, as Segal and Spaeth note, means both to punish *and* to approve.³⁸ How, then, would a literalist construe it?

Finally, even when the words are crystal clear, pure textualism may not be on firm ground. Despite the precision of the mathematical provisions, law professor Frank Easterbrook has suggested that they, like all the others, are loaded with “reasons, goals, values, and

the like.”³⁹ 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.”⁴⁰ 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.”⁴¹

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,”⁴² 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 to preserve 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, for example, points to *McCulloch v. Maryland* (1819). Among the

37. We draw this material and the related discussion to follow from Mark V. Tushnet, “A Note on the Revival of Textualism,” *Southern California Law Review* 58 (1985): 683–700.

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

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

40. Tushnet, “A Note on the Revival of Textualism,” 686.

41. *Towne v. Eisner* (1918).

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

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 Marshall for the Court said no 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.”⁴³

Here, Marshall invalidated a state action aimed at the federal government. Throughout this book, you will see the reverse: 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.”⁴⁴ What this means is that structural reasoning does not necessarily lead to a single answer in each and every case. *INS v. Chadha* (1983), involving the constitutionality of the legislative veto (used by Congress to veto decisions made by the executive branch), provides an example. Writing for the majority, Chief Justice Burger held that such a veto violated the constitutional doctrine of separation of powers; it eroded the “carefully defined limits of the power of each Branch” established by the framers. Writing in dissent, Justice White too relied in part on structural analysis but came to a very different conclusion: the legislative veto fit compatibly with the separation of powers system because it ensured that Congress could continue to play “its role as the Nation’s lawmaker” in the wake of the growth in the size of the executive branch.

The gap between Burger and White reflects disagreement over the very nature of the separation of powers system, and similar disagreements arise over federalism and the democratic process. Hence, even

when justices reason from structure, it is possible, even likely, that they will reach different conclusions.

Stare Decisis

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

The benefits of this approach are fairly evident. If justices rely on past cases to resolve current cases, some scholars argue, the law they generate becomes predictable and stable. Justice Harlan F. 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.”⁴⁵ 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. Along these lines, it is interesting to note that the Court rarely reverses itself—it has 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 163 precedents, or, on average, about 2.8 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.⁴⁶ 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

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

44. Bobbitt, *Constitutional Fate*, 84.

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

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

TABLE 1-2 Precedents Overruled, 1953–2013 Terms

COURT ERA (TERMS)	NUMBER OF TERMS	NUMBER OF OVERRULED PRECEDENTS	AVERAGE NUMBER OF OVERRULINGS PER TERM
Warren Court (1953–1968)	16	43	2.7
Burger Court (1969–1985)	17	47	2.8
Rehnquist Court (1986–2004)	16	51	3.2
Roberts Court (2005–2013)	9	16	1.8

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

since 1972.⁴⁷ Scholarly work considering precedent in search and seizure litigation has produced similar findings.⁴⁸

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

First, the Supreme Court has generated so much precedent that it is usually possible for justices to find support for any conclusion. By way of proof, turn to almost any page of any opinion excerpted in this book and you probably will find the writers—both for the majority and the dissenters—citing precedent.

Second, it may be difficult to locate the rule of law emerging in a majority opinion. To decide whether a previous decision qualifies as a precedent, judges and commentators often say, one must strip away the non-essentials 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

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

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

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. Because the Supreme Court, at least today, is so selective about the cases it decides, it probably would not take a case for which clear precedent existed. Even in the past, two cases that were precisely identical probably would not be accepted. What this means is that justices can always deal with “problematic” ratio decidendi by distinguishing the case at hand from those that have already been decided.

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 members of the Court. If a justice dissented from a decision establishing a particular precedent, the same justice would not dissent from a subsequent application of the precedent. But that was not the case. Of the eighteen justices included in the study, only two occasionally subjugated their preferences to precedent.⁴⁹

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

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.⁵⁰

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

50. Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393 (1932). Whether the justices actually 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* (2015).

Pragmatism

Whatever the role of precedent in constitutional interpretation, it is clear that the Court does not always feel bound to follow its own precedent. Perhaps a ruling was in error. Or perhaps circumstances have changed and the justices wish to announce a rule consistent with the new circumstances, even if it is inconsistent with the old rule. The justices might even consider the consequences of overturning a precedent or more generally of interpreting a precedent in a particular way. This is known as pragmatic analysis, and it entails appraising alternative rulings by forecasting their consequences. Presumably, justices who engage in this form of analysis will select among plausible constitutional interpretations the one that has the best consequences and reject the ones that have the worst.

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

When you encounter cases that engage in this sort of analysis, you might ask the same questions raised by some critics of the approach: 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?

Polls of 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.⁵¹

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

The Supreme Court has frequently used such evidence. When *Wolf v. Colorado* (1949) presented the Court with the question 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. But in 1961, when *Mapp v. Ohio* overruled *Wolf* and held that state courts must exclude all unconstitutionally obtained evidence, the justices again surveyed 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 state 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 take into account 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. At the end of the day, the justices decided not to follow the path taken by the U.S. Supreme Court, ruling instead that their constitution prohibited the state from imposing capital punishment. Rejection of U.S. practice was made all the more interesting in light of a speech delivered by Justice Harry Blackmun only a year before *Makwanyane*.⁵² In that address, Blackmun chastised his colleagues for failing to take into account a decision of South Africa's court to dismiss a prosecution against a person kidnapped from a neighboring country. This ruling, Blackmun argued, was far more faithful to international conventions than the one his court had reached in *United States v. Alvarez-Machain* (1992), which permitted U.S. agents to abduct a Mexican national.

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

Whether this practice will become more widespread or filter into other legal areas is an intriguing question, and one likely to cause debate among the justices. Although some support efforts to expand their horizons beyond U.S. borders, others apparently agree with Justice Scalia, who has 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.”⁵³

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

53. *Thompson v. Oklahoma* (1987); see also his dissent in *Atkins v. Virginia* (2002).

SUPREME COURT DECISION MAKING: REALISM

So far in our discussion we have not mentioned the justices' ideologies, their political party affiliations, or their personal views on various public policy issues. The reason is that legal approaches to Supreme Court decision making do not admit that these factors figure into the way the Court arrives at its decisions. Instead, they suggest that justices divorce themselves from their personal and political biases and settle disputes based upon the law. The approaches we consider below—recall, what some call more realistic or nonlegalistic approaches—posit a quite different vision of Supreme Court decision making. They argue that the forces that drive the justices are anything but legal in composition 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 like all of us, with 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 precedent, history, the text of the Constitution, and the like in deciding cases. Instead, we offer the results of decades of research by scholars who think that political and other extralegal forces shape judicial decisions. We organize these nonlegalistic approaches into three categories: preference-based, strategic, and external forces. See if you think these scholarly accounts are persuasive.

Preference-Based Approaches

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

Judicial Attitudes. Attitudinal approaches emphasize the importance 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 importance of the justices’ personal attitudes.⁵⁴ 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? Pritchett concluded that the justices were not following precedent but were “motivated by their own preferences.”⁵⁵

Pritchett’s findings touched off an explosion of research on the influence of attitudes on Supreme Court decision making.⁵⁶ Much of this scholarship describes how liberal or conservative the various justices have been and attempts to predict their voting behavior based on their attitudinal preferences. To understand some of these differences, consider Figure 1-4, which presents the voting records of the present chief justice, John Roberts, and his three immediate predecessors: Earl Warren, Warren Burger, and William Rehnquist. The data report the percentage of times each voted in the liberal direction in two different issue areas: civil liberties and economic liberties.

The data show dramatic differences among these four important jurists, especially in cases involving civil liberties. Cases in this category include disputes over issues such as the First Amendment freedoms of religion, speech, and press; the right to privacy; the rights of the criminally accused; and illegal discrimination. The liberal position is a vote in favor of the individual

who is claiming a denial of these basic rights. Warren supported the liberal side almost 80 percent of the time, but Burger, Rehnquist, and now Roberts did so in about one-third (or less) of such cases.

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 more than 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 Roberts, and a new associate justice, Samuel Alito, the press was quick to label both “reliable members of the conservative bloc.” And now Sonia Sotomayor and Elena Kagan, President Obama’s appointees, are often deemed “liberal.” Sometimes an entire Court era is described in terms of its political preferences, such as the “liberal” Warren Court or the “conservative” Rehnquist Court. The data in Figure 1-5 confirm that these labels have some basis in fact. Looking at the two lines from left to right, from the 1950s through the early 2000s, note the mostly downward trend, indicating the increased conservatism of the Court in economics and civil liberties cases.

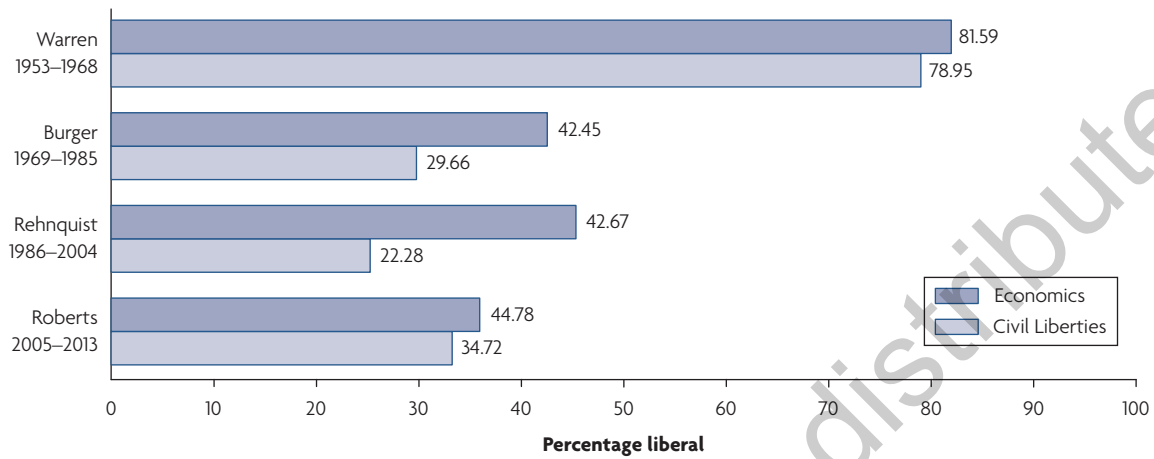
How valuable are the ideological terms used to describe particular justices or Courts in helping us understand judicial decision making? On one hand, knowledge of justices’ ideologies can lead to fairly accurate predictions about their voting behavior. Suppose that the Roberts Court handed down a decision dealing with the death penalty and that the vote was 5–4 in

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

55. Pritchett, *The Roosevelt Court*, xiii.

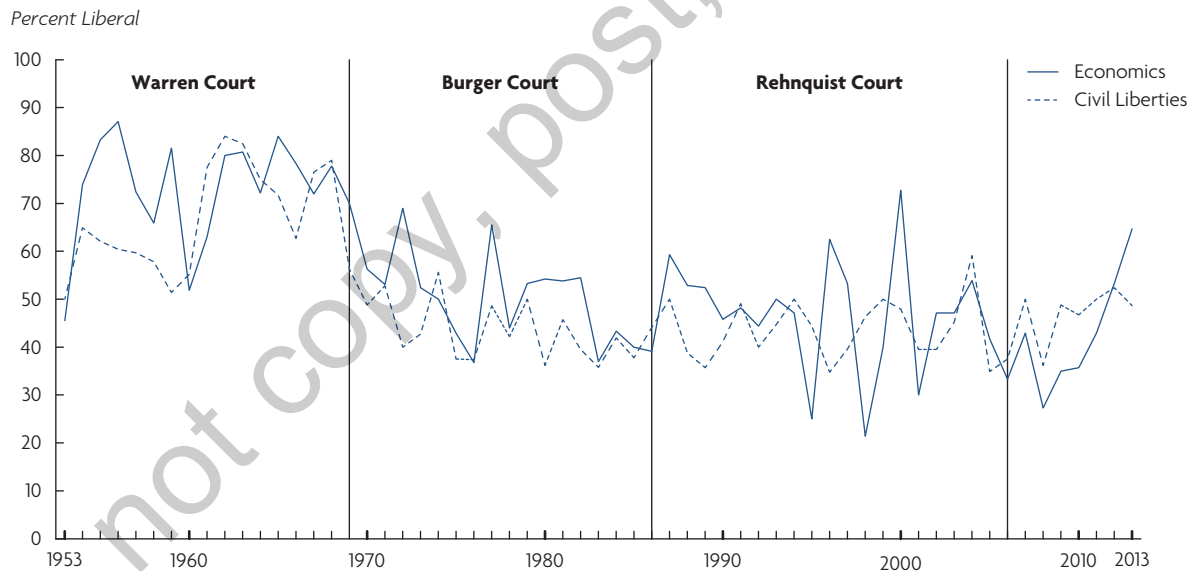
56. The classic works in this area are Glendon Schubert, *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965); and Rohde and Spaeth, *Supreme Court Decision Making*. For a lucid modern-day treatment, see Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, chaps.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

FIGURE 1-4 Percentage of Cases in Which Each Chief Justice Voted in the Liberal Direction, 1953–2013 Terms



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

FIGURE 1-5 Court Decisions on Economics and Civil Liberties, 1953–2013 Terms



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

favor of the criminal defendant. The most conservative members of that Court on death penalty cases are Chief Justice Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito—they almost always vote against the defendant in death penalty cases. If we predicted that Roberts, Scalia, Thomas, and Alito cast the

dissenting votes in our hypothetical death penalty case, we would almost certainly be right.⁵⁷

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

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 favors conservative positions on the Court because he is a conservative, and we know he is a conservative because he favors conservative positions in the cases he decides. 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) 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. But 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 probably would 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.⁵⁸ Some students of the Court argue that each

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

TABLE 1-3 Percentage of Votes to Declare Legislation Unconstitutional, 1994–2013 Terms

JUSTICE	FEDERAL LAWS	STATE AND LOCAL LAWS
Kennedy	95.0%	89.4%
Roberts	81.8	80.0
Thomas	77.5	57.5
Scalia	70.0	59.6
Alito	54.6	66.7
Breyer	50.0	74.5
Ginsburg	50.0	70.2

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 declare legislation unconstitutional. Forty cases were for federal laws and forty-seven for state and local laws. Some justices may not have participated in all cases. We include only justices currently on the Court, though we exclude Kagan and Sotomayor because they participated in fewer than ten of the cases. Roberts and Alito joined the Court in the 2005 term.

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 Court for some period between the 1994 and 2013 terms (and who are still on the Court) in cases in which the majority declared federal, state, or local

legislation unconstitutional. Note the wide variation among the justices, even for the five who sat together and heard the same cases (Kennedy, Thomas, Scalia, Breyer, and Ginsburg). Of particular interest is that some of the Court's conservative members—Kennedy, Scalia, and Thomas—were more likely to vote with the majority to strike down federal laws than those on the left (Breyer and Ginsburg).

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. 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 Court, the Court invalidated 127 laws—or about 7.9 per term. During the more conservative Rehnquist years, the Court struck 119 laws—or about 7.4 per term. Because this difference is very small, it 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 justices practice judicial activism or restraint, the question arises: To what extent does this information help us understand Supreme Court decision making? This question is difficult to answer because few scholars have studied the relationship between roles and voting in a systematic way.

The paucity of scholarly work on judicial roles leads to a criticism of the approach—namely, that it is virtually impossible to separate 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 criticism of the role approach is similar to that leveled at attitudinal factors—they tell us very little about the resulting policy in a case. Again, 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.⁵⁹

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 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.⁶⁰

How does strategic behavior manifest itself? One way is in the frequency of vote changes. During the deliberations that take place after oral arguments, the justices discuss the case and vote on it. These votes do not become

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

60. Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); David J. Danelski, “The Influence of the Chief Justice in the Decisional Process of the Supreme Court,” in *The Federal Judicial System*, ed. Thomas P. Jahngige 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*; Forrest Maltzman, Paul J. Wahlbeck, and James Spriggs, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).

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.⁶¹

A very 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. Another is the revision of opinions that occurs in almost every Court case.⁶² 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.⁶³

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

Does that mean that the justices are not affected by public opinion? Some scholars say they are, and offer three reasons for this claim.⁶⁴ 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 proclaimed that it would look toward "evolving standards of decency," as

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

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

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

64. See, for example, Barry Friedman, *The Will of the People* (New York: Farrar, Straus & Giroux, 2009); 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.

defined by public sentiment.⁶⁵ 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. 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 remain unconvinced of the role of public opinion in Court decision making. After systematically analyzing the data, Helmut Norpoth and Jeffrey A. Segal conclude: "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."⁶⁶ 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 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 this 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)."⁶⁷ 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."⁶⁸

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

65. *Trop v. Dulles* (1958).

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

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

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

system.”⁶⁹ In other words, the political environment has an effect on Court behavior. In fact, many assert that the Court is responsive to the influence of partisan politics, both internally and externally.

On the inner workings of the Court, 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 (see Chapter 14). In that case, five of the Court’s seven Republicans “voted” for Bush, and its two Democrats “voted” for Gore.

Political pressures from the outside also can affect the Court. Although the justices have no electoral connection or mandate of responsiveness, the other institutions of government have some influence on judicial behavior, and, naturally, the direction of that influence reflects the partisan composition of those branches. The Court has always had a complex relationship with the president, a relationship that provides the president with several possible ways to influence judicial decisions. The president has some direct links with the Court, including (1) the power to nominate justices and shape the Court; (2) personal relationships with sitting justices, such as Franklin Roosevelt’s with James Byrnes, Lyndon Johnson’s with Abe Fortas, and Richard Nixon’s with Warren Burger; and (3) the notion that the president, having been elected within the previous four years, may carry a popular mandate, reflecting the preferences of the people, which would affect the environment within which the Court operates.

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

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 the justices knew if they ruled a certain way, the Thomas Jefferson administration would not carry out their orders. Because the Court felt that such a failure would threaten the legitimacy of judicial institutions, it crafted its opinion in a way that would not force the administration to take any action but would send a message about its displeasure with the administration’s politics.

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.⁷⁰

Presidential influence is also demonstrated in the kinds of arguments a solicitor general 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 heard by the Court during the 1993–1994 term. Drew S. Days III, Clinton’s first solicitor general, rewrote at least four of those briefs to reflect the new administration’s more liberal posture. 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

70. See Epstein et al., *Supreme Court Compendium*, tables 7-15 and 7-16.

could not systematically challenge prospective jurors on the basis of sex; his predecessor had argued that such dismissals were constitutional.

Congress, too—or so some argue—can influence Supreme Court decision making. Like the president, the legislature has many powers over the Court the justices cannot ignore.⁷¹ 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. Some argue that these examples represent anomalies, not the rule. The Court, they say, 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 far more recently in response to the war on terrorism (see Chapter 2 for more details). 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

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

curiae briefs (see Box 1-2). 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.⁷² On average, organized interests in recent years filed at least one amicus brief in over 90 percent of all cases decided by full opinion between 2000 and 2013.⁷³ 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 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.⁷⁴ And eighty-eight amicus briefs were submitted in *Fisher v. Texas*, the affirmative action case in the 2012 term. 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

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

73. See Epstein, et al., *The Supreme Court Compendium*, table 7-22.

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

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 NAACP (National Association for the Advancement of Colored People) 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?⁷⁵ This question has no simple answer. When interest groups participate on both sides, it is reasonable to speculate that one or more exerted some intellectual influence or at least that intervention of groups on the winning side neutralized the arguments of those who lost. To determine how much influence any group or private party exerted, a researcher would have to interview all the justices who participated in the decision (and they do not grant such interviews) since even a direct citation to an argument advanced in one of the parties' or amici's briefs may indicate merely that a justice is seeking support for 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."⁷⁶ 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

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

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

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.⁷⁷

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

CONDUCTING RESEARCH ON THE SUPREME COURT

As you can see, considerable disagreement exists in the scholarly and legal communities about how justices should interpret the Constitution, and even why they decide cases the way they do. These approaches show up in many of the Court's opinions in this book. Keep in mind, however, that the opinions are not presented here in full; the excerpts included here 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*, *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

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

TABLE 1-4 Reporting Systems

REPORTER/PUBLISHER	FORM OF CITATION (TERMS)	DESCRIPTION
<i>United States 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> Lawyers' Cooperative Publishing Company	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> West Publishing Company	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>United States Law Week</i> Bureau of National Affairs	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.

SOURCE: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th ed. (Thousand Oaks, CA: CQ Press, 2015), table 2.9. Dates of reporters are from David Savage, *Guide to the U.S. Supreme Court*, 5th ed. (Washington, DC: CQ Press, 2010).

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 pages 228–234 to find an excerpt of *Texas v. Johnson* (1989). 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*.⁷⁸ 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 located in the three other reporters. The citations are as follows:

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

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

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

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

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

78. In this book, we list only the *U.S. Reports* cite for each case because *U.S. Reports* is the official record of Supreme Court decisions. It is the only reporter published by the federal government; the three others 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*.

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:

1. *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th 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.⁷⁹ 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.
2. *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.⁸⁰
3. *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 so forth.⁸¹

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.

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

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

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

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.

ANNOTATED READINGS

In the text and footnotes, we mention many interesting studies on the Supreme Court. Our goal in each chapter's Annotated Readings section is to highlight a few books for the interested reader.

Lawrence Baum's *The Supreme Court*, 10th ed. (Washington, DC: CQ Press, 2011), 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 of the current 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 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: MIT Press, 2013); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999); Richard H. Fallon Jr., *Implementing the Constitution* (Cambridge, MA: Harvard University Press, 2001); Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008); and Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010).

Noteworthy political science studies of judicial decision making (including case selection) are C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948); Glendon Schubert, *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965); Walter J. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); H. W.

Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991); Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002); Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009); Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton, NJ: Princeton University Press, 2011); Richard L. Pacelle Jr., Brett W. Curry, and Bryan W. Marshall, *Decision Making by the Modern Supreme Court* (New York: Cambridge University Press, 2011); and Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013).

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