



*The*  
**SUPREME  
COURT** **14<sup>th</sup>**  
EDITION

LAWRENCE BAUM



# **The Supreme Court**

**Fourteenth Edition**

*To my students*

# **The Supreme Court**

**Fourteenth Edition**

**Lawrence Baum**

*Ohio State University*





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# BRIEF CONTENTS

<b>Tables, Figures, and Boxes</b>	<b>ix</b>
<b>Preface</b>	<b>xi</b>
<b>About the Author</b>	<b>xv</b>
<b>CHAPTER 1 • The Court</b>	<b>1</b>
<b>CHAPTER 2 • The Justices</b>	<b>27</b>
<b>CHAPTER 3 • The Cases</b>	<b>69</b>
<b>CHAPTER 4 • Decision Making</b>	<b>111</b>
<b>CHAPTER 5 • Policy Outputs</b>	<b>161</b>
<b>CHAPTER 6 • The Court's Impact</b>	<b>191</b>
<b>Glossary of Legal Terms</b>	<b>233</b>
<b>Selected Bibliography</b>	<b>237</b>
<b>Sources on the Web</b>	<b>241</b>
<b>Case Index</b>	<b>243</b>
<b>Index</b>	<b>249</b>



# DETAILED CONTENTS

<b>Tables, Figures, and Boxes</b>	<b>ix</b>
<b>Preface</b>	<b>xi</b>
<b>About the Author</b>	<b>xv</b>
<b>CHAPTER 1 • The Court</b>	<b>1</b>
A Perspective on the Court	1
The Court in the Judicial System	4
The Court as an Institution	10
What the Justices Do	15
Historical Developments	21
<b>CHAPTER 2 • The Justices</b>	<b>27</b>
The Selection of Justices	27
Who Is Selected	49
Leaving the Court	59
Conclusion	64
<b>CHAPTER 3 • The Cases</b>	<b>69</b>
Reaching the Court: Litigants, Attorneys, and Interest Groups	70
Deciding What to Hear: The Court's Role	87
Conclusion	103
<b>CHAPTER 4 • Decision Making</b>	<b>111</b>
Components of the Court's Decision	111
The Decision-Making Process	112
Influences on Decisions: Introduction	120
The State of the Law	121
Justices' Values	128
Group Interaction	139
The Court's Environment	146
Conclusion	152
<b>CHAPTER 5 • Policy Outputs</b>	<b>161</b>
Areas of Activity: What the Court Addresses	161
The Court's Activism	167



The Content of Policy	173
Explaining the Court's Policies	182
Conclusion	187
<b>CHAPTER 6 • The Court's Impact</b>	<b>191</b>
Outcomes for the Litigants	191
Implementation of Supreme Court Policies	193
Responses by Legislatures and Chief Executives	204
Impact on Society	218
Conclusion: The Court, Public Policy, and Society	225
<b>Glossary of Legal Terms</b>	<b>233</b>
<b>Selected Bibliography</b>	<b>237</b>
<b>Sources on the Web</b>	<b>241</b>
<b>Case Index</b>	<b>243</b>
<b>Index</b>	<b>249</b>

# TABLES, FIGURES, AND BOXES

## TABLES

<b>Table 1-1</b>	Summary of Supreme Court Jurisdiction	7
<b>Table 1-2</b>	Sources of Supreme Court Cases in Recent Periods (in percentages)	9
<b>Table 2-1</b>	Nominations to the Supreme Court since 1953	28
<b>Table 2-2</b>	Senate Votes on Supreme Court Nominations since 1953	41
<b>Table 2-3</b>	Selected Career Experiences of Justices Appointed since 1937 (in percentages)	55
<b>Table 2-4</b>	Reasons for Leaving the Court since 1965	60
<b>Table 3-1</b>	Percentages of Cases with Oral Argument Involving Various Sets of Competing Litigants, 2019 Term	71
<b>Table 3-2</b>	Numbers of Oral Arguments over a Five-Term Period by Lawyers Arguing Cases in the 1994 and 2019 Terms (lawyers for federal government excluded)	75
<b>Table 3-3</b>	Participation of Solicitor General's Office in Cases Decided after Oral Argument, 2018 and 2019 Terms (in percentages)	84
<b>Table 4-1</b>	Selected Characteristics of Supreme Court Decisions, 2018 and 2019 Terms	116
<b>Table 4-2</b>	Percentages of Cases in Which Pairs of Justices Voted for the Same Side, 2018 and 2019 Terms	132
<b>Table 5-1</b>	Characteristics of Decisions with Oral Argument and Signed Opinions, 2019 Term	164
<b>Table 5-2</b>	Number of Federal Statutes and State and Local Statutes Held Unconstitutional by the Supreme Court, 1790–2019	168
<b>Table 5-3</b>	Summary of the Supreme Court's Policies during Three Historical Periods	182
<b>Table 6-1</b>	Percentages of Black Elementary and Secondary Students Going to School with Any Whites, in Eleven Southern States, 1954–1973	200
<b>Table 6-2</b>	Constitutional Amendments Proposed by Congress That Would Override Supreme Court Decisions	206

# FIGURES

---

<b>Figure 1-1</b>	The Most Common State Court Structures	5
<b>Figure 1-2</b>	Basic Structure of the Federal Court System	6
<b>Figure 3-1</b>	Numbers of Decisions with Full Opinions per Term, Averaged over Five-Term Periods, 1969–2018 Terms	101
<b>Figure 3-2</b>	Paid and Paupers' Cases Filed in the Supreme Court per Term, by Five-Year Averages, 1984–2018 Terms	102
<b>Figure 4-1</b>	Numbers of Decisions Overruling Supreme Court Precedents Explicitly, 1890–2019	125
<b>Figure 4-2</b>	Percentages of Liberal Votes Cast by Justices, 2018 and 2019 Terms	131
<b>Figure 5-1</b>	Number of Laws (Federal, State, and Local) Struck Down by the Supreme Court, in Economic and Civil Liberties Categories, by Decade, 1900–2019	178
<b>Figure 6-1</b>	Estimated Numbers of Legal Abortions and Related Government Policy Actions, 1966–2017	222

# BOXES

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► <b>Box 1-1</b>	Examples of Public Activities by Justices in 2019	21
► <b>Box 2-1</b>	Careers of the Supreme Court Justices, 2019–2020	50
► <b>Box 3-1</b>	A Sampling of Groups Submitting Amicus Curiae Briefs to the Supreme Court in the 2019 Term	78

# PREFACE

**T**he United States Supreme Court is not the most powerful institution in American government. But the first two decades of this century underline the Court's considerable impact on politics, public policy, and society. Its rulings on issues such as immigration policy and same-sex marriage have made a substantial difference for many people's lives. Its decisions have affected the continuation and functioning of the health care system that President Obama proposed and Congress enacted in 2010. A series of undramatic decisions has shaped the balance of power between businesses and the people who work for them or buy products and services from them. The Court resolved a contested presidential election at the beginning of the century, and its decisions since then have helped to determine whether Republicans or Democrats win elections for state and national office.

The Supreme Court's impact has hardly gone unnoticed. Indeed, we are in an era of extraordinary attention to the Court. News media of all types cover the Court, collectively putting out a great deal of information about both the Court's decisions and the justices who make them. As a result, the justices have all gained a degree of celebrity. And when the Court allowed people to listen live to its oral arguments for the first time in May 2020, the arguments attracted a sizeable audience even though most arguments are considerably more technical than exciting.

Because the membership of the Court has so much effect on its decisions, the selection of justices is a major focus for both participants in the selection process and observers of the Court. In this century presidents and their advisors have expended considerable energy on their choices of nominees, and every nominee's confirmation has been the subject of a heated battle within and outside the Senate. For their part, people who care about the Court look for hints about possible retirements of justices and closely follow the process of nominating and confirming candidates for the Court. In 2018 the confirmation of Brett Kavanaugh became a national spectacle.

The death of Justice Ruth Bader Ginsburg in September 2020 marked the beginning of another battle. President Trump quickly nominated Amy Coney Barrett to succeed Ginsburg, and the Republican leadership in the Senate set out to secure Barrett's confirmation before the November election. Animosity between the parties over the selection of justices was renewed and intensified, and the nomination and confirmation processes were closely watched by the news media and a good share of the public.

The strong expectation that Barrett would win confirmation, albeit by a close vote, intensified interest in the future of the Court. Throughout the time since the early 1970s, with the exception of one short period, a majority of the justices were

best labeled as conservatives. But that majority was slim, and the Court's decisions on some major issues favored liberal policies. Barrett's confirmation would create a 6-3 conservative (and Republican) majority on the Court, likely giving it a stronger leaning in one ideological direction than it had had for more than half a century. As a result, its decisions on issues such as abortion, affirmative action, and regulation of the economy might turn more sharply to the right. That prospect, hailed by some observers and condemned by others, seemed certain to focus even greater attention on the Court and its work in the years to come.

The attention that the Supreme Court receives in the current era has done much to improve understanding of the Court. Yet that understanding remains quite incomplete. The Court is a complicated institution, one that is more difficult to comprehend than the other branches of government. As a result, many people with great interest in American politics—even some who are experts in most aspects of that field—have only limited knowledge of the Court.

I have written this book to provide a better understanding of the Supreme Court. The book is intended to serve as a short but comprehensive guide to the Court, both for readers who already know much about the Court and for those who have a more limited sense of it. I discuss how the Court functions, the work that it does, and the effects of its rulings on politics, government, and the lives of people in the United States. And I probe explanations of the decisions that the Court and its justices make, of actions by other people and groups that affect what the Court does, and of the Court's impact on government and society.

The book discusses several elements of the Court's history, but it focuses primarily on the current era. One key concern is the impact of the most prominent attribute of government and politics today, the high level of political polarization in its various forms. I have been struck more and more by how pervasive that impact is, and that realization is reflected in the frequency with which this edition discusses the ways that polarization affects the Court and its members. At the same time, I give considerable attention to other developments that shape the Court in the current era.

The book's first chapter introduces the Court. In this chapter, I discuss the Court's role in general terms, examine its place in the judicial system, analyze the Court as an institution and its personnel, and present a brief summary of its history.

Each of the other chapters deals with an important aspect of the Court. Chapter 2 focuses on the justices: their selection, their backgrounds and careers, and the circumstances under which they leave the Court. Chapter 3 discusses how cases reach the Court through the actions of parties to cases, the lawyers who represent them, interest groups, and the special role of the federal government. The chapter then considers how and why the Court selects the small number of cases that it will fully consider and decide.

Chapter 4 examines decision making in the cases that the Court accepts for full consideration. After outlining the Court's decision-making procedures, I turn to the chapter's primary concern, the factors that influence the Court's choices among alternative decisions and policies. Chapter 5 describes and explains the kinds of

issues on which the Court concentrates, the policies it supports, and the extent of its activism in the making of public policy. I give special attention to changes in the Court's role as a policy maker and the sources of those changes. The final chapter examines the ways in which other government policy makers respond to the Court's decisions, as well as the Court's impact on American society as a whole.

The book reflects the very considerable help that many people gave me with earlier editions. This edition was strengthened by suggestions for revision from the reviewers for the Press: Michelle Belco, University of Houston Honors College; Ericka Christensen, Southern Utah University; Hans J. Hacker, Arkansas State University, Jonesboro; and Julie A. Keil, Saginaw Valley State University. In updating information for this edition, I received valuable help from Saul Brenner, Jake Horton, Simon Tam, and Matthew Weisberg. I owe a special debt to Neal Devins, because of all that I have learned about the Court and especially about the impact of political polarization from our collaborations on research.

As always, the professionals at CQ Press and SAGE did much to make my life easier and, more important, to make the book better. I am pleased to thank Scott Greenan, Christina West, Bennie Clark Allen, and Tiara Beatty.

I benefit a great deal from the professional community of scholars who study the courts and American politics. The ideas and findings of their research are incorporated throughout this book, and I learn directly from them as well. Traditional news media and online media such as blogs have both become increasingly valuable sources of information and ideas on the Court, and I have used these sources a great deal. I owe more specific thanks to the talented group of people who have made *SCOTUSblog* an enormously useful place to find information about the Court and to Howard Bashman, whose *How Appealing* blog provides links to a wide array of current sources on the Court. The Supreme Court's staff has made the Court's own website an excellent source of information on cases and decisions, and in doing so it has made the process of gathering material for the book considerably easier.

Throughout the life of this book in its various editions, I have received a great deal of support for my work from Ohio State University and particularly from the political science department at OSU. I am grateful for that support, and I also appreciate all that I have learned from colleagues at the university.

I owe the greatest debt to the students in my classes. The material in this book reflects my experience working with them to help them gain a thorough understanding of the Supreme Court. For their part, my students have added to my own understanding of the Court with the questions they raise and the ideas they offer. In this and other ways, they make teaching a great pleasure.



# ABOUT THE AUTHOR

**Lawrence Baum** is professor emeritus of political science at Ohio State University and holds a doctorate from the University of Wisconsin. A widely recognized authority on the court system, Baum is the author of *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (2019) (with Neal Devins), *Ideology in the Supreme Court* (2017), *The Battle for the Court* (2017) (with David Klein and Matthew Streb), *Specializing the Courts* (2011), *Judges and Their Audiences: A Perspective on Judicial Behavior* (2006), and *The Puzzle of Judicial Behavior* (1997), as well as articles on a range of topics related to the courts. He has received the Alumni Award for Distinguished Teaching and the University Distinguished Scholar Award at Ohio State University, as well as the Lifetime Achievement Award from the Law and Courts Section of the American Political Science Association.





## THE COURT

In the current era, the Supreme Court reaches full decisions in an average of fewer than eighty cases a year. But in those cases, the Court addresses some of the most important and controversial issues in the United States. The decisions it reaches on those issues sometimes have a powerful impact on government, politics, and society. Thus the enormous attention that the Court receives is fully justified, and there is good reason to gain an understanding of the Court.

In this book, I try to contribute to that understanding. Who serves on the Court, and how do they get there? What determines which cases and issues the Court decides? In resolving the cases before it, how does the Court choose between alternative decisions? In what policy areas does the Court play an active role, and what kinds of policies does it make? Finally, what happens to the Court's decisions after they are handed down, and what impact do those decisions have?

Each of these sets of questions is the subject of a chapter in the book. As I focus on each question, I seek to show not only what happens in and around the Court but also why things work the way they do. This first chapter is an introduction to the Court, providing background for the chapters that follow.

## A PERSPECTIVE ON THE COURT

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The Supreme Court is a complicated institution in some important ways, so it is useful to begin by considering some important attributes of the Court.

### The Court and the World Around It

The Supreme Court has considerable insulation from the rest of government and society. The key source of that insulation is the justices' life terms, which give them some freedom to chart their own course without concern about the potential reactions of political leaders and voters.

Individually and collectively, the justices have adopted other practices that help them to maintain distance from the outside world. Litigants and their lawyers cannot make arguments to individual justices in person; rather, they are limited to written briefs and formal oral presentations to the Court as a whole. In contrast

with Congress, the Court's collective deliberations over cases are held in private. There are relatively few leaks of information about the Court's decision-making process, though leaks about the positions of key justices in some major decisions have occurred in recent years.<sup>1</sup> The justices have not allowed their oral arguments to be televised despite pressure from members of Congress and others to do so. Indeed, in response to the coronavirus pandemic in 2020, the justices chose to hear arguments by telephone rather than through video links.

But the Court's insulation is far from total. One reason is that people in government, politics, and society as a whole have a strong interest in what the Court decides. This interest underlies the political battles that arise when a new justice is to be appointed. It is also reflected in the efforts of interest groups to bring cases to the Court and to make convincing arguments for their positions in those and other cases. An array of people lobby the Court indirectly with statements and commentaries about pending cases. Presidents and members of Congress sometimes try to put direct pressure on the justices by threatening adverse action such as eliminating the Court's power to hear certain kinds of cases.

The justices might simply shut out the world around them when they decide cases, but in practice that is impossible. For one thing, they may worry about negative reactions to their decisions. Justices frequently refer to the need to maintain the Court's "legitimacy" with the general public in order to gain acceptance of their decisions. And because justices are human beings, they care about how they are viewed by people outside the Court, especially the sets of people who are most important to them.

More fundamentally, justices' own views are shaped by what is going on in the outside world. For instance, justices could hardly be immune to the heightened concern about terrorism that developed in 2001. And social movements, such as the ongoing campaigns for racial equality and women's rights, change opinion in the Court just as they do in other segments of society.

Even if the justices were completely insulated from the rest of government and society when they made decisions, the outside world would still have a very substantial influence on what the Court does and what impact it has. The power of presidents to select justices fundamentally shapes the Court, and the set of cases brought to the Court determines what kinds of issues the justices can address. After the Court reaches its decisions, the consequences of those decisions depend heavily on the reactions of other policy makers and sometimes the reactions of people outside government.

The Court still stands out for its autonomy: far more than most other people in government, the justices are free to take the actions that they want to take. But one central theme of this book is that a full understanding of the Court requires close attention to the activities and impact of people and institutions outside the Court.

## **Law, Policy, and Politics**

The Supreme Court, of course, is a court—the highest court in the federal judicial system. Like other courts, it has jurisdiction to hear and decide certain kinds of cases. And like other courts, it can decide legal issues only in cases that are brought to it.

As a court, the Supreme Court makes decisions within a legal framework. Congress writes new law, but the Court interprets existing law. The Court justifies its rulings on the basis of its reading of the law, usually a provision of the Constitution or a statute enacted by Congress.

In interpreting the law, however, the Court inevitably makes public policy as well. In *Apple Inc. v. Pepper* (2019), the Court ruled that iPhone owners who bought apps through Apple's App Store could sue the company by alleging that it engaged in monopolistic practices. In reaching this decision, the Court was choosing one interpretation of Section 4 of the Clayton Antitrust Act, enacted by Congress in 1914. But it was also choosing a position on antitrust policy, a position that favored consumers over businesses on one issue in that field. Taken together, the Court's decisions in antitrust law powerfully shape antitrust policy. The same is true of its decisions in other fields such as civil rights, environmental protection, and criminal procedure.

Some of the Court's decisions have a direct impact on electoral politics. Its 2019 rulings on partisan gerrymandering of legislative seats and on inclusion of a question about a person's citizenship in the national census had potentially significant effects on the electoral success of the Republican and Democratic parties.<sup>2</sup> One of its decisions ensured that President Richard Nixon would leave office in 1974, and another ensured that George W. Bush would become president in 2001.<sup>3</sup> Other decisions have indirect but powerful effects on politics. *Roe v. Wade* (1973) has spurred political action and shaped partisan politics for half a century. The series of Supreme Court decisions on the health care law sponsored by President Barack Obama has helped set the terms of debates between the parties.<sup>4</sup>

For some people in the legal community, the most important aspect of Supreme Court decisions is how, and how well, they interpret the law. On the whole, however, the Court's audiences care about its decisions because of their impact on policy and politics. Presidents and senators sometimes talk about nominees to the Court in terms of their legal philosophies, but their primary concern is whether their votes and opinions are likely to favor liberal policies and Democrats or conservative policies and Republicans.

What about the justices themselves? When justices talk about their work, especially when they testify at their Senate confirmation hearings, they usually emphasize that their job is simply to interpret the law. The opinions they write analyze cases primarily in terms of their legal merits. Indeed, the goal of reaching good interpretations of the law almost surely is an important element in their decision making.

But even more surely, the justices' views about what constitutes good policy strongly affect their choices. That effect is unavoidable for two reasons. First, in the cases that the Court decides, it is often quite uncertain which of the alternative decisions that are available to the justices constitutes the best interpretation of the law. As a result, other considerations must come into play. Second, people who become justices have developed strong views about an array of policy questions: they are unlikely to be neutral on issues such as government regulation of abortion or

protection of the environment. Because of those conditions, it is not surprising that justices' disagreements in cases often mirror differences in their ideological positions.

Like other people who are interested in politics and government, most if not all justices have partisan loyalties and feelings. Those feelings may be especially strong in an era of bitter rivalry between Republicans and Democrats. And it might be that justices' partisan views affect their positions in certain cases alongside their concerns with making good law and good policy. This motivation and others that may shape the justices' votes and opinions are another central concern of this book.

## THE COURT IN THE JUDICIAL SYSTEM

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Because the Supreme Court is part of a court system, its place in that system structures its role by determining what cases it can hear and the routes those cases take.

### State and Federal Court Systems

The United States has a federal court system and a separate court system for each state. Federal courts can hear only those cases that Congress has put under their jurisdiction. Nearly all of the federal courts' jurisdiction falls into three categories.

First are the criminal and civil cases that arise under federal laws, including the Constitution. All prosecutions for federal crimes are brought to federal court. Some types of civil cases based on federal law, such as those involving antitrust and bankruptcy, must go to federal court. Other types can go to either federal or state court, but most are brought to federal court.

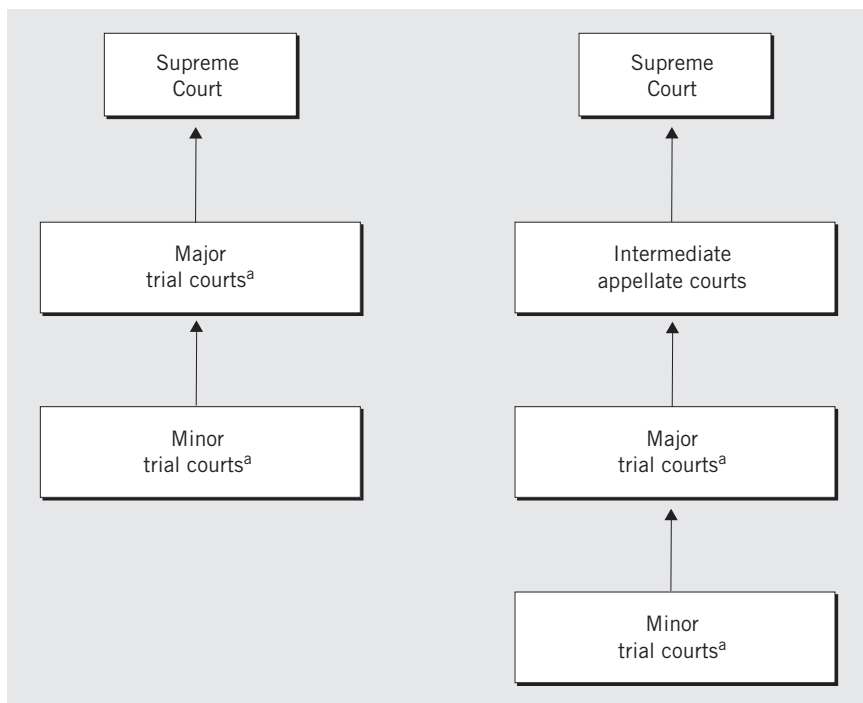
Second are cases to which the U.S. government is a party. When the federal government brings a lawsuit, it nearly always does so in federal court. When someone sues the federal government, the case must go to federal court.

Third are civil cases involving citizens of different states in which the amount of money in question is more than \$75,000. If this condition is met, either party may bring the case to federal court. If a citizen of New Jersey sues a citizen of Texas for \$100,000 for injuries from an auto accident, the plaintiff (the New Jersey resident) might bring the case to federal court, or the defendant (the Texan) might have the case "removed" from state court to federal court. If neither does so, the case will be heard in state court—generally in the state where the accident occurred or the defendant lives.

Only a small proportion of all court cases fit in any of those categories. The most common kinds of cases—criminal prosecutions, personal injury suits, divorces, actions to collect debts—typically are heard in state court. The courts of a single populous state such as Illinois or Florida hear far more cases than the federal courts across the country. However, federal cases are more likely than state cases to raise major issues of public policy.

State court systems vary considerably in their structure, but some general patterns exist (see Figure 1-1). Each state system has courts that are primarily trial courts, which hear cases initially as they enter the court system, and courts that are primarily appellate courts, which review lower-court decisions that are appealed to them. Most

**Figure 1-1 The Most Common State Court Structures**



Note: Arrows indicate the most common routes of appeals.

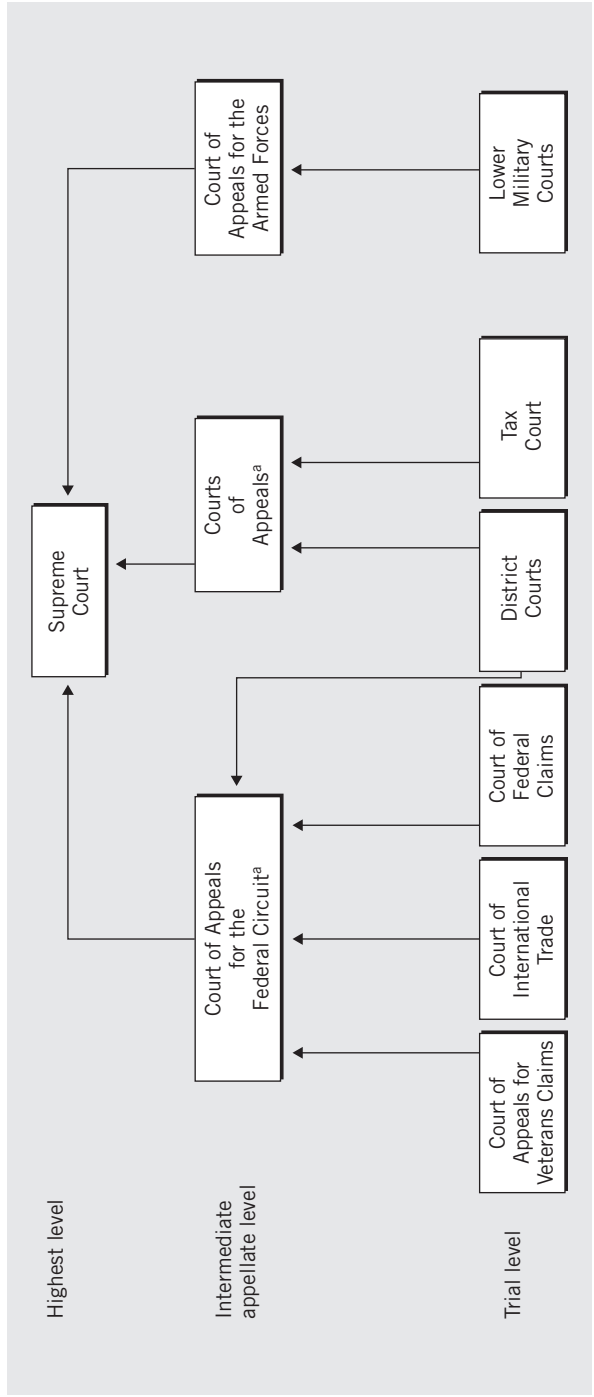
a. In many states, major trial courts or minor trial courts (or both) are composed of two or more different sets of courts. For instance, New York has several types of minor trial courts.

states have two sets of trial courts, one to handle major cases and the other to deal with minor cases. Major criminal cases usually concern what the law defines as felonies. Major civil cases are generally those involving large sums of money. Most often, appeals from decisions of minor trial courts are heard by major trial courts.

Appellate courts are structured in two ways. Ten states, mostly with small populations, have a single appellate court—usually called the state supreme court. All appeals from major trial courts go to this supreme court. The other forty states have intermediate appellate courts below the state supreme court. These intermediate courts initially hear most appeals from major trial courts. In those states, supreme courts have discretionary jurisdiction over most challenges to the decisions of intermediate courts. Discretionary jurisdiction means that a court can choose which cases to hear; cases that a court is required to hear fall under its mandatory jurisdiction.

The structure of federal courts is shown in Figure 1-2. At the base of the federal court system are the federal district courts. The United States has ninety-four

Figure 1-2 Basic Structure of the Federal Court System



Note: Arrows indicate the most common routes of appeals. Some specialized courts of minor importance are excluded.

a. These courts also hear appeals from administrative agencies.

district courts. Each state has between one and four district courts, and there is a district court in the District of Columbia and in some U.S. territories such as Puerto Rico and Guam. District courts hear all federal cases at the trial level, with the exception of a few types of cases that are heard in specialized courts.

Above the district courts are the twelve courts of appeals, each of which hears appeals in one of the federal judicial circuits. The District of Columbia constitutes one circuit; each of the other eleven circuits covers three or more states. The Second Circuit, for example, includes Connecticut, New York, and Vermont. Appeals from the district courts in one circuit generally go to the court of appeals for that circuit, along with appeals from the Tax Court and from some administrative agencies. Patent cases and some claims against the federal government go from the district courts to the specialized Court of Appeals for the Federal Circuit, as do appeals from three specialized trial courts. The Court of Appeals for the Armed Forces hears cases from lower courts in the military system.

### The Supreme Court’s Jurisdiction

The Supreme Court stands at the top of the federal judicial system. The Court has two types of jurisdiction, summarized in Table 1-1. First is the Court’s original jurisdiction: the Constitution gives the Court jurisdiction over a few categories of cases as a trial court, so these cases may be brought directly to the Court without going through lower courts. The Court’s original jurisdiction includes some cases to which a state is a party and cases involving foreign diplomatic personnel.

Under federal statutes, most cases within the Court’s original jurisdiction can be heard alternatively by a district court. The exception is lawsuits between two

**Table 1-1   Summary of Supreme Court Jurisdiction**

Types of jurisdiction	Categories of cases
Original	Disputes between states Some types of cases brought by a state Disputes between a state and the federal government Cases involving foreign diplomatic personnel
Appellate <sup>a</sup>	All decisions of federal courts of appeals and specialized federal appellate courts All decisions of the highest state court with jurisdiction over a case, concerning issues of federal law Decisions of special three-judge federal district courts (mandatory)

a. Some minor categories are not listed.



states, which can be heard only by the Supreme Court, and this category accounts for the preponderance of cases that the Court decides under its original jurisdiction. Some disputes between states have involved disagreements about state borders, and water rights have become a common issue in recent decades. The Court frequently refuses to hear cases that are brought under its original jurisdiction. In *Arizona v. California* (2020), Justices Clarence Thomas and Samuel Alito questioned that practice as it applies to the lawsuits between states that only the Court can hear. Altogether, the Court has decided fewer than 200 original jurisdiction cases in its history. When the Court does accept a case under its original jurisdiction, it ordinarily appoints a “special master” to gather facts and propose a decision to the Court.

The disputes that produce original cases can take a long time to resolve. The Court heard oral argument in a conflict over water rights between New Mexico and Texas in 2020. An earlier version of that conflict in the same case was brought to the Court in 1974.<sup>5</sup>

All the other cases that come to the Court are based on its appellate jurisdiction. Under its appellate jurisdiction, the Court hears cases brought by parties that are dissatisfied with the lower-court decisions in their cases. Within the federal court system such cases can come from the federal courts of appeals and from the two specialized appellate courts. The Court can hear a case before a court of appeals has reached judgment in the case. It seldom does so. But in *Department of Commerce v. New York* (2019), a case about the addition of a citizenship question to



istockphoto.com/artiste9999

► **Photo 1-1** The Pecos River. Lawsuits between states fall under the Supreme Court's original jurisdiction, and the Court has dealt with a suit between New Mexico and Texas over use of water from the Pecos for several decades.

the 2020 Census, the Court accepted the federal government’s argument that the Court should hear the case before the court of appeals acted in order to resolve the issue before census forms had to be printed. Cases also come to the Court directly from special three-judge district courts that are set up to decide specific cases. Most of these cases involve voting and election issues.

State cases can come to the Supreme Court after decisions by state supreme courts if they involve claims based on federal law, including the Constitution. If a state supreme court chooses not to hear a case, the losing party can then go to the Supreme Court. As shown in Table 1-2, a substantial proportion of both the cases brought to the Court and the cases it hears came from state courts, but most originated in federal courts.

The rule under which state cases come to the Supreme Court may be confusing, because cases based on federal law ordinarily start in federal court. But cases brought to state courts on the basis of state law sometimes contain issues of federal law as well. This situation is common in criminal cases. A person accused of burglary under state law will be tried in a state court. During the state court proceedings, the defendant may argue that the police violated rights protected by the U.S. Constitution during a search. The case eventually can be brought to the Supreme Court on that issue. If it is, the Court will have the power to rule only on the federal issue, not on the issues of state law involved in the case. Thus, the Court cannot rule on whether the defendant actually committed the burglary.

**Table 1-2 Sources of Supreme Court Cases in Recent Periods  
(in percentages)**

	Federal courts			State courts
	Courts of appeals	District courts	Specialized courts	
Cases brought to the Court <sup>a</sup>	73	0	2	25
Cases decided on the merits <sup>b</sup>	77	2	6	15

Source: Data on cases decided on the merits are from SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack>.

Note: Original jurisdiction cases are not included. Non-federal courts of the District of Columbia and of U.S. territories are treated as state courts. For cases heard by the Court, the rules for inclusion of cases are described in the source cited above.

a. Cases in which the Court issued rulings on petitions for hearings, October 7, 2019 (1,445 cases).

b. Cases that the Court decided on the merits, ruling on the issue or issues in the case, including summary reversals, 2018 and 2019 terms (142 cases).

Nearly all cases brought to the Court under its appellate jurisdiction also are under its discretionary jurisdiction, so it can choose whether or not to hear them. With occasional exceptions discretionary cases come to the Court in the form of petitions for a writ of certiorari, a writ through which the Court calls up a case from a lower court for a decision “on the merits”—that is, ruling on the legal issue or issues in the case. The cases that the Court is required to hear are called appeals. In a series of steps culminating in 1988, Congress converted the Court’s jurisdiction from mostly mandatory to almost entirely discretionary. Today, appeals can be brought to the Court in only the few cases that come directly from three-judge district courts.

The Supreme Court hears only a tiny fraction of the cases brought to federal and state courts. As a result, courts other than the Supreme Court have ample opportunities to make law and policy on their own. Moreover, their decisions help determine the ultimate impact of the Court’s policies. Important though it is, the Supreme Court certainly is not the only court that matters.

## THE COURT AS AN INSTITUTION

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Several attributes of the Supreme Court shape the Court as an institution. Especially important are the activities of justices and the people who help them do their work.

### The Court’s Building and Grounds

The Supreme Court did not move into its own building until 1935. In its first decade, the Court met first in New York and then in Philadelphia. The Court moved to Washington, D.C., with the rest of the federal government at the beginning of the nineteenth century. For the next 130 years, it sat in the Capitol, a tenant of Congress. In 1808, during renovation work in the Capitol, the Court’s hearings were moved temporarily to a nearby tavern.<sup>6</sup>

The Court’s accommodations in the Capitol were not entirely adequate. Among other things, the lack of office space meant that justices did most of their work at home. After an intensive lobbying effort by Chief Justice William Howard Taft, Congress appropriated money for the Supreme Court building in 1929. The five-story structure occupies a full square block across the street from the Capitol. Because the primary material in the impressive building is marble, it has been called a “marble palace.”

The building houses all the Court’s facilities. Formal sessions are held in the courtroom on the first floor. Behind the courtroom is the conference room, where the justices meet to discuss cases. Also near the courtroom are the chambers that contain offices for the associate justices and their staffs. The chief justice’s chambers are attached to the conference room. On the top floor is a basketball court, “the highest court in the land,” that law clerks and some justices use during breaks from their official duties.<sup>7</sup>

Parts of the building are open to the general public. The building has been closed to the public twice, after anthrax spores were discovered in the Court's mail warehouse at another site in 2001 and during the coronavirus pandemic beginning in March 2020. During that second period, the justices and many other court personnel worked at other locations. Meanwhile, Justice Ruth Bader Ginsburg regularly came to the "largely empty courthouse" for her widely publicized workouts with her personal trainer.<sup>8</sup>

People who want to attract attention to their causes sometimes use the area around the Court building to publicize those causes. In 1983 the Court struck down the part of a federal statute that prohibited an array of such activities on the sidewalks around the building. But in 2015 a federal court of appeals upheld the provision of the statute that prohibited the same activities in the building and on the Court grounds, and the Court made that decision final by choosing not to hear the case.<sup>9</sup> Occasionally people are arrested for violating that statute, and protesters who disrupted two proceedings in the courtroom in 2015 were also arrested.

## **Personnel: The Justices**

Under the Constitution, Supreme Court justices are nominated by the president and confirmed by the Senate. If a nominee is confirmed, the president then appoints the successful nominee to the Court. When the chief justice leaves the Court, the president can elevate an associate justice to chief and also appoint a new associate justice (as President Ronald Reagan did in 1986 when he named William Rehnquist as chief justice) or appoint a chief justice from outside the Court (as President George W. Bush did in 2005 when he chose John Roberts).

By long-established Senate practice, a simple majority is required for confirmation. But a supermajority was required to end a filibuster and thus allow a vote on a nomination until Senate rules were changed in 2017. The Constitution says that justices will hold office "during good behavior"—that is, for life unless they relinquish their posts voluntarily or they are removed through impeachment proceedings. Beyond these basic rules, questions such as the number of justices, their qualifications, and their duties have been settled by federal statutes and by tradition.

Congress has imposed some ethical rules such as financial reporting requirements on federal judges other than Supreme Court justices. One unresolved question is whether Congress has power to impose those rules on the justices. In any event, justices are not required to adhere to the Code of Conduct that the federal Judicial Conference has established for lower-court judges. But justices adhere to the financial reporting requirements voluntarily, and they have said that they also follow the Code of Conduct.

The Court's exemption from ethical rules mandated by Congress played the central role in the resolution of complaints of misconduct brought against Justice Brett Kavanaugh in 2018, complaints that were based on his testimony at his confirmation hearings for the Supreme Court and at earlier confirmation hearings for the court of appeals. A committee of the federal Judicial Conference ruled that once

Kavanaugh had joined the Supreme Court, he was no longer subject to the federal statute governing judicial conduct.<sup>10</sup>

The Constitution says nothing about the number of justices. The Judiciary Act of 1789 provided for six justices. Later statutes changed the number successively to five, six, seven, nine, ten, seven, and nine. The changes were made in part to accommodate the justices' duties in the lower federal courts and in part to serve partisan and policy goals of the president and Congress. The most recent change to nine members was made in 1869, and that number has become firmly established. The most serious effort to change that number, President Franklin Roosevelt's proposal to increase the number of justices, failed in 1937.

In 2020, each associate justice received an annual salary of \$265,600, and the chief justice received \$277,700. There are limits on the amount of outside income that justices can receive from activities such as teaching (about \$29,600 in 2020), but there are no limits on income from books. Clarence Thomas earned about \$1.5 million from his memoir and Sonia Sotomayor more than \$3 million from hers. Some of the current justices, including John Roberts and Stephen Breyer, were wealthy when they came to the Court. Thomas and Sotomayor were far from wealthy, and their book earnings improved their financial status enormously.<sup>11</sup>

## **Personnel: Law Clerks and Other Support Staff**

A staff of about 500 people, serving in several units, supports the justices. Most of the staff members carry out custodial and police functions under the supervision of the marshal of the Court. The clerk of the Court handles the clerical processing of all the cases that come to the Court. The reporter of decisions supervises preparation of the official record of the Court's decisions, the *United States Reports*. The librarian is in charge of the libraries in the Supreme Court building. The Court's public information office responds to inquiries and distributes information about the Court.

Of all the members of the support staff, the law clerks have the most direct effect on the Court's decisions.<sup>12</sup> Associate justices may employ four clerks each, the chief justice five (though the chief almost always hires only four). A retired justice has one clerk, who often works primarily with one of the sitting justices. Clerks almost always serve for only one year. The typical clerk is a high-ranked graduate of a prestigious law school. The clerks who were hired to serve sitting justices in the 2016–2020 terms came from two dozen law schools, but more than half had gone to Harvard or Yale.<sup>13</sup> Typically, clerks come to the Supreme Court after clerkships with one or two lower-court judges, most often on the federal courts of appeals. Some clerks in the Court also have experience in law firms, academia, or government. In an era of political polarization there has come to be a strong ideological element in hiring: as a group, law clerks selected by conservative justices are considerably more conservative than those selected by liberal justices. And with the exception of John Roberts, the sets of clerks that each justice chose for the 2018–2020 terms had their prior clerkships overwhelmingly with judges who had been appointed by a president of the same party as the justice's appointing president.<sup>14</sup>

Clerks typically spend much of their time on the petitions for certiorari, reading the case materials and summarizing them for the justices. Clerks also work on cases that have been accepted for decisions on the merits. They analyze case materials and issues, discuss cases with their justices, and sometimes consult with clerks for other justices to help in the process of winning support for opinions and reaching consensus. It appears that all the current justices have their clerks write the first drafts of their opinions.

The extent of law clerks' influence over the Court's decisions is a matter of considerable interest and wide disagreement.<sup>15</sup> Observers who depict the clerks as quite powerful probably underestimate the justices' ability to maintain control over their decisions. Still, the jobs that justices give to their clerks ensure significant influence. Drafting opinions, for instance, allows clerks to shape the content of those opinions, whether or not they seek to do so. The same is true of the other work that clerks do.

After law clerks leave the Court, they are in great demand among law firms that do Supreme Court litigation. Some former law clerks receive a "signing bonus" of as much as \$400,000 in addition to substantial salaries. They take a variety of career paths, and many have had distinguished careers as practicing lawyers, law professors, and government officials. Among President Trump's first forty-one nominees to the federal appellate courts, 44 percent had been Supreme Court clerks—including his Supreme Court nominees Neil Gorsuch and Brett Kavanaugh.<sup>16</sup> Alongside John Roberts, Stephen Breyer, and Elena Kagan, Gorsuch and Kavanaugh created a majority of justices who had served as clerks on the Court.

## The Court's Schedule

The Court has a regular annual schedule.<sup>17</sup> It holds one term each year, lasting from the first Monday in October until the beginning of the succeeding term a year later. (However, the clerk's office treats terms as starting and ending earlier, when the Court announces its final decisions for a term.) Ordinarily, the Court does nearly all its collective work from late September to late June. This work begins when the justices meet to act on the petitions for hearings that have accumulated during the summer and ends when the Court has issued decisions in all the cases it heard during the term.

Most of the term is divided into sittings of about two weeks, when the Court holds sessions to hear oral arguments in cases and to announce decisions in cases that were argued earlier in the term, and recesses of two weeks or longer. In May and June, the Court ordinarily hears no arguments but holds one or more sessions nearly every week to announce decisions. It issues few decisions early in the term because of the time required after oral arguments to write opinions and reach final positions, and a large minority of all decisions—about 40 percent in the 2018 term—are issued in June. The justices scramble to meet the internal deadline of June 1 to circulate drafts of all majority opinions to their colleagues and to reach final decisions by the end of June. The scramble is especially frenetic for cases argued in April and for the most consequential and controversial cases. It is not



surprising that a high proportion of the Court's major decisions are announced in the last few days of the Court's term.

When the Court has reached and announced decisions in all the cases it heard during the term, the summer recess begins. Cases that the Court accepted for hearing but that were not argued during the term are carried over to the next term. In summer, the justices generally spend time away from Washington but continue their work on the petitions for hearings that arrive at the Court. During that time, the Court and individual justices respond to applications for special action. When the justices meet at the end of summer to dispose of the accumulated petitions, the annual cycle begins again.

The pandemic that began in early 2020 led to an extraordinary change in the Court's schedule. The Court postponed the oral arguments it had scheduled for the last two sittings of the 2019 term. It later rescheduled a subset of those arguments for May, setting aside the others for the 2020 term. The May arguments were made by telephone, with live audio available to the public for the first time. The justices also met remotely for their conferences. And the Court departed from its usual practice of holding public sessions to announce decisions, instead simply issuing them in written form. The Court did not finish issuing decisions until July 9, 2020, going past the informal deadline of late June that it almost always meets.

The schedule of weekly activities, like the annual schedule, is fairly regular. During sittings, the Court generally holds sessions on Monday through Wednesday for two weeks and on Monday of the next week. The sessions begin at ten o'clock in the morning. Oral arguments usually are held during each session except on the last Monday of the sitting. They may be preceded by several types of business. On Mondays, the Court announces the filing of its order list, which reports the Court's decisions on petitions for hearing and other actions that were taken at its conference the preceding Friday. On Tuesdays, as well as the last Monday of a sitting, justices announce their opinions in any cases the Court has resolved. In May and June, however, opinions may be announced on any day of the week.

The oral arguments consume most of the time during sessions. The usual practice is to allot one hour for arguments in a case. On most argument days, the Court hears two cases.

During sittings, the Court holds two conferences each week. At the Wednesday afternoon conference, justices discuss the cases that were argued on Monday. In a longer conference on Friday, the justices discuss the cases argued on Tuesday and Wednesday, along with petitions for certiorari and other matters the Court must address. In May and June, after oral arguments have ended for the term, the Court has weekly conferences on Thursdays.

The Court also holds a conference on the last Friday of each recess to deal with the continuing flow of business. The remainder of the justices' time during recess periods is devoted to their individual work: study of petitions for hearing and cases scheduled for argument, writing of opinions, and reaction to other justices' opinions. This work continues during the sittings.

## WHAT THE JUSTICES DO

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Supreme Court justices carry out an array of tasks on the job. Many of them also have busy professional lives outside the Court.

### Work in the Court

On a day-to-day basis, the justices do most of their work separately from each other even in ordinary times. But the Court makes its decisions as a collective body. The most visible decisions are rulings on petitions for certiorari and on the merits of cases that the Court accepts. Both types of decisions will be discussed extensively in later chapters. A third type of decision involves responses to applications for various forms of preliminary action in cases. The most important form is a request for the Court to issue or vacate (remove) a stay of action by a lower court or another government body that prevents this action from going into effect.

The justices' work on applications for preliminary action is a partial exception to the rule that the Court acts collectively, an exception that has historical roots. Originally, each justice had the duty of sitting alongside lower-court judges to decide appeals within a federal circuit. This "circuit-riding" duty was arduous, especially in an era when travel was difficult. This duty was gradually cut down and then eliminated in 1891. One vestige remains: an application for preliminary action ordinarily goes first to the justice assigned to the relevant circuit. If the circuit justice rejects an application, it can then be made to a second justice. That justice ordinarily refers it to the whole Court, with five votes required to issue or vacate a stay. With occasional exceptions, stays on important matters are decided by the full Court, usually after referral by the circuit justice (who may issue a temporary stay until the full Court acts).

One common subject of stay requests is the death penalty. The Court is confronted with numerous requests to stay executions or vacate stays of execution, many of which come near the scheduled execution time. The Court grants only a small proportion of requests to stay executions.

Since 2017 the Court has addressed many stay requests that involve issues of significance for politics or policy. Some of these requests have concerned the drawing of legislative districts and other election matters, and the Court ruled on several of these requests in connection with the 2020 elections. Others have concerned abortion, gun regulation, the census, the DACA immigration program (Deferred Action for Childhood Arrivals), building of walls along the Mexican border, military service by transgender individuals, and release of the full report by special counsel Robert Mueller about Russian involvement in the 2016 presidential election. The growth in this kind of stay request has come in part from challenges by the Trump administration to lower-court rulings that blocked administration policies. The Court's grants of a majority of the administration's stay requests have allowed some significant programs to continue.<sup>18</sup>

Justices can dissent from decisions on stays, just as they can from decisions on the merits and on certiorari, and dissents by either liberal or conservative justices



are common. The DACA, border wall, and military service cases split the Court along ideological lines, with the Court's four liberals dissenting from the grants of stays that the Trump administration sought.<sup>19</sup> The same lineup appeared in two 2020 decisions that stayed lower-court orders to facilitate absentee voting in Wisconsin and Alabama during the coronavirus pandemic.<sup>20</sup>

Liberal justices have also dissented from denials of stays of execution in several cases. In one 2019 case, Justice Breyer wrote a six-page opinion for the four liberal justices arguing that the Court should not have vacated the stay of execution granted by the lower courts. In a further stage of the same case a month later, Justice Thomas wrote a thirteen-page opinion (joined by Justices Alito and Gorsuch) to refute Breyer's earlier opinion.<sup>21</sup>

In collective decision making, typically every justice participates in every case—nine justices unless there is a vacancy on the Court, as there was in the first week of the 2018 term before Justice Kavanaugh was confirmed. Occasionally a justice's poor health leaves the Court temporarily shorthanded. (But a justice who misses oral argument in a case can still participate in that case, as Justice Ginsburg did in a set of cases in 2019 while she was recovering from surgery.) More often, a justice does not participate in a case because of a perceived conflict of interest. As with financial reporting requirements, it has never been determined whether the federal statute that lists circumstances under which judges should withdraw from cases—recuse themselves—applies to the Court. In any event, the Court leaves this decision to the individual justice.

Across all the cases that are brought to the Court for consideration, recusals are common. In the 2015–2019 terms, the average number of recusals per term was a little under 200. Only a few of those recusals, about four per term, were in cases that the Court accepted for decisions on the merits. Justices seldom explain why they recused in a case, though Justice Sotomayor did so in 2020 when she cited her friendship with one of the litigants.<sup>22</sup> But those reasons usually can be discerned. Most recusals—about three-quarters in the 2019 term—result from a justice's prior involvement in a case as a lower-court judge or in another capacity.<sup>23</sup> The frequency of such recusals declines with justices' tenure on the Court. But Anthony Kennedy recused from a case in 2018 because he had participated in an earlier phase of the case as a court of appeals judge in 1985.<sup>24</sup> Financial conflicts of interest have become relatively uncommon because the justices collectively own fewer stocks in individual companies than they once did. Justice Alito has “unrecused” several times by selling a stock holding after the Court accepted a case.<sup>25</sup>

Controversies about justices' recusal decisions have arisen in recent years, spurred primarily by public statements by justices about matters related to pending or future cases and by interactions between justices and people who have an interest in the outcome of a case.<sup>26</sup> Litigants and others who care about particular cases have sought recusals on those grounds, sometimes in formal requests. In 2020 President Trump said that Justices Ginsburg and Sotomayor “should recuse themselves on all Trump, or Trump related, matters” because, he said, they were biased against him.<sup>27</sup> Justices seldom recuse themselves in response to these initiatives.

The Court may have a tie vote when only eight justices participate in a decision. A tie vote affirms the lower-court decision. If the tie applies to the whole decision, the votes of individual justices are not disclosed and no opinions are written. The justices seek to avoid that result: they may work to achieve a compromise outcome that a majority of the eight justices can accept, and they may set a case for rehearing at a time when a full complement of nine justices becomes available. When the Court was shorthanded for an extended period of time in 2016–2017 because the Senate did not act on President Obama’s nomination of Merrick Garland, it appears that the justices tried to avoid tie votes by turning down some cases in which a 4–4 split seemed likely and postponing arguments in others.

Similarly, the lower-court decision in a case is affirmed if the Court cannot reach a quorum of six members. This situation is uncommon. When it occurs, it is usually because a litigant named at least four justices as defendants in a lawsuit, as litigants did in two 2017 cases.<sup>28</sup>

The eight associate justices are equal in formal power. The chief justice is the formal leader of the Court. The chief presides over the Court’s conferences and public sessions and assigns the Court’s opinion whenever the chief voted with the majority. The chief also supervises administration of the Court with the assistance of committees.

One justice—by tradition, the most junior in seniority—sits with other Court employees on the cafeteria committee. It is a thankless task, because the cafeteria has long been viewed as substandard (a 2010 review in the *Washington Post* said that “this food should be unconstitutional”) and colleagues are happy to complain to the junior justice about deficiencies in the cafeteria. After he joined the cafeteria committee in 2018, Justice Kavanaugh succeeded in getting pizza added to the menu. He said that “my legacy is secure. It’s fine by me if I’m ever known as the pizza justice.” But his initiative went unrewarded: two reviews of the new pizza offering in the news media were decidedly negative.<sup>29</sup>

The chief justice has additional administrative responsibilities as head of the federal court system, a role reflected in the official title of Chief Justice of the United States. In that role, the chief justice appoints judges to administrative committees and some specialized courts. Since 1975, the chief has issued a “Year-End Report on the Federal Judiciary,” which usually includes recommendations to Congress about matters such as court budgets and the creation of additional judgeships.<sup>30</sup> Chief Justice Roberts presided over the Senate impeachment trial of President Trump in 2020, as his predecessor William Rehnquist had done in the trial of President Clinton in 1999.

Roberts has served as an advocate for federal judges. In 2007 he met with President George W. Bush and won his support for a bill that would raise judges’ salaries.<sup>31</sup> In 2018, after President Trump referred to a district judge who had ruled against one of his administration’s immigration policies as an “Obama judge,” Roberts issued a statement arguing that federal judges should not be seen as partisans.<sup>32</sup> In 2020, after Senate minority leader Chuck Schumer threatened retaliation against Justices Gorsuch and Kavanaugh for their prospective positions in an abortion case, Roberts condemned Schumer’s remarks as “inappropriate” and “dangerous.”<sup>33</sup>



► **Photo 1-2** Chief Justice John Roberts, presiding over the Senate impeachment trial of President Trump in 2020. The chief justice has administrative duties both within and outside the Court.

Like any other job, the position of Supreme Court justice has both positive and negative elements. There are some major positive elements, including the prestige and status of the position and the satisfaction of shaping legal policy in important ways. Those attractions explain why so many people want to serve on the Court.

The respect that justices receive may be all the more attractive because it is combined with considerable anonymity. One commentator said that justices are in an enviable position: “Almost nobody knows what you look like, but you always get the reservation you want.”<sup>34</sup> The desire to maintain that enviable position probably helps to explain justices’ aversion to televising of their public sessions. Yet the justices are not immune to the dangers that go along with celebrity: some receive death threats, and they sometimes request protection by security personnel when they travel or make public appearances.

The tasks and responsibilities that go with the job may weigh heavily on justices. That is especially true of new justices, whether or not they have extensive experience on lower courts. Justice Thomas said that “by the end of my first Term, I was very ill,” and Justice Breyer said that “I was frightened to death for the first three years.”<sup>35</sup>

As some observers of the Court see it, once justices become acclimated their workload is relatively light. These observers point to the relatively small number of cases that the Court now hears and the excellent support that the justices get from their law clerks. One law professor, exaggerating for emphasis, said that in many ways “it’s the cushiest job in the world.”<sup>36</sup> In contrast, justices often refer to the time their work requires, especially the volume of material they must read in the cases that come to the Court. At least some justices spend very long hours on the job.

In the current era, it seems clear that the satisfactions of serving as a justice outweigh the burdens of the job. That is clear from the justices' tenure on the Court: in the past half century, no justice has resigned to take another position and only two justices have retired before age seventy.

## Activities Outside the Court

Supreme Court justices attract wide interest from lawyers and from other people who are interested in government and politics. That interest has grown in the current era, in part because of the new media that provide more information about the Court's work and about the justices.

The extent of this interest is striking. Some of the Court's decisions receive extensive coverage in newspapers, television broadcasts, and blogs. Justices are satirized in stories and cartoons, and their activities are extensively chronicled. Beyond the news media, individual justices and the Court as a whole have been the topics of many books for a general audience over the years, as well as plays, movies, and even an opera. Antonin Scalia, who sat on the Court from 1986 to 2016, was a folk hero among conservatives. Ruth Bader Ginsburg achieved a similar status among liberals. She is the subject of several books, a widely seen documentary movie, and a theatrical movie in which she was played by Felicity Jones. Justice Ginsburg was also a recurring character on *Saturday Night Live*, played by Kate McKinnon. Merchandise portraying her included several T-shirts, an action figure, and Halloween costumes. Her public appearances often drew large audiences—more than 10,000 people for her 2019 conversation with a reporter in the Little Rock area.<sup>37</sup> Not surprisingly, late in her career Ginsburg ranked well ahead of any colleague in the numbers of people who could name her as a justice and who chose her as their favorite justice.<sup>38</sup>

Because of this widespread interest in the justices, they have ample opportunities to interact and communicate with people outside the Court. Law schools and an array of groups within and outside the legal profession vie with each other to attract visits from justices. Reporters would be delighted to gain an interview with a justice. Any book by a justice attracts wide attention. According to one legal scholar, "individual Justices have become celebrities akin to the Kardashians."<sup>39</sup>

Justices differ in their use of their opportunities for attention and adulation. David Souter, who served from 1990 to 2009, kept his distance from the news media and seldom made public appearances. Most other justices in this century have been more active than Souter but in limited ways, such as speaking with reporters from time to time, making occasional visits to law schools and other legal groups, and participating in other public events and in Washington social life. Justices who write books often make appearances and grant interviews to promote those books, as Neil Gorsuch did in 2019.

Some justices have been even more active, embracing their celebrity status and the opportunities it provides. Sandra Day O'Connor and her husband engaged in so much social activity that they hired a person to serve as assistant and social secretary. The assistant reported that "they were out more nights than they were in." Sixteen years after her 1981 appointment, O'Connor achieved her goal of speaking



► **Photo 1-3** Felicity Jones as Ruth Bader Ginsburg in the movie “On the Basis of Sex,” about Ginsburg’s work litigating sex discrimination cases. Ginsburg’s celebrity is one indication of the widespread interest in the Court and its members.

in all fifty states.<sup>40</sup> Among the current justices, Sonia Sotomayor makes the most public appearances.<sup>41</sup> Ginsburg visibly enjoyed her folk hero status.<sup>42</sup> She cooperated in creation of the movies about her and some of the books about her. She sometimes spoke out on public issues and talked about cases and issues that the Court addressed.

A year after she joined the Court in 2009, Justice Sotomayor estimated that what a friend called “her celebrity” took up about 40 percent of her time.<sup>43</sup> Sotomayor has written several books, including a best-selling memoir about her life before she became a judge. Many of her personal appearances outside the Court are related to her books. She gives talks that focus primarily on her personal story and efforts to inspire young people in her audiences, rather than the Court and legal issues. Her commitment to encouraging children is reflected in her two appearances on the television show *Sesame Street* in 2012.

In the aggregate, the justices make a great many public appearances—by one incomplete count, a total of 112 appearances in 2019.<sup>44</sup> These appearances are not limited to the summers, when the Court is out of session; justices find time for activities away from the Court throughout the year. Indeed, justices are occasionally absent from the sessions at which decisions are announced because of other activities. At one such session in 2018, only five of the nine justices were present.

Justices often receive awards at their public appearances. Perhaps the most unusual of these awards was for “Small Town Lawyer Made Good,” presented to both John Paul Stevens and Antonin Scalia in the 1980s by the lawyers in Poughkeepsie,

Washington. Neither justice had been a lawyer in anything like a small town. When Stevens was invited to come to Poulsbo to receive his award, he pointed out that he had practiced antitrust law in Chicago. The lawyer who invited him responded, “Justice Stevens, more than most people, you should understand that words have many interpretations. We define a ‘small town lawyer’ as anyone who practices in a town under 50,000 or any US Supreme Court Justice we can get here.”<sup>45</sup>

Box 1-1 illustrates the array of public activities in which justices participate.

## BOX 1-1

### Examples of Public Activities by Justices in 2019

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Participating in the Winter Mock Trial of the Shakespeare Theater Company (Stephen Breyer and Samuel Alito)

Hosting a reception of the Horatio Alger Association (Clarence Thomas)

Speaking at a conference on comparative constitutional approaches to civil liberties (Stephen Breyer)

Participating in a preshow conversation on the musical *West Side Story* and music, culture, and identity at the Kennedy Center in Washington, D.C. (Sonia Sotomayor)

Delivering the Anderson Lecture at Yale Law School (Elena Kagan)

Receiving an honorary doctorate from Lund University in Sweden (Ruth Bader Ginsburg)

Presiding at the installation of a new Secretary of the Smithsonian Institution (John Roberts)

Co-teaching a study-abroad class of the Antonin Scalia Law School of George Mason University (Brett Kavanaugh)

Speaking at the Federal Bar Association Civics Essay Award Reception (Neil Gorsuch)

Source: Information about justices’ appearances was obtained from SCOTUS Map, <https://www.scotusmap.com/>, and descriptions of the events in the Box are taken or adapted from that site.

## HISTORICAL DEVELOPMENTS

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This book is concerned primarily with the Supreme Court at present and in the recent past, but I frequently refer to the Court’s history in order to provide perspective on the current Court. A brief examination of some major developments in that history will provide background for later chapters.

One key development was a strengthening of the Court as an institution. In its first decade, the Court was not viewed as an important body. Several people rejected offers to serve on the Court, and two justices—one of them Chief Justice John Jay—resigned to take more attractive positions in state government. But John Marshall, chief justice from 1801 to 1835, sought to strengthen the Court's standing. Marshall asserted the Court's power to rule that federal statutes are unconstitutional in his opinion for the Court in *Marbury v. Madison* (1803). A few years later, the Court claimed the same power of judicial review over state acts.

Some of the Marshall Court's actions led to denunciations and threats, including an effort by President Thomas Jefferson to have Congress remove at least one justice through impeachment. Marshall's skill in minimizing confrontations helped to prevent a successful attack on the Court. The other branches of government and the general public gradually accepted the powers that he claimed for the Court. Those powers are challenged from time to time, and the Court is frequently denounced for decisions that critics see as overstepping its proper role. But the Court's position as the ultimate interpreter of federal law, with the power to strike down actions by other government institutions, is firmly established.

The Court has been strengthened in other respects as well.<sup>46</sup> The elimination of the justices' circuit-riding duties in 1891 allowed them to focus on their duties in the Court, and the shift in the Court's jurisdiction from mostly mandatory to nearly all discretionary gave it control over its agenda. The Court's move from the Capitol to its own building in 1935 was an important symbolic step that also improved the justices' working conditions. The gradual growth in the size of the Court's staff, especially the law clerks, has also enhanced the justices' ability to do their work.

A second development has been evolution in the subjects of the Court's work.<sup>47</sup> In the period when the Court had little control over its agenda, the subject matter of its work reflected the cases that came to it. But even then, the justices could emphasize some types of cases over others, especially in their interpretations of the Constitution. After 1925, when the Court gained substantial control over its agenda, the justices had even greater ability to determine what kinds of issues they would address.

In the nineteenth century, up to the Civil War, the primary emphasis was federalism, the division of power between the federal government and the states. That emphasis reflected the heated battles in government and politics over federalism and the justices' efforts to develop constitutional principles relating to the federal-state balance. In the late nineteenth and early twentieth centuries, as government increasingly enacted legislation to regulate economic activity, constitutional challenges to that regulation became the most prominent element of the Court's agenda.

After a confrontation between the Court and President Franklin Roosevelt over decisions that struck down several of Roosevelt's New Deal programs, the Court in 1937 retreated from the limits that it had put on government power to regulate the economy. Beginning in the 1940s, the Court gave greater attention to civil liberties. Since the 1960s, that has been the most prominent area of the Court's work. Its decisions address a wide range of civil liberties issues, among them freedom of expression, privacy, equality, and the procedural rights of criminal defendants.



The Court also plays a significant role in other fields, including government regulation of business and other economic issues.

A third development is change in the legal policies that the Court makes on the issues it addresses. In the eras when the Court focused on federalism and economic regulation, its policies shifted over time. The same has been true of the Court in the second half of the twentieth century and the early twenty-first century.

In the 1960s, the Court became highly liberal, by the usual meaning of that term, in both economic policy and civil liberties. Its civil liberties policies were especially noteworthy, with major rulings expanding defendants' rights, supporting freedom of expression, and favoring racial equality.

A series of appointments by Republican presidents beginning in 1969 shifted the Court's ideological balance. Since the early 1970s, the Court has almost always had a conservative majority, although usually by a small margin. With some major exceptions, the Court's policies have become more conservative on both economic and civil liberties issues. The close balance between liberals and conservatives has raised the stakes in the selection of new justices, and those high stakes have been reflected in battles over Supreme Court appointments.

One constant in the Court's history is that the Court is shaped in powerful ways by events and trends elsewhere in government and society. The most important change in American politics over the last few decades has been a growth in polarization: the views of people in politics have moved toward more extreme positions, the ideological distance between the Republican and Democratic parties has grown considerably, and there is greater hostility between partisan and ideological camps.<sup>48</sup> Polarization has affected the Court in powerful ways, ways that are discussed later in the book. Its most direct effect has been on the nomination and confirmation of justices, which I discuss in the next chapter.

## NOTES

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4. The decisions were *National Federation of Independent Business v. Sebelius* (2012), *King v. Burwell* (2015), and *Zubik v. Burwell* (2016).
5. The history of the case is reflected in its docket sheet, *Texas v. New Mexico*, 22O65. Docket sheets for cases are available at <https://www.supremecourt.gov/docket/docket.aspx>.
6. Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: W. W. Norton, 2018), 57.
7. Stanley Kay, "The Highest Court in the Land," *Sports Illustrated*, July 25, 2018, 66–71.
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9. The decisions were *United States v. Grace* (1983) and *Hodge v. Talkin* (2015).
10. *In re: Complaints Under the Judicial Conduct and Disability Act*, Committee on Judicial Conduct and Disability of the Judicial Conference of the United States, C.C.D. No. 19-01 (August 1, 2019).
11. The justices' annual financial disclosure reports list the (very) approximate values of their financial assets at the end of each calendar year. They also list the justices' outside income, including book royalties. The reports for the justices since 2002 are posted at <https://www.opensecrets.org/pfds>.
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## THE JUSTICES

In recent years, the selection of Supreme Court justices has been a highly visible battleground. After Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Obama's nomination of Merrick Garland for Scalia's seat, saying the seat should be saved for the new president in 2017. In the next two years, President Trump's nominations of Neil Gorsuch and Brett Kavanaugh to the Court led to bitter conflicts between the two parties, and both nominees were confirmed by votes that followed party lines almost perfectly. After Justice Ruth Bader Ginsburg died in September 2020, President Trump and Senate Republicans moved quickly to fill her seat over heated complaints from Democrats. And there were no signs that this partisan strife would abate.

These battles reflect the importance of the Court's membership: what the Court does is determined to a considerable degree by who the justices are, so people who care about the Court's decisions also care about the selection of justices. The battles also reflect two key developments over the past several decades. One is a growing recognition of the Court's substantial role in shaping public policy, which has brought increased attention to the selection of justices. The other is the high level of polarization that has developed in the world of government and politics, especially in the form of increased hostility between Republicans and Democrats.

The first and longest section of this chapter examines the process by which justices are nominated and confirmed to fill vacancies on the Court. The second section turns to the outcomes of that process in terms of the attributes of the people who win seats on the Court. The final section deals with the process by which vacancies are created in the first place. Throughout the chapter, I give particular attention to the changes that have occurred in both the processes that determine the Court's membership and the kinds of people who become justices.

## THE SELECTION OF JUSTICES

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As of mid-2020, presidents had made 163 nominations to the Supreme Court, and 114 people had served as justices. The difference between those two numbers has

several sources, including nominees who declined appointments and those who were appointed as associate justice and then as chief justice. But the most common source was a failure to win Senate confirmation. Table 2-1 lists the thirty-six nominations to the Court and the twenty-eight justices chosen between 1953 and 2019.

The Constitution gives formal roles in the selection of justices only to the president (for nomination, and then appointment if a nominee is confirmed) and the Senate (for confirmation of nominees). But in addition to those who assist presidents and senators, a variety of other people and groups play significant unofficial roles. I will discuss those unofficial participants and then consider how the president and the Senate reach their decisions.

**Table 2-1   Nominations to the Supreme Court since 1953**

Name	Nominating president	Justice replaced	Years served
Earl Warren (CJ)	Eisenhower	Vinson	1953–1969
John Harlan	Eisenhower	Jackson	1955–1971
William Brennan	Eisenhower	Minton	1956–1990
Charles Whittaker	Eisenhower	Reed	1957–1962
Potter Stewart	Eisenhower	Burton	1958–1981
Byron White	Kennedy	Whittaker	1962–1993
Arthur Goldberg	Kennedy	Frankfurter	1962–1965
Abe Fortas	Johnson	Goldberg	1965–1969
Thurgood Marshall	Johnson	Clark	1967–1991
Abe Fortas (CJ)	Johnson	(Warren)	Withdrew, 1968
Homer Thornberry	Johnson	(Fortas)	Moot, 1968
Warren Burger (CJ)	Nixon	Warren	1969–1986
Clement Haynsworth	Nixon	(Fortas)	Defeated, 1969
G. Harrold Carswell	Nixon	(Fortas)	Defeated, 1970
Harry Blackmun	Nixon	Fortas	1970–1994
Lewis Powell	Nixon	Black	1971–1987
William Rehnquist	Nixon	Harlan	1971–2005

Name	Nominating president	Justice replaced	Years served
John Paul Stevens	Ford	Douglas	1975–2010
Sandra Day O'Connor	Reagan	Stewart	1981–2006
William Rehnquist (CJ)	Reagan	Burger	1986–2005
Antonin Scalia	Reagan	Rehnquist	1986–2016
Robert Bork	Reagan	(Powell)	Defeated, 1987
Douglas Ginsburg	Reagan	(Powell)	Withdrew, 1987
Anthony Kennedy	Reagan	Powell	1988–2018
David Souter	G. H. W. Bush	Brennan	1990–2009
Clarence Thomas	G. H. W. Bush	Marshall	1991–
Ruth Bader Ginsburg	Clinton	White	1993–2020
Stephen Breyer	Clinton	Blackmun	1994–
John Roberts (CJ)	G. W. Bush	Rehnquist	2005–
Harriet Miers	G. W. Bush	(O'Connor)	Withdrew, 2005
Samuel Alito	G. W. Bush	O'Connor	2006–
Sonia Sotomayor	Obama	Souter	2009–
Elena Kagan	Obama	Stevens	2010–
Merrick Garland	Obama	(Scalia)	Not considered, 2016
Neil Gorsuch	Trump	Scalia	2017–
Brett Kavanaugh	Trump	Kennedy	2018–

Note: CJ = chief justice. Fortas and Rehnquist were associate justices when nominated as chief justice. Roberts was originally nominated to replace O'Connor and then was nominated for chief justice after Rehnquist's death.

Withdrew = Nomination or planned nomination was withdrawn. The Fortas nomination was withdrawn after a vote to end a filibuster failed. Douglas Ginsburg withdrew before he was formally nominated.

Moot = When Fortas withdrew as nominee for chief justice, the Thornberry nomination to take Fortas's position as associate justice became moot.

Defeated = Senate voted against confirmation.

Not considered = Senate did not consider nomination.

## Unofficial Participants

Because Supreme Court appointments are so important, many people seek to influence those appointments. When a vacancy occurs, and even before then, presidents and other administration officials may hear from a wide array of individuals and groups. So do senators who are deciding whether to vote to confirm a nominee. The most important of these individuals and groups fall into three categories: prospective justices, the legal community, and other interest groups.

### Candidates for the Court

Some Supreme Court nominees had never thought of themselves as potential justices. Indeed, some prospective nominees withdraw from consideration, and some turn down nominations. Even those who accept nominations sometimes do so reluctantly, as Abe Fortas did in 1965 and Lewis Powell did in 1971.

But for many lawyers, the Supreme Court is a long-standing dream, so they would (and do) accept nominations readily. Indeed, people who hope for appointments to the Court sometimes make considerable effort to maximize their chances of success. William Howard Taft became chief justice in 1921 after years of efforts to position himself for that appointment. As an ex-president he had a great deal of influence, and one commentator described Taft as “virtually appointing himself” chief justice.<sup>1</sup>

One longtime acquaintance of Brett Kavanaugh said, perhaps in jest, that “he’s been running for the Supreme Court since he’s been 25 years old.”<sup>2</sup> Some of Kavanaugh’s activities off the bench may have reflected his interest in achieving a nomination to the Court. When he was a leading candidate for a nomination in 2018, his judicial chambers were the central location for work by his former law clerks to help secure the nomination for him. According to one account, “Nobody was working harder than Kavanaugh himself,” because “he wouldn’t be able to live with himself if he were not chosen because he had failed to prepare.”<sup>3</sup>

There is circumstantial evidence that some judges on the federal courts of appeals campaign in a different way, taking positions in cases that they hope will enhance their chances of a Supreme Court nomination.<sup>4</sup> In 2019 and 2020 some judges on the federal courts of appeals wrote long concurring or dissenting opinions that were likely to appeal to President Trump and to those advising him on nominations to the Court. In doing so they may have been “auditioning,” as some other judges have described such opinions.<sup>5</sup>

Nominees participate actively in the confirmation process. They typically meet with most senators before their confirmation hearings. Occasionally, what nominees say in those meetings has an impact. After conferring with his advisors, Neil Gorsuch replied to a Democratic senator’s question by saying that he was unhappy about President Trump’s criticisms of federal judges. After the senator reported Gorsuch’s response, some administration officials feared that the president would want to withdraw the Gorsuch nomination, and by some accounts he did consider that step.<sup>6</sup>

Nominees also testify for many hours before the Senate Judiciary Committee at their hearings and provide voluminous written materials to the committee. Nominees go through elaborate preparations for their testimony. The Trump administration brought together advisors to help Gorsuch prepare, and he ultimately rebelled at their efforts to tell him how to respond to senators' questions. Gorsuch even suggested that he could withdraw his own nomination and continue to serve as a court of appeals judge.<sup>7</sup>

When nominees testify, senators who support confirmation typically use their questions to help the nominee make a favorable impression. Senators who are negatively inclined ask questions that raise criticisms of the nominee or that might elicit damaging answers. Questions often concern a nominee's views about past decisions or issues that the Court might address in the future.<sup>8</sup> Typically, nominees take positions on a few issues on which they know their answers will be popular or uncontroversial. With that exception, they turn back questions about judicial issues on the ground that they do not want to prejudice issues that might come before the Court. One commentator described the "key lessons" for nominees from recent confirmation hearings: "Say nothing, say it at great length, and then say it again."<sup>9</sup>

When senators are truly undecided about their confirmation votes, what a nominee says (or refuses to say) before the Judiciary Committee can affect the outcome. In 1987, for instance, Robert Bork's testimony increased some senators' concerns about his views on issues that the Court addresses. But today, in an era of



► **Photo 2-1** Judge Brett Kavanaugh testifying at the special confirmation hearing before the Senate Judiciary Committee on charges of sexual misconduct against him in 2018. Supreme Court nominees' testimony has become a key stage in the selection process for justices.



strong political polarization, senators generally make up their minds on a partisan basis quite early. For that reason, few votes on confirmation are affected by nominees' testimony.

Just as Brett Kavanaugh played an active role in the campaign to win President Trump's nomination in 2018, he played an unusually active role late in the confirmation process. After charges of sexual misconduct were raised against Kavanaugh, he worked to refute those charges. He gave an interview to Fox News before testifying at the special Judiciary Committee hearing on the charges. His combative testimony at that hearing helped to solidify support for him from Republican senators. It also raised questions about his "judicial temperament" for some people, and he responded with an op-ed in the *Wall Street Journal* in which he apologized for some of the things he had said.<sup>10</sup>

## The Legal Community

Lawyers have a particular interest in the Supreme Court's membership, and their views about potential justices may carry special weight. As the largest and most prominent organization of lawyers, the American Bar Association (ABA) occupies an important position. An ABA committee investigates presidential nominees for federal judgeships, including the Supreme Court, and rates them as "well-qualified," "qualified," or "not qualified."

Ideally, from the ABA's perspective, it would make ratings of prospective nominees before they are selected, so the president's administration could take those ratings into account. But Republican presidents have become unwilling to give that role to the ABA committee, based on a perception that the committee is biased against conservative nominees. Even so, the ABA's unanimous ratings of nominees as "well-qualified," which every nominee since 1993 has received (Harriet Miers in 2005 withdrew before she was rated), strengthen their credentials. By the same token, if a nominee does not get such strong approval, that negative sign might affect the judgments of some senators.

Other legal groups and individual lawyers also participate in the selection process. The most important legal group for Republican presidents is the Federalist Society, the leading organization of conservative lawyers and law students. When then-candidate Donald Trump sought to assure conservatives that he would select conservative justices if he became president, the Federalist Society was one of two groups that played key roles in assembling a list of potential nominees that Trump announced in May 2016 and the revised lists that were issued later in 2016 and in 2017 and 2020. Trump said in June 2016 that "we're going to have great judges, conservative, all picked by the Federalist Society."<sup>11</sup> Leonard Leo, executive vice president of the Society, helped to coordinate the processes that culminated in the nominations of Neil Gorsuch and Brett Kavanaugh.

Supreme Court justices sometimes participate in the selection process, most often by recommending a potential nominee. Chief Justice Warren Burger, appointed by Richard Nixon in 1969, was active in suggesting names to fill other

vacancies during the Nixon administration. He played a crucial role in the nomination of his longtime friend Harry Blackmun. Some years later, Burger lobbied the Reagan administration on behalf of Sandra Day O'Connor.<sup>12</sup> Anthony Kennedy's support for his former law clerk Brett Kavanaugh as a prospective justice helped to bring about President Trump's selection of Kavanaugh as Kennedy's successor.<sup>13</sup>

## Other Interest Groups

Many interest groups have a stake in Supreme Court decisions, so groups often seek to influence the selection of justices. The level of group activity has grown substantially in the past half century, and it now pervades both the nomination and confirmation stages of the selection process.

Interest groups would most like to influence the president's nomination decision. The groups that actually exert influence at this stage typically are politically important to the president. Democratic presidents usually give some weight to the views of labor and civil rights groups. Republican presidents usually pay attention to groups that take conservative positions on social issues such as abortion. The Heritage Foundation, a conservative group with a broad agenda, worked alongside the Federalist Society in helping to build the lists of potential Trump nominees for the Court.

The influence of these core groups was underlined in 2005, after President George W. Bush nominated White House Counsel Harriet Miers to succeed Sandra Day O'Connor. Many conservatives were uncertain that Miers was strongly conservative, and some groups and individuals mounted a strong campaign against her. After their campaign secured Miers's withdrawal, President Bush chose Samuel Alito, who was popular with conservative groups.

Once a nomination is announced, groups often work for or against Senate confirmation. Significant interest group activity at this stage was limited and sporadic until the late 1960s.<sup>14</sup> Its higher level since then reflects growth in the intensity of interest group activity, greater awareness that nominations to the Court are important, and group leaders' increased understanding of how to influence the confirmation process. Leaders of some groups have also found that opposition to controversial nominees is a good way to generate interest in their causes and monetary contributions from their supporters.

Groups that opposed specific nominees achieved noteworthy successes between 1968 and 1970. Conservative groups helped to defeat Abe Fortas, nominated for elevation to chief justice by President Lyndon Johnson in 1968, and labor and civil rights groups helped to secure the defeats of Richard Nixon's nominees Clement Haynsworth and G. Harrold Carswell. President Reagan's nomination of Robert Bork in 1987 gave rise to an unprecedented level of group activity, and the strong mobilization by liberal groups was one key to Bork's defeat in the Senate.

Since the Bork nomination, interest groups have been involved in the confirmation process for every nominee. Group activity increases with perceptions that a nominee would shift the ideological balance in the Court substantially and that a

nominee might be vulnerable to defeat. But even when these conditions are lacking, there are always some groups that mount campaigns for and against nominees.

Conservative groups were quite active in the battles over confirmation of Merrick Garland, Neil Gorsuch, and Brett Kavanaugh. The conservative Judicial Crisis Network spent at least \$7 million in opposition to Garland, \$10 million in support of Gorsuch, and \$12 million on behalf of Kavanaugh.<sup>15</sup> These campaigns centered on advertising in states with potentially wavering senators, especially Democrats from strongly Republican states. For their part, liberal groups pushed Democratic senators to oppose Gorsuch and Kavanaugh vigorously. Their advertising campaigns against the two nominees were substantial but less extensive than the campaigns for the nominees.

The regular involvement of interest groups and their appeals to the general public underline how the process of selecting justices has opened up over time. Nomination and confirmation now include “a broad array of players—both internal and external—and are conducted much like other political processes in a democracy.”<sup>16</sup>

## The President’s Decision

One key attribute of Supreme Court nominations is variation: the process of selecting nominees and the criteria for choosing those nominees differ from president to president and even among the nominations that one president makes. But there are also some general patterns in process and criteria that can be identified.<sup>17</sup>

Presidents vary in their personal involvement in the selection process. Bill Clinton, George W. Bush, and Barack Obama played a more active role in the process than did their predecessors Ronald Reagan and George H. W. Bush. Obama, a former constitutional law professor with a strong interest in the Court, was especially active. Still, all presidents delegate most of the search process to other officials in the executive branch. In recent administrations, the process has been centered in the Office of the White House Counsel.

Administrations in the current era typically do a good deal of preparatory work before a vacancy in the Court actually arises. In the George W. Bush administration, White House officials interviewed prospective nominees in 2001, four years before there was a vacancy to fill.<sup>18</sup> Once a vacancy occurs, occasionally a president fixes on a single candidate for nomination. More often, administrations create a short list and then work to identify the best candidate from that list. President Obama, for instance, chose Elena Kagan from a group of finalists that also included three judges on the federal courts of appeals.<sup>19</sup> This process allows presidents and other officials to work systematically through the advantages and disadvantages of choosing different names from the list. But uncertainties about potential nominees and shifting conditions often introduce an element of chaos to the process. That was true of the George W. Bush nominations and, even more, those made by President Clinton.

President Trump’s nominations of Neil Gorsuch and Brett Kavanaugh were unusual in the announcement of prospective nominees before Trump was elected

and in the integral roles played by two interest groups in identifying those candidates. In other respects, the process that culminated in those nominations was fairly typical for the current era. The lists of candidates were put together by Donald McGahn, who became White House Counsel after Trump was elected. McGahn also headed up the efforts to choose the actual nominees. Even before Trump took office, according to one report, McGahn had a clear vision of what was going to happen: Gorsuch would be nominated to fill the existing vacancy on the Court, the administration would encourage Anthony Kennedy to retire, and Kavanaugh would be nominated to fill his seat.<sup>20</sup>

Although that vision was fulfilled, President Trump and his advisors considered and interviewed several candidates from the list of prospective nominees for each vacancy. Gorsuch was one of three judges on the federal courts of appeals whom Trump interviewed in 2017. A fourth court of appeals judge reportedly was not interviewed because one advisor “thought him too impressive and was worried that Trump might favor him over Gorsuch, upending the underlying strategy.”<sup>21</sup> When those interviews were completed, McGahn strongly recommended Gorsuch and Trump chose him.<sup>22</sup>

Before he nominated Kavanaugh in 2018, Trump met four prospective nominees and spoke on the phone with a fifth. The path to nomination was not as smooth for Kavanaugh as it was for Gorsuch, in part because some conservatives lobbied strongly against him. But after two interviews of Kavanaugh and a telephone conversation with him, as well as considerable input from an array of other people, the president offered him the nomination.<sup>23</sup>

Amy Coney Barrett was widely expected to win a nomination for Justice Ginsburg’s seat if Ginsburg left the Court while Trump was president. Indeed, she was nominated with extraordinary speed. Two White House staff members contacted her the day after Ginsburg’s death. After she had a series of meetings with members of the administration, two days later President Trump offered her the nomination and she accepted it, though the nomination was not announced until later that week.

The possible criteria for nominations fall into several categories: the “objective” qualifications of potential nominees, their policy preferences, rewards to political and personal associates, and building political support. Cutting across these criteria and helping to determine their use is the goal of securing Senate confirmation for a nominee.

### **“Objective” Qualifications**

Presidents have strong incentives to select Supreme Court nominees who have demonstrated high levels of legal competence and adherence to ethical standards. For one thing, most presidents respect the Court. Further, highly competent justices are in the best position to influence their colleagues. Finally, serious questions about a candidate’s competence or ethical behavior work against Senate confirmation.

Because presidents care about competence, only in a few cases has a nominee’s capacity to serve on the Court been seriously questioned. One of those was Nixon’s

nominee G. Harrold Carswell, who was denied confirmation. Perceptions that Harriet Miers had only limited knowledge of constitutional law were one source of the opposition that led her to withdraw as a nominee in 2005.

The ethical behavior of several nominees has been questioned. Opponents of Abe Fortas (when nominated for promotion to chief justice), Clement Haynsworth, Stephen Breyer, and Samuel Alito pointed to what they saw as financial conflicts of interest. Fortas was also criticized for continuing to consult with President Johnson while serving as an associate justice. The charges against Fortas and Haynsworth helped prevent their confirmation. After Douglas Ginsburg was announced as a Reagan nominee, a disclosure about his past use of marijuana led to his withdrawal. Allegations of sexual misconduct by Clarence Thomas in 1991 and Brett Kavanaugh in 2018 resulted in special sets of Senate hearings on these allegations and potentially put their confirmation in jeopardy.

To minimize the possibility of such embarrassments, administrations today give close scrutiny to the competence and ethics of potential nominees. This does not necessarily mean that the people chosen to serve on the Court are the most qualified of all possible appointees. One highly respected federal judge expressed the view that the justices are probably not “nine of the best 100 or, for that matter, 1,000 American lawyers.”<sup>24</sup> But presidents do seek to choose lawyers who have demonstrated a high level of skill as well as ethical conduct.

## Policy Preferences

By policy preferences, I mean an individual’s attitudes toward policy issues. These criteria have always been a consideration in the selection of Supreme Court justices. In the current era, every president pays considerable attention to the policy preferences of prospective nominees. This emphasis reflects the Court’s increased prominence as a policy maker and the fact that interest groups associated with both parties care so much about the Court’s direction. But presidents of the two parties have taken somewhat different approaches.

Republican presidents give special emphasis to policy considerations. In part, this is because Republican leaders, activists, and voters generally share strongly conservative views on issues that the Court addresses. Also important are past disappointments. Between 1969 and 1991, all ten appointments to the Court were made by Republican presidents. But the records of some of those justices were relatively moderate, and three—Harry Blackmun (appointed by Nixon), John Paul Stevens (Ford), and David Souter (George H. W. Bush)—were actually on the liberal side of the Court’s ideological spectrum during much of their tenure. The same was true of two justices appointed by Republican President Eisenhower in the 1950s, Earl Warren and William Brennan.

In response to these disappointments, party activists have pushed Republican administrations to give strong weight to prospective nominees’ policy preferences as a criterion and to probe carefully for evidence about those preferences. Their efforts were reflected in the nominations of John Roberts and Samuel Alito

by George W. Bush and in the key roles that conservative groups played in the selection of potential Donald Trump nominees and Trump's choices of Gorsuch, Brett Kavanaugh, and Amy Coney Barrett from those candidates.

For recent Democratic presidents, it was important that their nominees be liberals, but not that they be strong liberals. On the whole, the Clinton and Obama nominees were relatively moderate. Memoranda by people helping Clinton in 1993 described Stephen Breyer as moderate or even moderately conservative on some issues, but Clinton nonetheless nominated Breyer to the Court a year later.<sup>25</sup>

Obama's 2016 nomination of the moderate liberal Merrick Garland was a special case, because Obama sought someone who might cause some senators in the Republican majority to break from their leadership's position that it would not consider any Obama nominee. The other four Clinton and Obama nominations came when Democrats held Senate majorities, yet none were perceived as highly liberal. For the two presidents, one motivation was to choose people who would not arouse strong opposition from Republicans, so that confirmation would be relatively easy.

Also relevant are differences between the parties in the current era. Most fundamentally, ideology is not the key unifying force in the Democratic Party that it is for Republicans; the Democrats are more "a coalition of social groups."<sup>26</sup> And in part for that reason, Supreme Court policy has not been as high a priority for Democrats. As a result, Democratic presidents have felt relatively little pressure to choose strong liberals. But because of widespread unhappiness among liberals about the Senate's refusal to consider Garland and President Trump's appointments to the Court, future Democratic presidents will feel much greater pressure to make ideology the key criterion for nominations.

Presidents of both parties seek to ascertain the views of prospective nominees on issues of legal policy. This is the primary reason why every nominee since 1986 except for Elena Kagan and Harriet Miers has come from a federal court of appeals. If a judge has a long record of judicial votes and opinions on issues of federal law, as Sonia Sotomayor, Neil Gorsuch, and Brett Kavanaugh did, presidents and their advisors can be fairly confident about the kinds of positions the judge would take on many issues as a justice.

Some nominees do not have these long records. Miers and Kagan had never served as judges. Sandra Day O'Connor had served only on state courts, and most kinds of issues that come to the Supreme Court are uncommon in state courts. John Roberts, Clarence Thomas, and David Souter had only short service on federal courts of appeals—for Souter, so short that he had written no opinions. For candidates such as these, other sources of information can be consulted.

Most justices do reflect the ideological leaning of the president's party at least fairly well. But the Republican appointees from the 1950s to 1990 who developed moderate or liberal records on the Court are a reminder that this is not always the case. These exceptions generally fall into two categories. First, some justices were chosen by presidents who did not have a strong interest in choosing ideologically compatible justices or who were not careful about doing so. For instance, policy considerations were not dominant in Gerald Ford's choice of John Paul Stevens or

in Ronald Reagan's choice of Sandra Day O'Connor. President Eisenhower and his aides did not scrutinize Earl Warren and William Brennan as closely as they might have, and those two justices helped to establish a highly liberal Court majority in the 1960s.

Second, some justices shift their ideological positions after reaching the Court. Richard Nixon's one "failure" was Harry Blackmun, who had a distinctly conservative record in his early years on the Court but gradually adopted more liberal positions. Anthony Kennedy also may have shifted in a liberal direction after reaching the Court, although to a lesser degree. A conservative publication later referred to Kennedy as "surely Reagan's biggest disappointment."<sup>27</sup>

To the extent that presidents seek nominees who reflect their party's dominant ideological orientation, the increased "sorting" of conservatives into the Republican Party and liberals into the Democratic Party in the last few decades has made presidents' jobs easier. Because of sorting, fewer people with the credentials needed for a Supreme Court appointment deviate from their party's dominant orientation. The enhanced role of ideology in the selection of court of appeals judges in the past few decades has reinforced that development. A Republican president, for instance, can choose from a substantial pool of judges with strongly conservative backgrounds and judicial records. Because of those changes and the increasing care with which nominations are made, the overall records of justices on the Court are now unlikely to disappoint the presidents who chose them.

### Political and Personal Reward

For most of the country's history, it was a standard practice for presidents to nominate friends and acquaintances to the Supreme Court. As of 1968, about 60 percent of nominees had known the nominating president personally.<sup>28</sup> Certainly this was true in the mid-twentieth century. With the exception of Dwight Eisenhower, all the presidents from Franklin Roosevelt through Lyndon Johnson selected mostly people whom they knew personally.

Rewarding personal and political associates seemed to be the main criterion for Harry Truman in choosing justices. Sherman Minton, a friend and former Senate colleague of Truman's, was serving as a federal judge in Indiana when he learned that one of the justices had died. Minton reportedly traveled to Washington, D.C. as quickly as he could, went to the White House, and asked Truman to nominate him for the vacancy. Truman immediately agreed, and Minton became a justice.<sup>29</sup>

Some appointments to the Court were direct rewards for political help. Eisenhower selected Earl Warren to serve as chief justice largely because of Warren's crucial support of Eisenhower at the 1952 Republican convention. As governor of California and leader of that state's delegation at the convention, Warren had provided Eisenhower the needed votes on a preliminary issue and thereby helped secure his nomination.

This pattern has changed fundamentally. Of the twenty-six nominees from Warren Burger in 1969 to Amy Coney Barrett in 2020, only Harriet Miers and