7 edition

Lee Epstein
Thomas G. Walker

Constitutional Law for a Changing America

A Short Course

Constitutional Law for a Changing America

Seventh Edition

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PREFACE

OVER THE PAST two decades or so, constitutional law texts for political science courses have experienced a radical change. At one time, relatively short volumes, containing either excerpts from landmark cases or narratives of them, dominated the market. Now, large, almost mammoth books abound—some in single volumes, others in two volumes, but all designed for a two-semester sequence.

This trend, while fitting compatibly with the needs of many instructors, bypassed others, including those who teach institutional powers, civil liberties, rights, and justice in a single academic term and those who prefer a shorter core text. *Constitutional Law for a Changing America: A Short Course* was designed as an alternative text for these instructors. The first edition appeared in 1996. Its positive reception encouraged us to prepare subsequent editions—including this, the seventh edition.

Like its predecessors, this edition of *A Short Course* seeks to combine the best features of the traditional, concise volumes—it interweaves excerpts of the U.S. Supreme Court's most important decisions and narratives of major developments in the law. For example, our discussion of the right to counsel offers not only the landmark decision *Gideon v. Wainwright* (1963) but also an account of the critical cases preceding *Gideon,* such as ***Powell v. Alabama*** (1932), and those following it, such as ***Scott v. Illinois*** (1979). (*Note:* Boldface here and throughout the book indicates cases we analyze in the text and excerpt in the book's archive. More details on the archive follow.)

At the same time, we thought it important to move beyond the traditional texts and write a book that reflects the exciting nature of constitutional law. In doing so, we were not without guidance. For more than two decades we have been producing *Constitutional Law for a Changing America,* now moving into its tenth edition. This two-volume book, we believe, provides an accessible yet sophisticated and contemporary take on the subject.

A Short Course, then, although presenting cases and other materials in ways quite distinct from our two-volume book, maintains some of its most desirable features. First, we approach constitutional law, as we do in *Constitutional Law for a Changing America,* from a social science perspective, demonstrating how many forces—not just legal factors—influence the development of the law. The justices carry out their duties in the context of the political, historical, economic, and social environment that surrounds them. Accordingly, throughout *A Short Course,* we highlight how relevant political, historical, economic, and social events; personnel changes on the Court; interest groups; and even public opinion may have affected the justices' decisions, in addition to traditional legal considerations, such as precedent, text, and history.

Second, just as our two-volume set seeks to animate the subject, so too does *A Short Course.* To us and, we suspect, most instructors, constitutional law is an exciting subject, but we realize that some students may not (at least initially) share our enthusiasm. To whet their appetites, we develop the human side of landmark litigation. Where possible, we include photographs of litigants and places that figured prominently in cases. For each excerpted case, we provide a detailed description, in accessible prose, of the dispute that gave rise to the suit. Students are spared the task of digging out facts from Court opinions and can plunge ahead to the ruling with the contours of the dispute firmly in mind. We also present information about the political environment surrounding various cases in tables, figures, and boxes that supplement the narrative and case excerpts.

Third, because many adopters of *Constitutional Law for a Changing America* commented favorably on the supporting material we provide in those volumes, we maintain that feature in *A Short Course.* Along these lines, chapter 2, "Understanding the U.S. Supreme Court," reviews not only the procedures the Court uses to decide cases but also the various legal and extralegal approaches scholars have invoked to understand and explain why the Court rules as it does. Fourth, this edition of *A Short Course* takes advantage of the expanding resources available to students of constitutional law that can be found on the Internet. With each excerpted opinion we provide locations online where students may read the full, unabridged decision. We also alert students whenever the oral arguments for a case have been made available on the Internet by the Oyez Project.

With each edition we attempt to enhance the coverage and accessibility of the material, and this seventh edition is no exception. The most significant changes are in the individual chapters. We have thoroughly updated each to include important opinions handed down during the Roberts Court era. Since Chief Justice John Roberts took office in 2005, the Court has taken up many pressing issues of the day, including, of course, health care; we've thus excerpted, in chapters 7 ("The Commerce Power") and 8 ("The Power to Tax and Spend"), the major dispute over the 2010 Patient Protection and Affordable Care Act (often referred to as Obamacare), *National Federation of Independent Business v. Sebelius* (2012). Then there's same-sex marriage, which we discuss in several chapters but especially in chapter 16 ("The Right to Privacy") where we excerpt *Obergefell v. Hodges* (2015), invalidating all existing state bans on the practice. We also excerpt other Roberts Court decisions of note, including *United States v. Jones* (2012), which addresses whether police use of GPS tracking devices without a warrant violates the Fourth Amendment; *Shelby County, Alabama v. Holder* (2013), which concerns the Voting Rights Act; and ***Fisher v. the University of Texas*** (2016), in which the justices consider the constitutionality of an affirmative action program. Other contemporary decisions have received less attention but are no less important for understanding constitutional law, including ***Zivotofsky v. Clinton*** (2012) (political question doctrine) and ***United States v. Comstock*** (2010) (the necessary and proper clause).

But readers will find more than just updating. We have tried to bring a fresh eye to each chapter, reconsidering all existing case excerpts and clarifying existing material. Our discussions of federalism (chapter 6) and the commerce clause (chapter 7) provide examples. In the last edition, we reworked some of this material to highlight new developments. Here we continue along the same path, moving even more of the commerce material to chapter 7 and adding more basic federalism material (including an excerpt of *Coyle v. Smith*) to chapter 6. Recent decisions in the areas of religion (chapter 12), privacy (chapter 16), and discrimination (chapter 19) also provided us the opportunity to supplement and, we hope, further illuminate some important new and perennial topics. To provide one more example, in chapter 12 we have added material to take into account the Court's most recent forays into the First Amendment's guarantee of the free exercise of religion. New material includes a discussion of ***Burwell v. Hobby Lobby*** (2014), a dispute over compliance with a provision of Obamacare that required companies of a given minimum size to offer health insurance to their employees—including benefits for a range of contraceptive medications and devices.

These are but a few examples of the many changes we have made throughout the book. At the same time, we have retained and enhanced two innovative features from previous editions. The first is a series of "Aftermath" boxes sprinkled throughout the text. These boxes are a response to our own experiences in the classroom when confronted with questions such as "Whatever happened to Ernesto Miranda?" The Aftermath boxes discuss what occurred after the Supreme Court handed down its decision. In addition to providing human interest material, they lead to interesting discussions about the Court's impact on the lives of ordinary Americans. We hope these materials demonstrate to students that Supreme Court cases are more than merely legal names and citations; they involve real people involved in real disputes. To that end, we have added several new boxes covering both old and newer cases (for example, *McCulloch v. Maryland* and *Boy Scouts of America v. Dale*).

A second major change reflects our effort to respond to an inevitable question facing any author of a constitutional law text: Which Supreme Court cases should be included? Other than classic decisions such as *Marbury v. Madison,* instructors have differing ideas about which cases best illustrate the various points of constitutional law. Each has his or her list of personal favorites, but given the page limitations of a printed book, not every instructor's preferences can be satisfied.

We have attempted to overcome this problem by creating, and regularly updating, an electronic archive of more than three hundred supplemental Supreme Court decisions. These cases are excerpted using the same format as the case excerpts that appear in this printed volume. The archive allows instructors to use additional cases or to substitute favorite cases for those that appear in the printed text. The archive also provides an efficient source of material for students who want to read more deeply into the law and for instructors who wish to direct their students to an easily accessible information source for paper assignments. The cases included in the archive are identified in the text in bold italic type. The archive can be accessed on the Internet at https://edge.sagepub.com/conlaw.

We keep the electronic archive current between printed editions. Instructors and students no longer must wait until the next edition is published to have ready access to recent rulings presented in a format designed for classroom use.

ACKNOWLEDGMENTS

The roots of this seventh edition of *A Short Course* extend back to our two-volume book. As a consequence, those who influenced the development of the original version of *Constitutional Law for a Changing America* influenced this project as well. We are particularly grateful to our three former editors, Joanne Daniels, Brenda Carter, and Charisse Kiino, as well as our current editor, Monica Eckman. Joanne conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. She brought the concept to our attention and helped us develop it. Brenda guided us through the completion of the project and its subsequent editions and urged us to go forward with *A Short Course.* Her support for our projects was constant and strong, and her advice always wise. Charisse brought new enthusiasm and ideas to this book. Her responsiveness to our needs and requests was extraordinary. Working with her was a joy. Finally, although our executive editor, Monica Eckman, came aboard just as we were completing this latest edition, she already has provided us with terrific support and encouragement as we continue to develop the *Constitutional Law for a Changing America* books and supplementary materials.

Other members of the CQ Press team also deserve our thanks and praise. Neither of us is quite sure what we would have done without Carolyn Goldinger, our copy editor for many earlier editions of the *Constitutional Law for a Changing America* series. To call her "our copy editor" is true enough. But she did so much more than perfect our writing and check our facts. She contributed so many ideas for presentation and content that our books would have been far the worse without her. We'll never be able to thank her enough. Judy Selhorst, who copyedited more recent versions of our books more than filled Carolyn's shoes. In ways big and small, she improved the volumes immeasurably, as did our most recent copy editor, Gretchen Treadwell. We are very grateful for all their efforts on our behalf. We are also especially grateful for the efforts of content development editor, John Scappini, editorial assistant, Zachary Hoskins, and production editor, Veronica Stapleton Hooper. We also thank Timothy Johnson for creating ancillary material. Finally, other members of the CQ Press family, too numerous to mention, brought ideas, enthusiasm, and efficiency to the project.

Over the years, we have also benefited from the suggestions of numerous scholars who read our manuscripts, offered suggestions, provided data, or shared their thoughts about constitutional law. We are especially grateful to Judith A. Baer, Ralph Baker, Lawrence Baum, Robert W. Bennett, John Brigham, Rebecca Brown, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, Phillip J. Cooper, Sue Davis, Jolly Emrey, John Fliter, John B. Gates, Leslie Goldstein, Edward V. Heck, Dennis Hutchinson, Jack Knight, Joseph F. Kobylka, Adam Liptak, John A. Maltese, Kevin McGuire, Wayne McIntosh, Susan Mezey, Richard L. Pacelle Jr., Martin H. Redish, C. K. Rowland, Jeffrey A. Segal, Donald Songer, Harold Spaeth, and Harry P. Stumpf. We would like to thank John Brigham of the University of Massachusetts, Paula A. Franzese of Barnard College, Lori Cox Han of Austin College, Gordon P. Henderson of Widener University, Susanna Peters of Michigan Technological University, Chris Edelson of American University, Marshall DeRosa of Florida Atlantic University, Donna Merrell of Kennesaw State University, Meg Hobday of Hamline University, Angela Narasimhan of Idaho State University, and Joseph Ross of Florida Gulf Coast University for their suggestions on previous editions. We are also grateful to those instructors and students who have used *Constitutional Law for a Changing America* and sent us comments and suggestions, especially Akiba J. Covitz, Alec C. Ewald, and Neil Snortland.

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

Any errors of omission or commission, of course, remain our sole responsibility. We encourage students and instructors alike to comment on the book and to inform us of any errors. Contact us at *epstein@wustl.edu* or *polstw@emory.edu.*

To my niece and nephews
Alexandra, Brian, Jason, and Zach—L. E.
To Nicole—T. G. W.

PART I The U.S. Constitution

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An Introduction to the U.S. Constitution

1. THE LIVING CONSTITUTION
2. UNDERSTANDING THE U.S. SUPREME COURT

An Introduction to the U.S. Constitution

ACCORDING TO President Franklin D. Roosevelt, "Like the Bible, it ought to be read again and again."[1] Senator Henry Clay said it "was made not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity."[2] Justice Hugo Black carried a copy with him virtually all the time. The object of all this admiration? The U.S. Constitution. To be sure, the Constitution has its flaws and its share of detractors, but most Americans take great pride in their charter. And why not? It is, after all, the world's oldest written constitution.

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

THE ROAD TO THE U.S. CONSTITUTION

While the fledgling United States was fighting for its independence from England, it was being run (and the war conducted) by the Continental Congress. Although this body had no formal authority, it met in session from 1774 through the end of the war in 1781, establishing itself as a de facto government. But it may have been something more than that: About a year into the Revolutionary War, the Continental Congress took steps toward nationhood. On July 2, 1776, it passed a resolution declaring the "United Colonies free and independent states." Two days later, on July 4, it formalized this proclamation in the Declaration of Independence, in which the nation's founders used the term *United States of America* for the first time.[3] But even before the adoption of the Declaration of Independence, the Continental Congress had selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee labored for several months to produce a proposal for a national charter, the Articles of Confederation.[4] Congress passed the proposal and submitted it to the states for ratification in November 1777. Ratification was achieved in March 1781, when Maryland—a two-year holdout—gave its approval.

The Articles of Confederation, however, had little effect on the way the government operated; instead, the articles more or less institutionalized practices that had developed under the Continental Congress (1774–1781). Rather than provide for a compact between the people and the government, the 1781 charter institutionalized "a league of friendship" among the states, an agreement that rested on strong

1. Fireside chat, March 9, 1937.

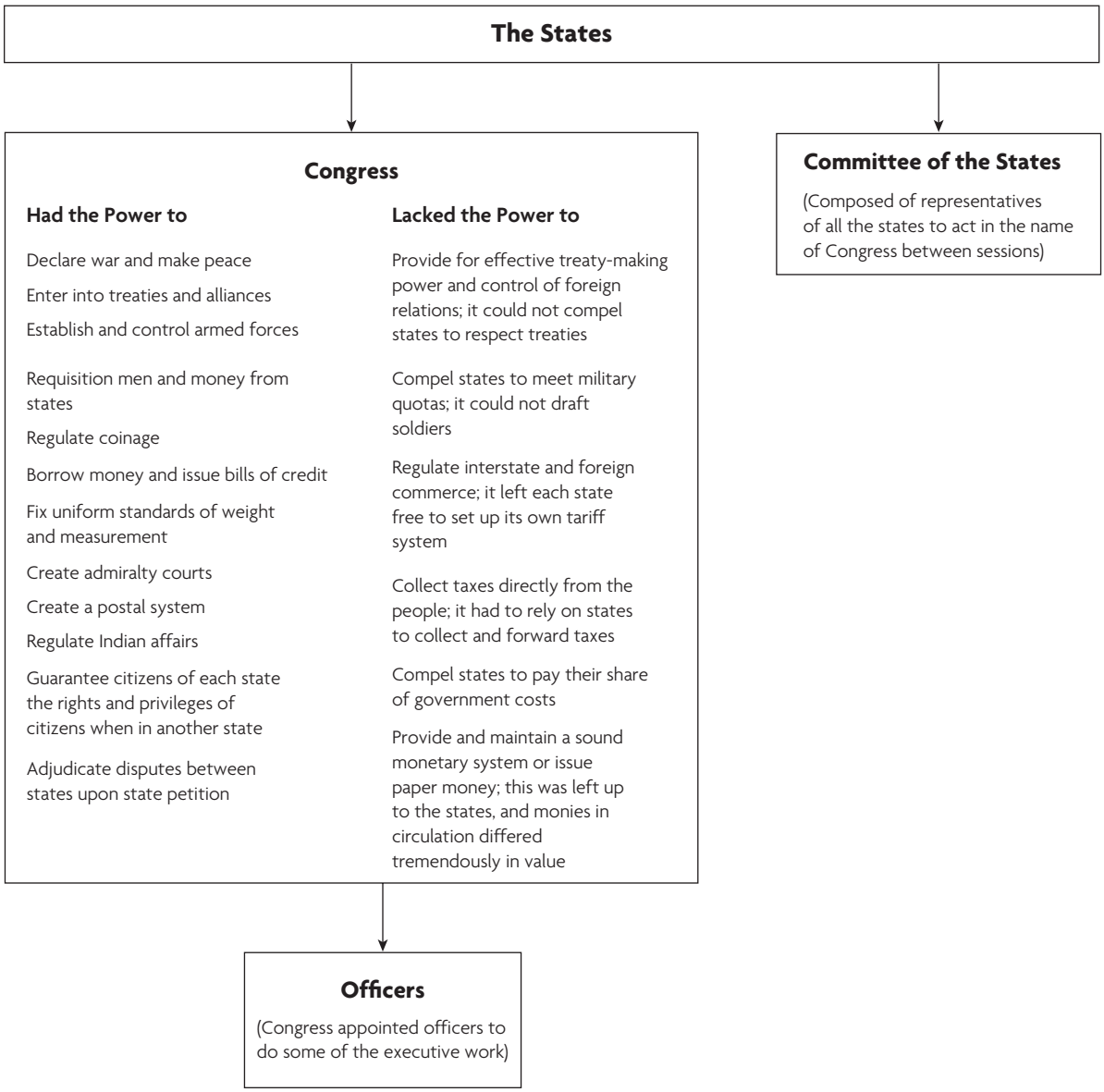
2. Speech to the Senate, January 29, 1850.

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

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

notions of state sovereignty. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it, and not from the people.

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



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

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

- Because it allowed Congress only to requisition funds and not to tax, the federal government was virtually broke. From 1781 to 1783 the national legislature requested $10 million from the states and received only $1.5 million. Given the foreign debts the United States had accumulated during the Revolution, this problem was particularly troublesome.
- Because Congress lacked any concrete way to regulate foreign commerce, treaties between the United States and other countries were of limited value. Some European nations (for example, England and Spain) took advantage by imposing restrictions on trade that made it difficult for America to export goods.
- Because the government lacked coercive power over the states, cooperation among them quickly dissipated. The states engaged in trading practices that hurt one another economically. In short, they acted more like thirteen separate countries than a union or even a confederation.
- Because the exercise of most national authority required the approval of nine states and because the passage of amendments required unanimity, the articles stymied Congress. Indeed, given the divisions among the states at the time, the approval of nine states for any action of substance was rare, and the required unanimity for amendment was never obtained.

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

In the mid-1780s, as the articles' shortcomings were becoming more and more apparent, several dissidents, including James Madison of Virginia and Alexander Hamilton of New York, held a series of meetings to arouse interest in revising the system of government. At a session in Annapolis in September 1786, they urged the states to send delegations to another meeting scheduled for the following May in Philadelphia. Their plea could not have come at a more opportune time. Just the month before, a former Revolutionary War captain, Daniel Shays, had led disgruntled farmers in an armed rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers.

Shays's Rebellion was suppressed by state forces, but it was seen as yet another sign that the Articles of Confederation needed amending. In February 1787 Congress issued a call for a convention to reevaluate the current national system. It was clear, however, that Congress did not want to scrap the articles; in fact, it stated that the delegates were to meet "for the sole and express purpose of revising the Articles of Confederation."

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

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

The delegates had much to accomplish during the convention period. Arguments between large states and small states over the structure of the new government and its relationship to the states threatened to deadlock the meeting. Indeed, it is almost a miracle that the delegates were able to frame a new constitution, which they did in just four months. One can speculate that the founders succeeded in part because they could close their meetings to the public, a feat almost inconceivable today; a contemporary convention of the states

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

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

would be a media circus. Moreover, it is hard to imagine that delegates from fifty states could agree even to frame a new charter, much less do it in four months.

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

These questions have been the subject of lively debates among scholars. Many agree with historian Melvin I. Urofsky, who wrote of the Constitutional Convention, "Few gatherings in the history of this or any other country could boast such a concentration of talent." And, "despite [the framers'] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment."[5]

Indeed, they were an impressive group. Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—all white men, many of whom had been educated at the country's best schools—skeptics suggest that the document the framers produced was biased in various ways. In 1987 Justice Thurgood Marshall said that the Constitution was "defective from the start," that despite its first words, "We the People," it excluded "the majority of American citizens" because it left out blacks and women. He further alleged that the framers "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[6]

Along the same lines is the point of view expressed by historian Charles Beard in his controversial work *An Economic Interpretation of the Constitution of the United States,* which depicts the framers as self-serving. Beard says the Constitution was an "economic document" devised to protect the "property interests" of those who wrote it. Various scholars have refuted this view, and Beard's work, in particular, has been largely negated by other studies.[7] Still, *by today's standards,* it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class.

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

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

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

Given these charges, how has the Constitution survived for so long, especially considering the U.S. population's increasing diversity? The answer lies in part with the Supreme Court, which generally has analyzed the document in light of the contemporary context. That is, some justices have viewed the Constitution as a living document and have sought to adapt it to their own times. In addition, the founders provided for an amending process to ensure the document's continuation. That we can alter the Constitution to fit changing needs and expectations is obviously important. For example, the original document held a slave to be three-fifths of a person for the purposes of representation, and a slave had no rights of citizenship at all. In the aftermath of the Civil War, the country recognized the outrageousness of such provisions and added three amendments to alter the status of blacks and provide for their full equality under law.

This is not to suggest that controversies surrounding the Constitution no longer exist. To the contrary, charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome, that it is too slanted toward the will of the majority. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers' biases.

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

UNDERLYING PRINCIPLES OF THE CONSTITUTION

Table I-1 sets forth the basic proposals considered at the convention and how they got translated into the Constitution. What it does not show are the fundamental principles underlying, but not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers/checks and balances doctrine, which governs relations among the branches of government; federalism, which governs relations between the states and the national government; and the principle of individual rights and liberties, which governs relations between the government and the people.

Separation of Powers/Checks and Balances

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

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

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

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

But institutional powers are only one side of the coin. We should also consider the other side—constraints on those powers. As depicted in Figure I-2, the framers not only endowed each branch with distinct power and authority over its own sphere but also provided explicit

checks on the exercise of those powers such that each branch can impose limits on the primary functions of the others. In addition, the framers made the institutions responsible to different sets of constituencies. They took these steps—creating an intricate system of checks and balances—because they feared the concentration of powers in a single branch.

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

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

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

Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the federal government and the states. As already noted, the national legislature was not just weak—it was more or less an apparatus controlled by the states. They had set up the Articles of Confederation, and, therefore, they empowered Congress.

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

- The Constitution grants certain legislative, executive, and judicial powers to the national government. Those not granted to the national government are reserved to the states.
- The Constitution makes the national government supreme. The Constitution, all laws passed pursuant to it, and treaties are the supreme law of the land. American citizens, most of whom are also state citizens, and state officials owe their primary allegiance to the national government.
- The Constitution denies some powers to both national and state governments, some only to the national government, and still others only to the state governments.

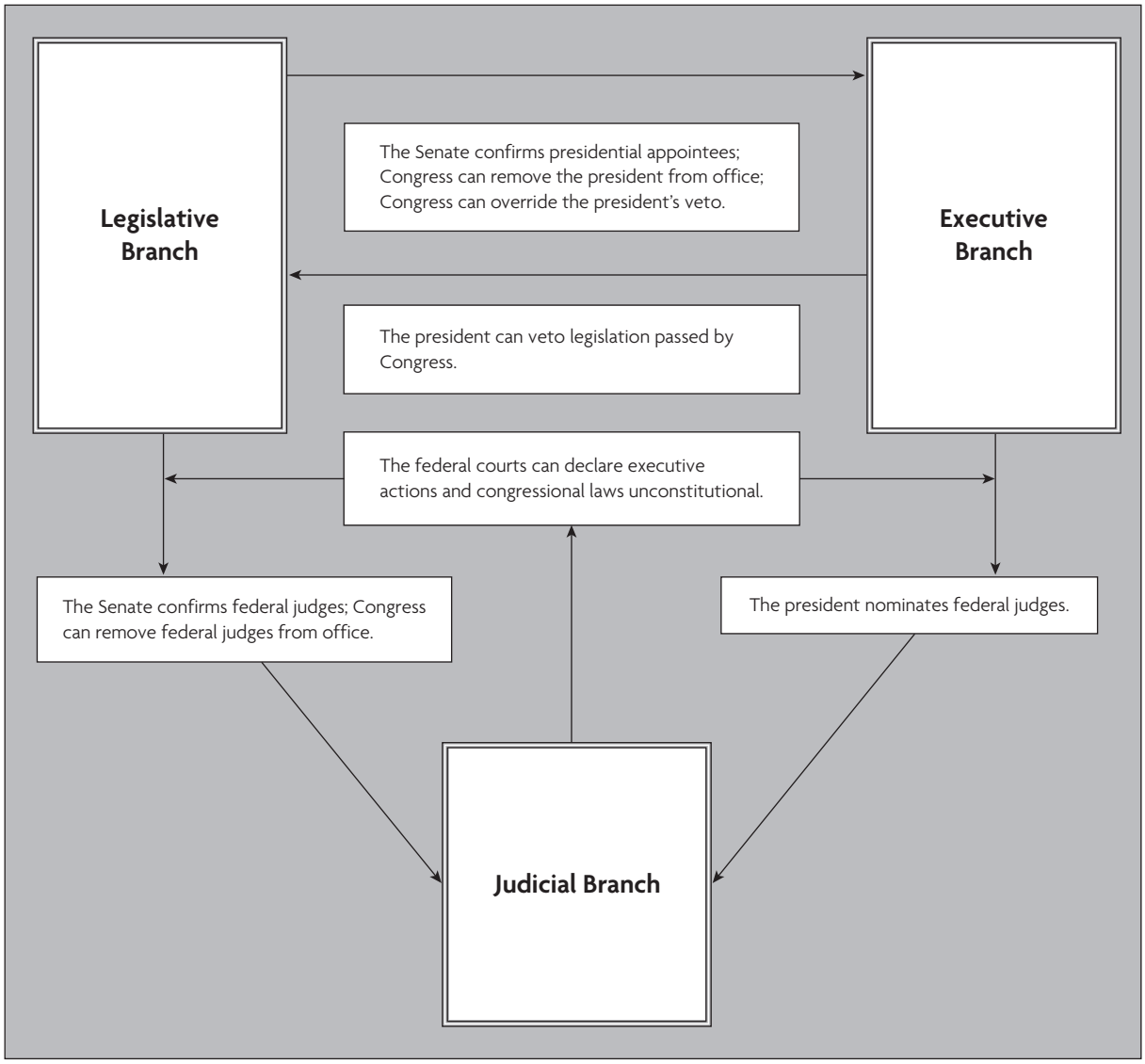
By making the national government supreme in its spheres of authority, the Constitution corrected a defect in the Articles of Confederation. But despite the best efforts of the framers to spell out the nature of federal–state relations, the Constitution still left many questions unanswered. For example,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

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

Individual Rights and Liberties

The Constitutional Convention was called in response to conditions resulting from the ineffectiveness of government under the Articles of Confederation. For that reason, most of the efforts in Philadelphia were focused on the creation of a new governmental structure, with careful attention given to the powers the national government could wield and appropriate limitations to be placed on those powers. The document that emerged from the convention reflected that emphasis.

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



The prominence of issues of governmental powers and structure, however, did not mean that the framers had forgotten the purposes of the Revolution. The war for independence had ended only a few years before the convention met. The values of individual liberty and freedom, over which the war was fought, were still fresh in the framers' minds. There is no doubt that safeguarding those rights remained a high priority.

It is therefore a puzzle to many that the Constitution drafted in Philadelphia had only scant references to individual rights and liberties. How could such a fundamental governing document produced by those who had led the nation to its independence fail to include a systematic statement of basic freedoms?

Several reasons have been suggested. Some observers point out that the immediate crisis facing the nation

in 1787 was an economic one. Creating a government that had ample power to stabilize the economy, stimulate growth, and protect private property rights was the highest priority. There was no immediate civil liberties crisis. English rule had been overthrown, and the states each had their own bills of rights that protected individual liberties.

Others cite practical problems facing the delegates. By the time the convention had resolved matters of governmental structure and power, the delegates understandably were exhausted. Leaving behind their personal businesses and occupations, they had spent May through September confined together in a hot and humid room, engaged in intense debates and negotiations. The prospect of spending additional time attempting to resolve questions of what liberties should be included in a bill of rights and how those rights should be stated was not an attractive one. Many of the delegates even questioned the need for a bill of rights. They were optimistic that the checks and limitations placed on the powers of the proposed national government would be sufficient to block government abuses of individual rights.

Yet the question of a bill of rights would not go away. One of the primary concerns voiced during state debates over the ratification of the proposed Constitution was that it lacked a bill of rights. Many argued that despite the various restraints on governmental power placed in the document, the new government would have the potential to become a very powerful institution, and one that would be quite capable of depriving the people of their freedoms. This argument was particularly persuasive, and consequently ratification was placed in jeopardy. In response, supporters of the Constitution began to suggest a compromise: if the Constitution was ratified, one of the new government's first orders of business would be the drafting of a bill of rights to be added to the Constitution.

In chapter 1 we describe that compromise, which took the form of the first ten amendments to the Constitution—the Bill of Rights. It is enough to note for now that the eventual ratification of the Bill of Rights, on December 15, 1791, quieted those who had voiced objections. But the guarantees it contains continue to serve as fodder for debates and, most relevant here, for Supreme Court litigation. Many of these debates involve the construct of specific guarantees, such as free speech and free exercise of religion, under which individuals seek relief when governments allegedly infringe upon their rights. They also involve clashes between the authority of the government to protect the safety, health, morals, and general welfare of citizens and the right of individuals not to be deprived of their liberty without due process of law.

1 The Living Constitution

IN MAY 1787 the founders of the United States met in Philadelphia for the sole and express purpose of revising the Articles of Confederation, but within a month they had dramatically altered their mission. Viewing the articles as unworkable, they decided to start afresh. What emerged just four months later, on September 17, was an entirely new government scheme embodied in the U.S. Constitution.

The framers were quite pleased with their handiwork; when they had finished, they "adjourned to City Tavern, dined together and took cordial leave of each other."[1] After the long, hot summer in Philadelphia, most of the delegates left for home, confident that the new document would receive speedy passage by the states. At first, it appeared as if their optimism was justified. As Table 1-1 depicts, before the year was out, four states had ratified the Constitution—three by unanimous votes. But after January 1788, the pace began to slow. By this time, a movement opposed to ratification was growing and marshaling arguments to deter state convention delegates. What these opponents, the Anti-Federalists, feared most was the Constitution's new balance of power. They believed that strong state governments provided the best defense against the concentration of too much power in the national government, and that the Constitution tipped the scales in favor of federal power. These fears were countered by the Federalists, who favored ratification.

Although their arguments and writings took many forms, among the most important was a series of eighty-five articles published in New York newspapers under the pen name "Publius." Written by John Jay, James Madison, and Alexander Hamilton, *The Federalist Papers* continue to provide insight into the objectives and intent of the founders.[2] Debates between the Federalists and their opponents often were highly philosophical in tone, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were full of the stuff of ordinary politics—deal making. Massachusetts provides a case in point. After three weeks of debate among the delegates, Federalist leaders realized that they would never achieve victory without the support of Governor John Hancock. They went to his house and proposed that he endorse ratification on the condition that a series of amendments be tacked on for consideration by Congress. The governor agreed, but in return he wanted to become president of the United States if Virginia failed to ratify or if George Washington refused to serve. Or he would accept the vice presidency. With the deal cut, Hancock went to the state convention to propose the compromise—the ratification of the Constitution with amendments. The delegates agreed, making Massachusetts the sixth state to ratify.[3]

1. *1787,* compiled by historians of the Independence National Historical Park (New York: Exeter Books, 1987), 191.

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

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

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

Why were states so reluctant to ratify the Constitution without a bill of rights? Some viewed the proposed document with downright suspicion because of the extensive powers it would grant to the national government. But more tended to agree with Thomas Jefferson, who in a letter to James Madison argued that "a bill of rights is what the people are entitled to against every government on earth, general and particular, and what no just government should refuse, or rest on inference."

TABLE 1-1 The Ratification of the Constitution

STATE	DATE OF ACTION	DECISION MARGIN
Delaware	December 7, 1787	ratified 30–0
Pennsylvania	December 12, 1787	ratified 46–23
New Jersey	December 18, 1787	ratified 38–0
Georgia	December 31, 1787	ratified 26–0
Connecticut	January 8, 1788	ratified 128–40
Massachusetts	February 6, 1788	ratified with amendments 187–168
Maryland	April 26, 1788	ratified 63–11
South Carolina	May 23, 1788	ratified with amendments 149–73
New Hampshire	June 21, 1788	ratified with amendments 57–47
Virginia	June 25, 1788	ratified with amendments 89–79
New York	July 26, 1788	ratified with amendments 30–27
North Carolina	August 2, 1788	rejected 184–84
	November 21, 1789	ratified with amendments 194–77
Rhode Island	May 29, 1790	ratified with amendments 34–32

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

What Jefferson's remark suggests is that many thought well of the new system of government but were troubled by the lack of a declaration of rights. Remember that at the time Americans clearly understood the concepts of *fundamental* and *inalienable* rights, those that inherently belonged to them and that no government could deny. Even England, the country they fought against to gain their freedom, had such guarantees. The Magna Carta of 1215 and the Bill of Rights of 1689 gave Britons the right to a jury trial, to protection against cruel and unusual punishment, and so forth. Moreover, after the Revolution, virtually every state constitution included a philosophical statement about the relationship between citizens and their government or a listing of fifteen to twenty inalienable rights, such as religious freedom and electoral independence. Small wonder that the call for such a statement or enumeration of rights in the federal Constitution became a battle cry. If the desire for one was so widespread, why had the framers failed to include it in the original document? Did they not anticipate the reaction?

Records of the 1787 debates indicate that, in fact, the delegates to the Constitutional Convention considered specific individual guarantees on at least four separate occasions.[4] On August 20, Charles Pinckney submitted a proposal that included several guarantees, such as freedom of the press and the eradication of religious affiliation requirements for holding public office, but the various committees never considered his plan. On September 12, 14, and 16, just before the close of the convention, some tried, again without success, to persuade their fellow delegates to enumerate specific guarantees. At one point, George Mason said that a bill of rights "would give great quiet to the people; and with the aid of the state delegations, a bill might be prepared in a few hours." This motion was unanimously defeated by those remaining in attendance. On the convention's last day, Edmund Randolph

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

made a desperate plea that the delegates allow the states to submit amendments and then convene a second convention. To this, Pinckney responded, "Conventions are serious things, and ought not to be repeated."

Why the majority of delegates showed no enthusiasm for these suggestions is a matter of scholarly debate. Some claim that the pleas came too late, that the framers wanted to complete their mission by September 15 and were simply unwilling to stay in Philadelphia even one day longer. Others disagree, arguing that the framers were more concerned with the structure of government than with individual rights, and that the plan they devised—one based on enumerated, not unlimited, powers—would foreclose the need for a bill of rights. In *Federalist* No. 84, Hamilton wrote, "The Constitution is itself . . . a Bill of Rights." Under it the federal government could exercise only those functions specifically bestowed upon it; all remaining rights lay with the people. He also asserted that "independent of those which relate to the structure of government," the Constitution did, in fact, contain some of the more necessary specific guarantees. For example, Article I, Section 9, prohibits bills of attainder, ex post facto laws, and the suspension of writs of habeas corpus. Hamilton and others further argued that no list of rights could be complete.

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

In May 1789, one month after the start of the new Congress, Madison announced to the House of Representatives that he would draft a bill of rights and submit it within the coming month. As it turned out, the task proved a bit more difficult than he had anticipated; the state conventions had submitted nearly two hundred amendments, some of which would have decreased significantly the power of the national government. After sifting through these lists, Madison at first thought it might be best to incorporate the amendments into the Constitution's text, but he soon changed his mind. Instead, he presented the House with the following statement, echoing the views expressed in the Declaration of Independence: "That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people."[5]

The legislators rejected this proposal, preferring a listing of rights to a philosophical statement. Madison returned to his task, eventually fashioning a list of seventeen amendments. When he took it back to the House, however, the list was greeted with suspicion and opposition. Some members of Congress, even those who had argued for a bill of rights, now did not want to be bothered with the proposals, insisting that they had more important business to settle. One suggested that other nations would not see the United States "as a serious trading partner as long as it was still tinkering with its constitution instead of organizing its government."[6] Finally, in July 1789, after Madison had prodded and even begged, the House considered his proposals. A special committee scrutinized them and reported a few days later, and the House adopted, with some modification, Madison's seventeen amendments. The Senate approved some and rejected others, so that by the time the Bill of Rights was submitted to the states on October 2, 1789, only twelve remained.[7] The states ended up ratifying ten of the twelve. The amendments that did not receive approval were the original Articles I and II. Article I dealt with the number of representatives:

> After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

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

6. Farber and Sherry, *A History of the American Constitution*, 330.

7. Among those rejected was the one Madison prized above all others: that the states would have to abide by many of the enumerated guarantees.

Article II contained the following provision:

> No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

This article also failed to garner sufficient support from the states in the 1790s and did not become a part of the Bill of Rights. Unlike the original Article I, however, the legislative compensation provision eventually took its place in the Constitution. In 1992, more than two hundred years after the amendment was first proposed, the states ratified it and it became the Twenty-seventh Amendment to the U.S. Constitution.

Why the states originally refused to pass this amendment, along with the original Article I, is something of a mystery, for few records of state ratification proceedings exist. What we do know is that when Virginia ratified on December 15, 1791, the Bill of Rights became part of the U.S. Constitution.

THE AMENDMENT PROCESS

It is truly remarkable that Congress proposed and the states ratified the first ten amendments to the Constitution in three years; since then only seventeen others have been added! Undoubtedly, this reticence would have pleased the writers of the Constitution. They wanted to create a government that would have some permanence, even though they recognized the need for flexibility. One of the major flaws in the Articles of Confederation, some thought, was the amending process, because changing that document required the approval of all thirteen states. The framers imagined an amending procedure that would be "bendable but not trendable, tough but not insurmountable, responsive to genuine waves of popular desire, yet impervious to self-serving campaigns of factional groups."[8]

In Article V the framers established a two-step process for altering the Constitution *(see Table 1-2)*. Proposing a constitutional amendment is the first step. This may be done either by a two-thirds vote of both houses of Congress or by two-thirds of the states petitioning for a constitutional convention. To date, all proposed constitutional amendments have been the products of congressional action. A second constitutional convention has never been called.[9] This method has been avoided because it raises serious questions. Would the delegates to such a convention deliberate only the amendments under consideration, or would they be able to take up any or all parts of the Constitution? Remember that the 1787 Philadelphia delegates met solely to amend the Articles of Confederation, but they ended up reframing the entire system of government.

The second step is ratification. Here, too, the framers allowed two options. Proposed amendments may be ratified by three-fourths of the state legislatures or by three-fourths of special state-ratifying conventions. Historically, only the Twenty-first Amendment, which repealed Prohibition, was ratified by state conventions. The others were all ratified by the required number of state legislatures.

By 2017 members of Congress proposed more than 11,000 amendments but sent only thirty-three to the states for ratification. Among the six that did not receive the approval of enough states were the child labor

TABLE 1-2 Methods of Amending the Constitution

PROPOSED BY	RATIFIED BY	USED FOR
Two-thirds vote in both houses of Congress	State legislatures in three-fourths of the states	26 amendments
Two-thirds vote in both houses of Congress	Ratifying conventions in three-fourths of the states	Twenty-first Amendment
Constitutional convention (called at the request of two-thirds of the states)	State legislatures in three-fourths of the states	Never used
Constitutional convention (called at the request of two-thirds of the states)	Ratifying conventions in three-fourths of the states	Never used

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

9. This is not to say that attempts to call a constitutional convention have never been made. Perhaps the most widely reported was Senator Everett Dirksen's effort to get the states to request a national convention for the purpose of overturning *Reynolds v. Sims,* the Supreme Court's 1964 reapportionment decision. He failed, by one state, to do so. A later attempt by the states to initiate constitutional change was a proposed amendment to require a balanced federal budget. This effort stalled with just two additional states required to call a convention.

amendment (proposed in 1924), which would have placed restraints on "the labor of persons under 18 years of age," and the equal rights amendment (ERA; proposed in 1972), which stated, "Equality of rights under law shall not be denied or abridged by the United States or any State on account of sex." Suggestions for new constitutional amendments continue to be advanced. In 2006 the House of Representatives voted on a federal marriage amendment that would have defined marriage as "the union of a man and a woman." The amendment failed to obtain the necessary two-thirds vote. Today, efforts are ongoing to persuade Congress to propose an amendment limiting the number of terms that U.S. representatives and senators may serve. Along similar lines, some law scholars have proposed that the tenure of U.S. Supreme Court justices should be limited to one nonrenewable eighteen-year term.[10]

THE SUPREME COURT AND THE LIVING CONSTITUTION

So far, our discussion of the amendment process has not mentioned the president or the Supreme Court. The reason is that neither has any formal constitutional role in it. We do not want to suggest, however, that these institutions have nothing to do with the process; both have significant, albeit informal, functions. Presidents often instigate and support proposals for constitutional amendments. Indeed, virtually every chief executive has wanted some alteration to the Constitution. In his first inaugural address, George Washington urged adoption of a bill of rights. During his presidency, George W. Bush, in response to state court rulings allowing same-sex marriages, endorsed the proposed marriage amendment; and during his campaign, Donald Trump stated his support for an amendment limiting the terms of members of Congress. The Court also has played at least three important roles in the process: as instigator, as interpreter, and as nationalizer.

The Court as an Instigator of Constitutional Amendments

Of the seventeen additions to the Constitution after the Bill of Rights, Congress proposed four specifically to overturn Supreme Court decisions *(see Table 1–3).* Many consider one of these—the Fourteenth—the single most important addition since 1791.

Many of the proposals Congress considered were aimed at similar objectives, among them the failed child labor and equal rights amendments, both of which emanated, at least in part, from Supreme Court rulings rejecting their premises. Congress ultimately proposed these two amendments, but the states did not ratify them. More recently, Congress has considered the following amendments, all of which were aimed at overturning Court decisions: a human life amendment that would make abortion illegal (in response to *Roe v. Wade,* 1973), a school prayer amendment that would allow students in public schools to engage in prayer (in response to ***Engel v. Vitale***, 1962, and *School District of Abington Township v. Schempp,* 1963), a flag desecration amendment that would prohibit mutilation of the American flag (in response to *Texas v. Johnson,* 1989), and a term limits amendment (to overturn the Supreme Court's ruling in *U.S. Term Limits v. Thornton,* 1995).[11]

The Court as an Interpreter of the Amendment Process

While the Court has been asked to interpret Article V, which deals with the amendment process, it has been hesitant to do so. One example is ***Coleman v. Miller*** (1939), which involved the actions of the Kansas legislature over the child labor amendment. Proposed by Congress in 1924, the amendment stated: "The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." In January 1925 Kansas legislators rejected the amendment. The issue arose again, however, when the state senate reconsidered the amendment in January 1937. At that time, the legislative body split 20–20, with the lieutenant governor casting the decisive vote in favor of the amendment. Members of the Kansas legislature (mostly those who opposed the amendment) challenged the 1937 vote on two grounds: they questioned the ability of the lieutenant governor to break the tie, and, more generally, they opposed the reconsideration of an amendment that previously had been rejected.

10. See, for example, Roger C. Cramton and Paul D. Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham, NC: Carolina Academic Press, 2006).

11. Boldface type indicates that the opinions in the case can be found in the online archive at https://edge.sagepub.com/conlaw. For a complete list of cases in the archive, see the Online Case Archive List at the end of this volume.

TABLE 1-3 Five Amendments that Overturned Supreme Court Decisions

AMENDMENT	DATE RATIFIED	SUPREME COURT DECISION OVERTURNED
Eleventh	February 7, 1795	*Chisholm v. Georgia* (1793). In its first major decision, the Court authorized citizens of one state to sue another state in the Supreme Court. The decision angered advocates of states' rights.
Thirteenth	December 6, 1865	*Scott v. Sandford* (1857). The Court ruled slaves are property with which Congress may not interfere, and that neither slaves nor their descendants are citizens under the Constitution. Ratified in the wake of the Civil War, the Thirteenth and Fourteenth Amendments rectified the Court's decision.
Fourteenth	July 9, 1868	*Scott v. Sandford* (1857).
Sixteenth	February 3, 1913	*Pollock v. Farmers' Loan & Trust* Co. (1895). The Court declared the federal income tax unconstitutional, occasioning the adoption of the Sixteenth Amendment eighteen years later.
Twenty-sixth	July 1, 1971	*Oregon v. Mitchell* (1970). The Court ruled that Congress has the power to lower the voting age to eighteen only for federal, not state and local, elections. At a period when eighteen-year-olds were drafted to serve in the Vietnam War, Congress quickly responded to *Mitchell*, proposing the Twenty-sixth Amendment in March 1971.

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), Tables 1-1 and 7-1.

Writing for the Court, Chief Justice Charles Evans Hughes refused to address this point. Rather, he asserted that the suit raised questions, particularly those pertaining to rescission, that were political and, therefore, nonjusticiable, meaning that a court was not an appropriate place to settle them. In his words, "the ultimate authority" over the amendment process was Congress, not the Court.

Over the years, the Court has followed the *Coleman* approach, leaving questions regarding the interpretation of Article V to Congress. To illustrate, consider how it treated its most recent Article V case, ***NOW v. Idaho*** (1982). At issue was a 1978 act of Congress that extended the original deadline for state ratification of the equal rights amendment from 1979 to 1982 and rejected a clause that would have permitted state legislatures to rescind their prior approval. In the wake of a strong anti-ERA movement, Idaho, which had passed the amendment in the early 1970s, decided to ignore federal law and retract its original vote.[12] The National Organization for Women (NOW) challenged the state's action, and in 1982 the Court docketed the case for argument. But, upon the request of the U.S. solicitor general, it dismissed the suit as moot: the congressionally extended time period for ratification had run out, and the controversy was no longer viable.

The Court as a Nationalizer of the Bill of Rights

In 1789, as we have noted, James Madison submitted to the First Congress a list of seventeen suggested amendments, mostly aimed at safeguarding personal freedoms against tyranny by the federal government. In a speech to the House, he suggested that "in revising the Constitution, we may throw into that section, which interdicts the abuse of certain powers of the State legislatures, some other provisions of equal, if not greater importance than those already made." To that end, Madison's fourteenth amendment proposal said that "no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases."[13] This article failed to garner congressional approval and the states never considered it.

Although scholars now agree that Madison viewed his fourteenth amendment as the most significant among the seventeen he proposed, Congress's refusal to adopt it may have meant that the founders never intended for the Bill of Rights to be applied to the states or their local governments. The language of the amendments lends some support to this interpretation. Consider the First Amendment to the U.S. Constitution: "Congress shall make no law . . . abridging the freedom of speech." Note that the wording specifically and exclusively limits the powers of Congress,

12. Three other states—Kentucky, Nebraska, and Tennessee—also rescinded.

13. James Madison, speech before the House of Representatives, June 7, 1789.

reflecting the fact that the Bill of Rights was added to the Constitution because of fear that the *federal* government might become too powerful and encroach upon individual rights.

Does this language mean that state legislatures *may* enact laws curtailing their citizens' free speech? For more than one hundred years it did. The U.S. Supreme Court, following historical interpretations and emphasizing the intention of the framers of the Constitution, refused to nationalize the Bill of Rights by making its protections as binding on the state governments as they are on the federal government. Not being restricted by the federal Bill of Rights, the states were free to recognize those freedoms they deemed important and to develop their own guarantees against state violations of those rights.

Through a doctrine called selective incorporation, however, this interpretation is no longer valid. Under this doctrine, the Court uses the Fourteenth Amendment's due process clause ("Nor shall any State deprive any person of life, liberty, or property, without due process of law") to apply certain rights to the states. That is, through incorporation the Supreme Court has informed state governments that they too must abide by most guarantees contained in the first eight amendments of the federal Constitution. But, as Table 1-4 shows, the process by which Americans obtained these rights was long; in fact, early litigants who clamored for incorporation (in the major cases) actually lost in the Court. And it was only in 2010 that a divided Court incorporated the Second Amendment, which the justices read to guarantee an individual right "to keep and bear arms" *(see chapter 15)*.

TABLE 1-4 Cases Incorporating Provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment

CONSTITUTIONAL PROVISION	CASE	YEAR
First Amendment		
Freedom of speech and press	*Gitlow v. New York*	1925
Freedom of assembly	*DeJonge v. Oregon*	1937
Freedom of petition	*Hague v. CIO*	1939
Free exercise of religion	*Cantwell v. Connecticut*	1940
Establishment of religion	*Everson v. Board of Education*	1947
Second Amendment		
Right to bear arms	*McDonald v. Chicago*	2010
Fourth Amendment		
Unreasonable search and seizure	*Wolf v. Colorado*	1949
Exclusionary rule	*Mapp v. Ohio*	1961
Fifth Amendment		
Payment of compensation for the taking of private property	*Chicago, Burlington & Quincy Railroad v. Chicago*	1897
Self-incrimination	*Malloy v. Hogan*	1964
Double jeopardy	*Benton v. Maryland*	1969
When jeopardy attaches	*Crist v. Bretz*	1978
Sixth Amendment		
Public trial	*In re Oliver*	1948
Due notice	*Cole v. Arkansas*	1948
Right to counsel (felonies)	*Gideon v. Wainwright*	1963
Confrontation and cross-examination of adverse witnesses	*Pointer v. Texas*	1965

(Continued)

TABLE 1-4 (Continued)

CONSTITUTIONAL PROVISION	CASE	YEAR
Speedy trial	*Klopfer v. North Carolina*	1967
Compulsory process to obtain witnesses	*Washington v. Texas*	1967
Jury trial	*Duncan v. Louisiana*	1968
Right to counsel (misdemeanor when jail is possible)	*Argersinger v. Hamlin*	1972
Eighth Amendment		
Cruel and unusual punishment	*Louisiana ex rel. Francis v. Resweber*	1947
Ninth Amendment		
Privacy[a]	*Griswold v. Connecticut*	1965

NOTE: Provisions the Court has not incorporated: Third Amendment right against quartering soldiers, Fifth Amendment right to a grand jury hearing, Seventh Amendment right to a jury trial in civil cases, and Eighth Amendment right against excessive bail and fines.

a. The word *privacy* does not appear in the Ninth Amendment (nor anywhere in the text of the Constitution). In *Griswold* several members of the Court viewed the Ninth Amendment as guaranteeing (and incorporating) that right.

Today, however, we can take for granted that the states in which we live must not infringe on our right to exercise our religion freely, to feel safe in our homes against unwarranted government intrusions, and so forth. Seen in this way, Madison may have lost the battle to see his fourteenth article become a part of the Constitution, but he won the larger war. For all practical purposes and with only a few exceptions *(see the note following Table 1-4),* a current reading of the Constitution ensures that basic rights and liberties of the citizens of the United States are supposed to be uniformly protected against infringement by any government entity—federal, state, or local.

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.

Books on the creation and ratification of the Bill of Rights include Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998); Neil Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997); Richard Labunksi, *James Madison and the Struggle for the Bill of Rights* (New York: Oxford University Press, 2006); Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 1999); Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Boston: Northeastern University Press, 1997).

Among the interesting articles available on the incorporation debate are Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?," *Stanford Law Review* 2 (1949): 5–173; Felix Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," *Harvard Law Review* 78 (1965): 746–783; Louis Henkin, "Selective Incorporation in the Fourteenth Amendment," *Yale Law Journal* 73 (1963): 74–88; Frank H. Walker, "Constitutional Law—Was It Intended That the Fourteenth Amendment Incorporate the Bill of Rights?," *North Carolina Law Review* 42 (1964): 925–936. Books on the incorporation debate are not many in number. We recommend Richard C. Cortner, *The Supreme Court and the Second Bill of Rights* (Madison: University of Wisconsin Press, 1981); and Leonard Levy, *Introduction to the Fourteenth Amendment and the Bill of Rights: The Incorporation Theory* (New York: Da Capo, 1970).

2 Understanding the U.S. Supreme Court

THIS BOOK IS DEVOTED to narrative and opinion excerpts showing how the U.S. Supreme Court has interpreted the Constitution. As a student approaching this material, perhaps for the first time, you may think it is odd that the subject requires more than 700 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.

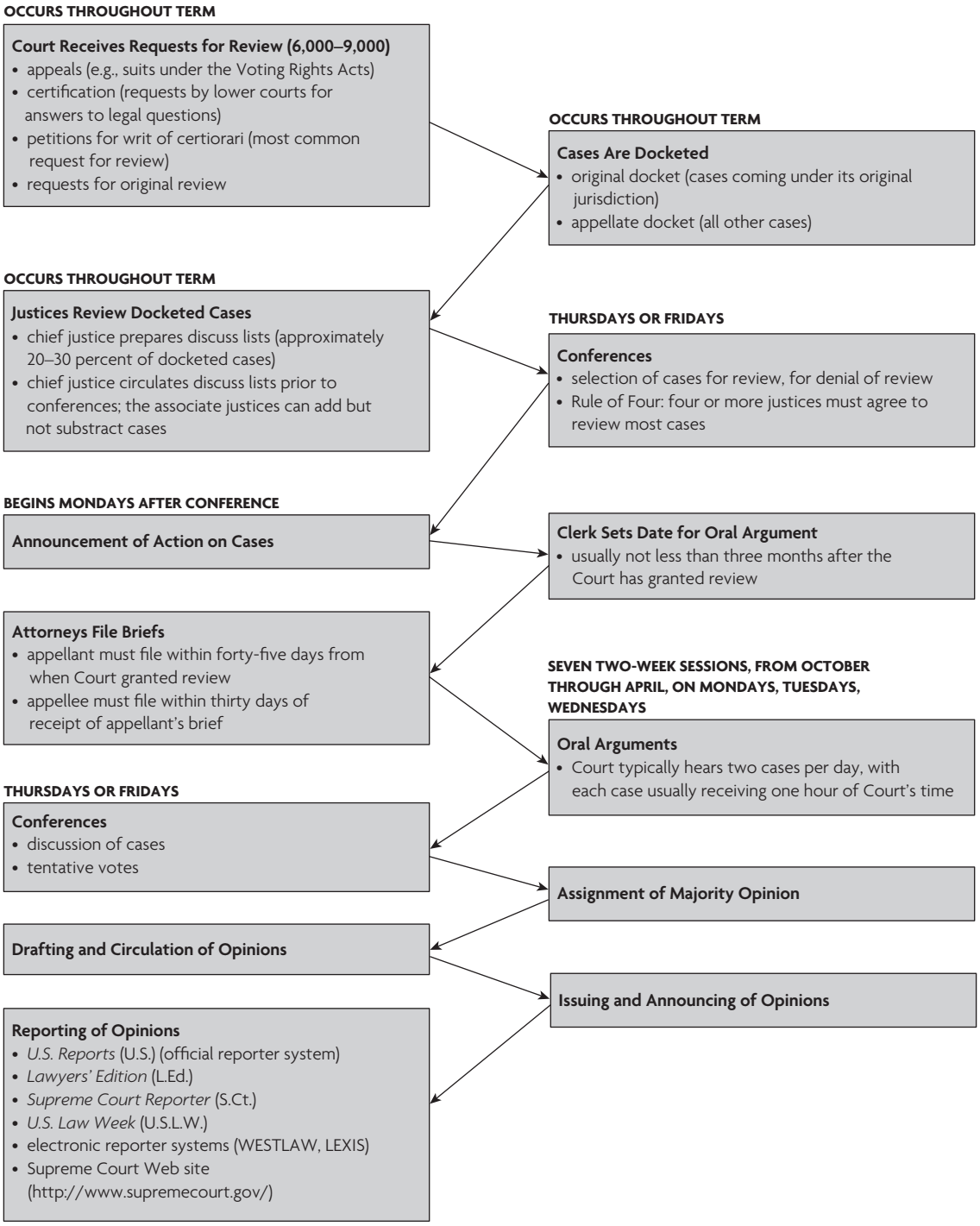
But, as Figure 2-1 shows, a great deal happens before the justices actually decide cases. We begin our discussion with a brief overview of the steps depicted in the figure. Next, we consider explanations for the choices justices make at the final and most important stage, the resolution of disputes.

PROCESSING SUPREME COURT CASES

During the 2015–16 term, more than 6,400 cases arrived at the Supreme Court's doorstep, but the justices decided only sixty-two 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. Chief Justice John Roberts, "2016 Year-End Report on the Federal Judiciary," https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf.

FIGURE 2-1 The Processing of Cases



SOURCE: Compiled by authors.

Deciding to Decide: The Supreme Court's Caseload

As the figures for the 2015–16 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 2-2*). Chapter 3 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that no other court has heard. Article III of the Constitution authorizes such suits in cases involving ambassadors from foreign countries and those to which a state is a party. But, because 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.

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 2-2 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.

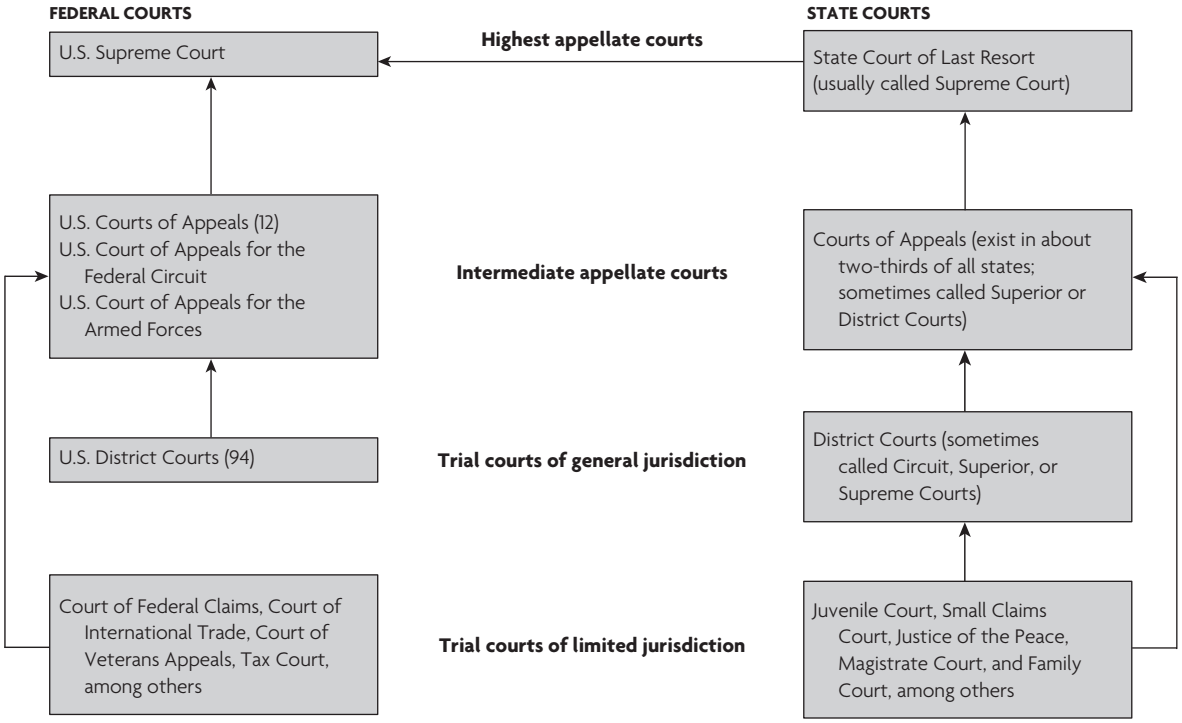
To invoke the Court's appellate jurisdiction, litigants can take one of three routes, depending on the nature of their dispute: appeal as a matter of right, certification, or certiorari. Cases falling into the first category (normally called "on appeal") involve issues Congress has determined are so 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 six thousand or more 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.

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.

FIGURE 2-2 The American Court System



SOURCE: Compiled by authors.

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 six to seven thousand petitions faces several checkpoints along the way *(see Figure 2-1),* which significantly reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari arrives, the clerk's office examines it to make sure it is in proper form and conforms to the Court's precise rules. Briefs must be "prepared in a 6 1/8- by 9 1/4-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines." Exceptions are made for litigants who cannot afford to pay the Court's

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 (2017) Court, all the justices but Samuel Alito and Neil Gorsuch 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 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 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 2-3 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. The process described here is how the Court considers petitions, but why do the justices make the decisions that they do? Scholars have developed several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.[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,

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.

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.

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 3 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.

FIGURE 2-3 A Page from Justice Harry Blackmun's Docket Books

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

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

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

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 reason is that the Court is well aware of the SG's special role. A presidential appointee whose decisions often reflect the administration's philosophy, the SG also represents the interests of the United States. As the nation's highest court, the Supreme Court cannot ignore these interests. In addition, the justices rely on the solicitor general to act as a filter—that is, they expect the SG to examine carefully the cases to which the government is a party and bring only the most important to their attention. Further, because solicitors general are involved in so much Supreme Court litigation, they acquire a great deal of knowledge about the Court that other litigants do not. They are "repeat players" who know the so-called 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 "consummate legal professionals whose information justices can trust."[10]

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. See Lawrence Baum, *The Supreme Court,* 12th ed. (Washington, DC: CQ Press, 2016), 91.

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.

The second political factor is the amicus curiae (friend of the court) brief. Interest groups and other third parties usually file these briefs after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage *(see Box 2-1)*. Research by political scientists shows that amicus briefs significantly enhance a case's chances of being heard, and multiple briefs have a greater effect.[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 based on their ideology. Scholarly studies also suggest that justices engage in strategic voting behavior at the cert stage. In other words, justices are forward thinking; they consider the implications of their cert vote for the later merits stage, asking themselves, If I vote to grant a particular petition, what are the odds of my position winning down the road? As one justice explained his calculations, "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent."[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 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 2-1)*. Those

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.

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 2-1 THE AMICUS CURIAE BRIEF

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

How does an organization become an amicus curiae participant in the Supreme Court of the United States? Under the Court's rules, groups wishing to file an amicus brief at the certiorari or merits stage must obtain the written consent of the parties to the litigation (the federal and state governments 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
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PAUL M. SMITH JENNER & BLOCK LLP 1099 New York Avenue, N.W. Washington, DC 20001

Counsel for Amici Curiae

wishing to submit friend of the court briefs must obtain the written permission of the parties or the Court. Only the federal government and state governments are exempt from this requirement.

Oral Arguments. Attorneys also present their cases orally before the justices. Each side has thirty minutes to convince the Court of the merits of its position and to field questions from the justices, though sometimes

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

The justices can interrupt the attorneys at any time with comments and questions, as 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'

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.

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

The Supreme Court Decides: Some Preliminaries

After the Court hears oral arguments, it meets in a private conference to discuss the case and to take a preliminary vote. 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 decision is not final until the opinions have been written, circulated, and approved. Because the Court's decisions can have major impacts on politics and the economy, any party having advance knowledge of case outcomes could use that information for unfair business and political advantage.

The system works so well that, with only a few exceptions, the justices have not experienced information leaks—at least not prior to the public announcement of a decision. After that, clerks and even justices have sometimes thrown their own sunshine on the Court's deliberations. *National Federation of Independent Business v. Sebelius* (2012), involving the constitutionality of the health care law passed in 2010, provides a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice John G. Roberts 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 their colleagues. This sort of information, as we shall see, may be important as the justices begin the process of crafting and circulating opinions.

Opinion Assignment and Circulation. The conference typically leads to a tentative outcome and vote. What happens at this point is critical because it determines who assigns the opinion of the Court—the Court's only authoritative policy statement, the only one that establishes precedent. Under Court norms, when the chief justice votes with the majority, he or she assigns the writing

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.

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

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

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

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***.

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 their personal biases, preferences, and partisan attachments when they take their seats on the bench. But, it is argued, justices *do not* shed these biases, preferences, and attachments; rather, their decisions often reflect the justices' own politics or the political views of those around them.

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 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, and pragmatism.[20]

Table 2-1 provides a brief summary of each, using the Second Amendment as an example (in what 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 15),* 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.

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).

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," *UCLA Law,* http://www2.1aw.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 2-1 Methods of Constitutional Interpretation

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

SOURCES: We adopt much of the material in this table from Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," *UCLA Law,* http://www2.1aw.ucla.edu/volokh/2amteach/interp.htm. Other material comes from the briefs filed in *District of Columbia v. Heller.*

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

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

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.

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.

> 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 William H. Rehnquist's opinion in *Nixon v. United States* (1993) provides an example. Here, the Court considered a challenge to the procedures the Senate used to impeach a federal judge, Walter L. Nixon Jr. Rather than the entire Senate trying the case, a special twelve-member committee heard 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, considering the 1787 Constitution's treatment of women and blacks, Marshall did not find "the wisdom, foresight, and sense of justice exhibited by the framers particularly profound."[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

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.

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

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 which the justices could turn, such as the profusion of

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." 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."

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, 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 Justice Hugo Black is most closely associated with this view—at least in its pure form. During his thirty-four-year tenure on the Court, Black continually emphasized his literalist philosophy. His own words best describe his position:

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

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

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 because 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 questions the Court addressed was whether a state could tax a federal entity—the Bank of the United States. Even though states have the power to tax, Chief Justice John Marshall for the Court said 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

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.

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 2-1, 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 2-2 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 2.6 per term. What is more, the justices almost always cite previous rulings in their decisions; indeed, it is the rare Court opinion that does not mention other cases.[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 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

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.

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.

TABLE 2-2 Precedents Overruled, 1953–2015 Terms

COURT ERA (TERMS)	NUMBER OF TERMS	NUMBER OF OVERRULED PRECEDENTS	AVERAGE NUMBER OF OVERRULINGS PER TERM
Warren Court (1953–1968)	16	46	2.9
Burger Court (1969–1985)	17	56	3.3
Rehnquist Court (1986–2004)	19	45	2.4
Roberts Court (2005–2015)	11	16	1.5

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

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 nonessentials of the case and expose the basic reasons for the Supreme Court's decision. This process is generally referred to as "establishing the principle of the case," or the ratio decidendi. Other points made in a given opinion—obiter dicta (any expression in an opinion that is unnecessary to the decision reached in the case or that relates to a factual situation other than the one actually before the court)—have no legal weight, and do not bind judges. It is up to courts to separate the ratio decidendi from dicta. Not only is this task difficult but it also provides a way for justices to skirt precedent with which they do not agree. All they need to do is declare parts of it to be dicta. Or justices can brush aside even the ratio decidendi when it suits their interests. 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 Louis 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]

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

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 follow this idea—that stare decisis policy is more flexible in constitutional cases—is a matter of debate. See Lee Epstein, William M. Landes, and Adam Liptak, "The Decision to Depart (or Not) from Constitutional Precedent," *NYU Law Review* 90 (2015): 1115–1159.