Lee Epstein | Kevin T. McGuire | Thomas G. Walker

# CONSTITUTIONAL LAW *for a* Changing America

## A Short Course | Eighth Edition

# Constitutional Law for a Changing America

Eighth Edition

*To my niece and nephews, Alexandra, Brian, Jason, and Zach—L. E.*

*To my teacher, Bob DiClerico—K. T. M.*

*To Nicole—T. G. W.*

# Constitutional Law for a Changing America

## A Short Course

Eighth Edition

**Lee Epstein**
*Washington University in St. Louis*

**Kevin T. McGuire**
*The University of North Carolina at Chapel Hill*

**Thomas G. Walker**
*Emory University*

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# PREFACE

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

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

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

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

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

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

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

students whenever the oral arguments for a case have been made available on the Internet by the Oyez Project.

With each edition we attempt to enhance the coverage and accessibility of the material, and this eighth edition is no exception. The most significant changes are in the individual chapters. We have thoroughly updated each to include important opinions handed down during the Roberts Court era. Since Chief Justice John G. Roberts took office in 2005, the Court has taken up many pressing issues of the day, including, of course, health care; we've thus excerpted, in chapters 7 ("The Commerce Power") and 8 ("The Power to Tax and Spend"), the major dispute over the 2010 Patient Protection and Affordable Care Act (often referred to as Obamacare), *National Federation of Independent Business v. Sebelius* (2012). Then there's same-sex marriage, which we discuss in several chapters but especially in chapter 16 ("The Right to Privacy") where we excerpt *Obergefell v. Hodges* (2015), invalidating all existing state bans on the practice. We also excerpt other Roberts Court decisions of note, including *Carpenter v. United States* (2018), which addresses whether law enforcement's use of cell phone records without a warrant violates the Fourth Amendment; *Shelby County, Alabama v. Holder* (2013), which concerns the Voting Rights Act; and *Fisher v. the University of Texas* (2016), in which the justices consider the constitutionality of an affirmative action program. Other contemporary decisions have received less attention but are no less important for understanding constitutional law, including ***Zivotofsky v. Clinton*** (2012) (political question doctrine) and ***United States v. Comstock*** (2010) (the necessary and proper clause).

But readers will find more than just updating. We have tried to bring a fresh eye to each chapter, reconsidering all existing case excerpts and clarifying existing material. In the previous edition, we reworked some of the discussion relating to federalism (chapter 6) and the commerce clause (chapter 7) to highlight new developments. Here we continue along the same path, enhancing the Takings Clause chapter (chapter 11) to include a section on just compensation (along with an excerpt of *United States v. 564.54 Acres of Land*). Chapters 12 ("Religion") and 13 ("Freedom of Speech, Assembly, and Association") have received even more extensive facelifts. Recent decisions in the areas of legislative power (chapter 4), executive power (chapter 5), religion (chapter 12), privacy (chapter 16), and discrimination (chapter 19) also provided us the opportunity to supplement and, we hope, further illuminate some important new and perennial topics. To provide one example, in chapter 4 we substituted *Gundy v. United States* (2019) for ***Mistretta v. United States*** (1989) to attend to debates among today's justices over the delegation of legislative powers.

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

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

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

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

## WELCOMING A NEW COAUTHOR

After nearly five decades of teaching law-related courses to undergraduate and PhD students (including Lee Epstein), Tom Walker has taken on the much-deserved status as an emeritus professor. Although Professor Walker will always be a member of the *Constitutional Law for a Changing America* team, he has stepped back from the day-to-day responsibilities of producing the volumes.

It is with great pleasure then that we welcome Kevin T. McGuire of the University of North Carolina at Chapel Hill as a coauthor for the entire *Constitutional Law for a Changing America* series—beginning with this edition of *A Short Course*. If you are familiar with Professor McGuire's justifiably famous work on the U.S. Supreme Court, lawyers, and judicial-legislative relations, you know that he is a meticulous scholar and an excellent writer. He is also a superb teacher, with deep expertise in all topics covered in *Constitutional Law for a Changing America*. A better coauthor Epstein and Walker could not imagine!

Sara Miller McCune founded SAGE Publishing in 1965 to support the dissemination of usable knowledge and educate a global community. SAGE publishes more than 1000 journals and over 600 new books each year, spanning a wide range of subject areas. Our growing selection of library products includes archives, data, case studies and video. SAGE remains majority owned by our founder and after her lifetime will become owned by a charitable trust that secures the company's continued independence.

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# ACKNOWLEDGMENTS

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

Other members of the CQ Press team also deserve our thanks and praise. Neither of us is quite sure what we would have done without Carolyn Goldinger, our copy editor for many earlier editions of the *Constitutional Law for a Changing America* series. To call her "our copy editor" is true enough. But she did so much more than perfect our writing and check our facts. She contributed so many ideas for presentation and content that our books would have been far the worse without her. We'll never be able to thank her enough. Judy Selhorst and Gretchen Treadwell, who copyedited more recent versions of our books, more than filled Carolyn's shoes. After nearly three decades of producing this series, it might seem that a copy editor would be left with little to hone, query, or correct. Not so. Colleen Brennan, our most recent copy editor, has done a fabulous job improving this volume in ways big and small. We are very grateful for all her efforts on our behalf. We also owe a debt of gratitude to our content development editor, Jennifer Jovin-Bernstein; editorial assistant, Lauren Younker; and production editor, Veronica Stapleton Hooper. Finally, other members of the CQ Press family, too numerous to mention, brought ideas, enthusiasm, and efficiency to the project.

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

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

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

PART ONE

# THE U.S. CONSTITUTION

**An Introduction to the U.S. Constitution**

1. **The Living Constitution**
2. **Understanding the U.S. Supreme Court**


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ACCORDING TO James Madison, "The happy Union of these States is a wonder; their Constitution a miracle; their example the hope of Liberty throughout the world. Woe to the ambition that would meditate the destruction of either." In a very real sense, the U.S. Constitution is a marvel. It was crafted in an environment of political uncertainty, and its success was by no means certain. Not only has it survived, it has demonstrated its strength, as well, weathering challenges and change that its authors scarcely could have foreseen. Even after two and a quarter centuries, the document remains the foundation for the structure of American government; it is the world's oldest written constitution.[1] This is especially impressive, given that most constitutions hardly endure for a generation. Since the Constitution was ratified in 1789, national constitutions around the world have lasted an average of only seventeen years.[2]

In what follows, we provide a brief introduction to the U.S. Constitution—in particular, the circumstances under which it was written, the basic principles underlying it, and some controversies surrounding it. This material may not be new to you, but it is especially important to review, since these concerns frequently frame and inform how the Supreme Court interprets the Constitution.

## THE ROAD TO THE U.S. CONSTITUTION

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

The Articles of Confederation, however, had little effect on the way the government operated; instead, the articles more or less institutionalized practices that had developed under the Continental Congress (1774–1781). Rather than provide for a compact between the people and the government, the 1781 charter institutionalized "a league of friendship" among the states, an agreement that rested on strong notions of state sovereignty. Having just fought successfully for independence from what they perceived as "repeated injuries and usurpations" by a distant, overbearing government, they were naturally wary of concentrating power. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it and not from the people.

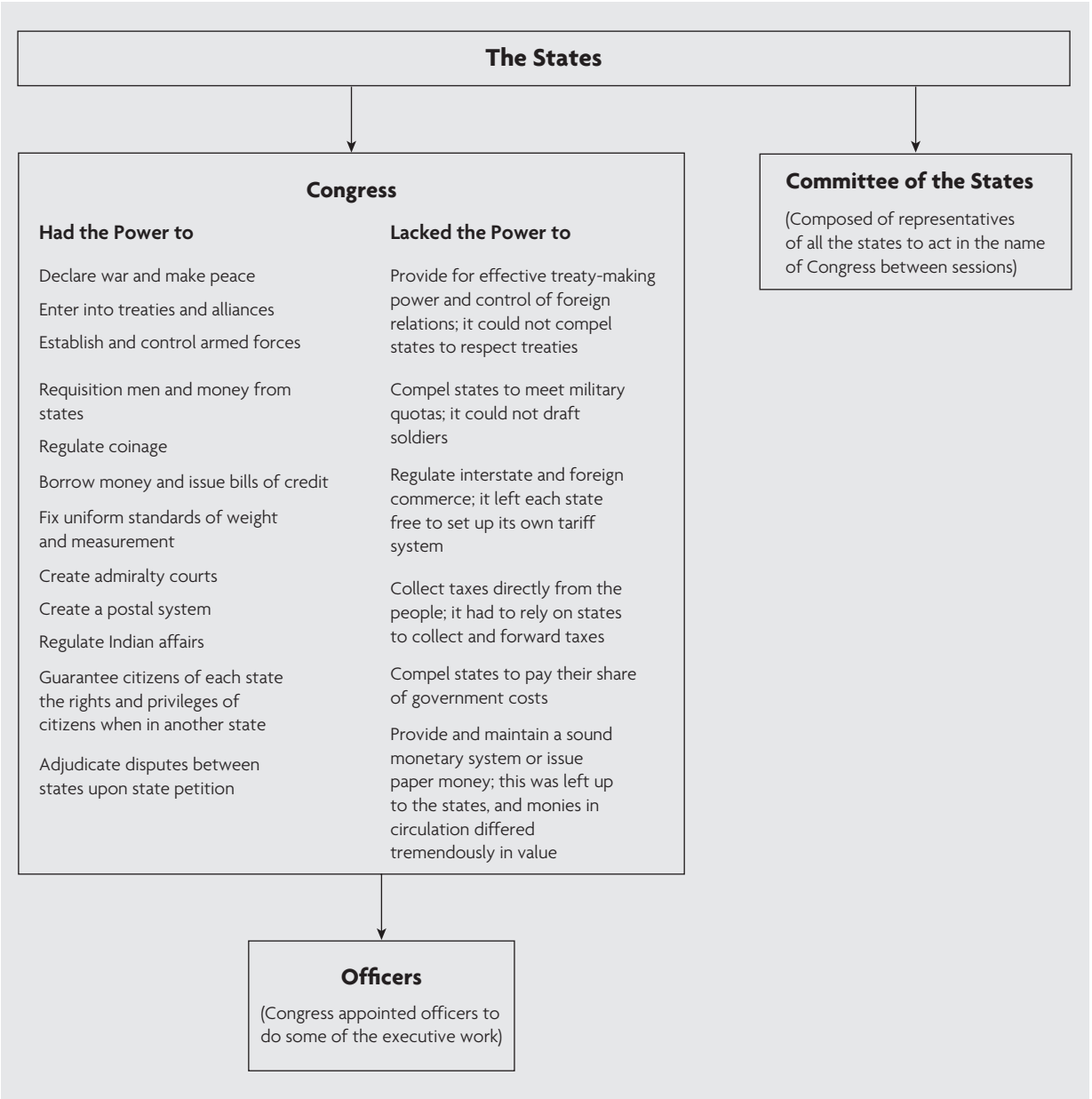
[1] Technically, the small microstate of San Marino, located completely within the nation of Italy, has the oldest constitution, but it is not a single document. It consists of a series of books that date to 1600.

[2] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

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

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

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




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

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

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

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

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

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

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

Known as the Virginia Plan, these proposals were formally introduced to all the delegates on May 29, just four days after the convention began. And although it was the target of a counterproposal submitted by the New Jersey delegation, the Virginia Plan set the tone for the convention. It served as the basis for many of the ensuing debates and, as we shall see, for the Constitution itself *(see Table I-1)*. With the delegates now drafting an entirely new charter, they had to consider both the structure of the national government and its relationship to the states. Since the framers reflected competing political ideologies and represented diverse interests from across the states, one might well wonder how they were able to reach consensus—and do so in just four months.

A plausible explanation is that the Constitutional Convention was an assembly of very able men, the generation's leading lights of statecraft. According to historian Melvin I. Urofsky, "Few gatherings in the history of

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

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

this or any other country could boast such a concentration of talent." And, "despite [the framers'] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment."[5] That certainly would have been apparent to observers at the time; Thomas Jefferson, who was serving as ambassador to France during the convention, observed that it was "an assembly of demigods." Indeed, they were an impressive group. Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—white men, well-educated, and affluent—skeptics suggest that the document the framers produced was biased in various ways. This point of view was expressed by historian Charles Beard in *An Economic Interpretation of the Constitution of the United States*, which depicts the framers as self-serving. Beard says the Constitution was an "economic document" devised to protect the "property interests" of those who wrote it. Various scholars have refuted this view, and Beard's work, in particular, has been largely negated by other studies.[6] Still, *by today's standards*, it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class. As Justice Thurgood Marshall once observed, the Constitution was "defective from the start"; despite its first words, "We the People," it excluded "the majority of American citizens" because it left out blacks and women. He further alleged that the framers "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[7] Over time, of course, Americans have revised the Constitution to make it substantially more egalitarian.

This is not to suggest that controversies surrounding the Constitution no longer exist. To the contrary,

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

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

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

charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome, that it is too slanted toward the will of the majority. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers' biases.

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

## UNDERLYING PRINCIPLES OF THE CONSTITUTION

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

### Separation of Powers with Checks and Balances

One of the fundamental weaknesses of the Articles of Confederation was their failure to establish a strong and authoritative federal government. The articles created a national legislature, but that body had few powers, and those it did have were kept in check by the states. The new U.S. Constitution overcame this deficiency by creating a national government invested with a host of explicit powers and significant authority independent of the states. Despite their desire to invigorate national power, though, the framers were also aware that power could be abused, especially when it was concentrated. One guard against such abuse was to diffuse authority, to divide and disperse it rather than allow it to be centralized. By creating a national government with three branches—the legislature, the executive, and the judiciary—and providing each with its own set of responsibilities, the members of the convention sought to limit the possibility of arbitrary and oppressive policy making.

The framers did not consider the separation of powers sufficient protection, however. As depicted in Figure I-2, they allowed each branch to impose limits on the primary functions of the others through the use of checking powers. Before Congress could enact legislation, it would need the support of the president. The president could not make treaties without supervision from the Senate. If the president, as commander in chief, had designs on entering into foreign conflicts, the Congress retained the power to declare war as well as the fiscal authority to refuse to pay for the executive's ambitions. The Supreme Court may have been empowered to interpret federal law, but the president and Senate together limit the Court when selecting its members. In addition to these checking powers, the framers included a number of institutional balances: they made each element of the national government responsible to a different constituency and had them all selected on different timetables. This made it unlikely that the national government could be overwhelmed by the prevailing passions of the day.

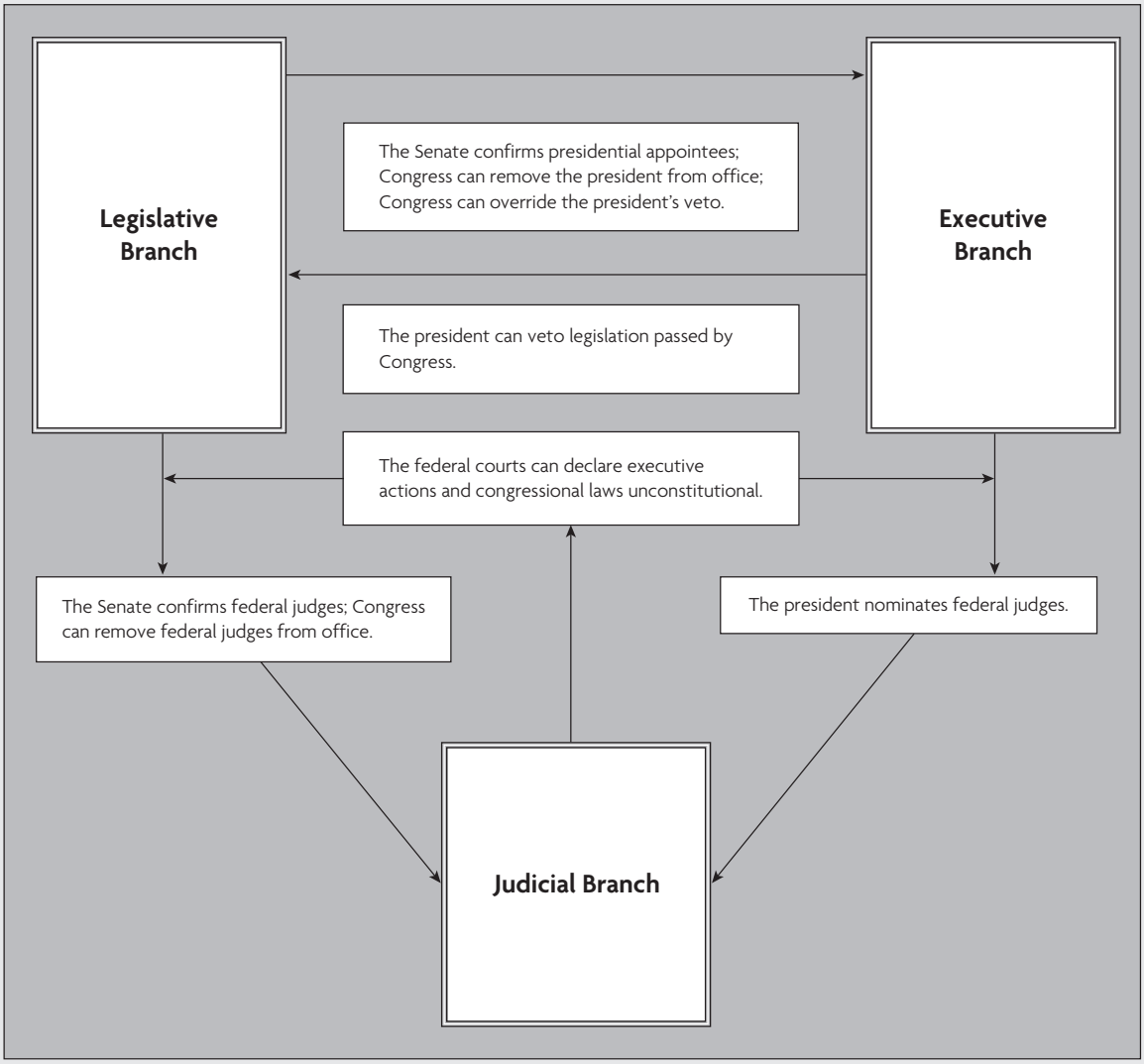
These various institutional designs underscored the framers' pessimism about human nature. They were realists; as Madison observed, in steering the ship of government, "[e]lightened statesmen will not always be at the helm." The solution was to craft a government that incorporated their distrust. "Ambition must be made to counteract ambition."

### Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the national government and the states. As already noted, the Congress under the articles was not just weak—it was more or less an apparatus controlled by the states. Remember that, only a few years earlier, most Americans thought of themselves as residents of British colonies—the Connecticut Colony, the Delaware Colony, the Colony of Virginia, and so on. Now they were independent states, and their citizens did not necessarily have a "national" consciousness. The Articles of Confederation reflected that view; the states were the center of political life.

Some of the delegates at the convention—most notably, Alexander Hamilton—greatly preferred national power over state authority and proposed to place there as much control as possible. Under the articles, states had often pursued their own particular interests, attempting to raise revenue by charging tariffs on goods passing across their borders. These "rival, conflicting, and angry regulations," as Madison called them, hindered national economic growth.

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




Other delegates, by contrast, were quite worried about ceding any power to a new national government. After all, the states were sovereign entities. Skeptical of national authority, they believed that a republican government worked best on a localized level, where policy makers were more likely to be attuned to the needs and desires of those whom they represented. Fortunately, the framers were familiar with the political philosophies of Enlightenment thinkers, and one of the most prominent was Montesquieu. This French lawyer had written an influential book on democratic theory, *The Spirit of the Laws*, and it contained a number of ideas that appealed to the framers. Most notably, he proposed what he called a "confederate republic," a government that was composed of *both* a national government limited by the separation of powers and smaller individual governments. By his logic, the national government would provide strength and protect the nation in foreign affairs and the smaller, local governments could better reflect the

interests of the people in crafting domestic policy. Although the delegates modified the specifics of Montesquieu's plan, they adopted its broad principles. Thus, federalism became a key element of the framers' design, one that was meant to appeal to both sides of the debate over national versus state power.

Under this framework, the states agreed to relinquish only some of their sovereignty. The national government would be one of limited authority, restricted to exercising only those powers that were enumerated in the Constitution. Although the Constitution and the laws written by Congress were to be "the supreme law of the land," the states retained all of the remaining power.

This strategy both enlarged and limited the power of the national government, but the Constitution still left unanswered many questions about federal-state relations. For example, would the national government be empowered to exercise other, non-explicit powers in order to carry out its explicit obligations? What would happen if Congress, in exercising one of its explicit powers, regulated something that might have been reserved to the states? Could states judge for themselves the meaning of national law? As you will see, the Supreme Court has played a prominent role in defining the boundaries of federal and state power by answering these questions. In so doing, it has helped shape the contours of American federalism.

### Individual Rights and Liberties

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

The prominence of issues of governmental powers and structure, however, did not mean that the framers had forgotten the purposes of the Revolution. The war for independence had ended only a few years before the convention met. The values of individual liberty and freedom, over which the war was fought, were still fresh in the framers' minds. There is no doubt that safeguarding those rights remained a high priority. In fact, records of the debates indicate that some of the delegates offered specific guarantees of individual rights. George Mason, Charles Pinckney, and Edmund Randolph, for example, all proposed to enumerate rights in the Constitution, but their efforts could muster no support.[8] Mason, the author of the Virginia Declaration of Rights, refused to sign the Constitution because it failed to include explicit limits on the powers of the national government.

It is therefore a puzzle to many that the Constitution drafted in Philadelphia had only scant references to individual rights and liberties. Other than prohibiting government from passing ex post facto laws or bills of attainder—that is, laws that punish retroactively or legislative declarations that convict and punish—the framers included no explicit limitations. How could such a fundamental governing document produced by those who had led the nation to its independence fail to include a systematic statement of basic freedoms?

One explanation is that the central concern of the convention was increasing, not decreasing, the authority of the national government. In light of the failures of the Articles of Confederation, creating a government that had ample power to stabilize the economy and stimulate growth was the highest priority. There was no immediate civil liberties crisis; oppressive English rule had been overthrown. Moreover, the states all had their own bills of rights that protected individual liberties.

Another reason, according to some of the framers, was that the Constitution itself served to limit the power of the national government. Hamilton and Madison, for instance, pointed out that the national government was one of limited powers, granted by the states. By enumerating power—by explicitly stating what Congress *may* do—the Constitution, in fact, protected rights—by implicitly stating what Congress *may not* do. Not only that, Madison believed that abuses of individual rights were much more likely to take place at the state level, where local populations were more homogenous and thus more likely to be intolerant of political minorities. If national power was to be feared, he was optimistic that the checks and limitations the framers imposed would be sufficient to block abuses of personal liberty.

In addition, there was a more practical problem facing the delegates. By the time the convention had resolved matters of governmental structure and power, the delegates understandably were exhausted. Leaving behind their personal businesses and occupations, they had spent May through September confined together in a hot and humid room, engaged in intense debates and

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

negotiations. The prospect of spending additional time attempting to resolve questions of what liberties should be included in a bill of rights and how those rights should be stated was not an attractive one. Yet the question of a bill of rights would not go away. Once the states set about debating ratification of the proposed Constitution, one of the primary complaints was that it lacked a bill of rights. Many argued that despite the various restraints on governmental power placed in the document, the new government would have the potential to become a very powerful institution, and one that would be quite capable of depriving the people of their freedoms. This argument was particularly persuasive, and consequently ratification was placed in jeopardy. In response, supporters of the Constitution began to suggest a compromise: if the Constitution was ratified, one of the new government's first orders of business would be the drafting of a bill of rights to be added to the Constitution. That compromise took the form of the first ten amendments to the Constitution—the Bill of Rights. Since the ratification of the Bill of Rights, on December 15, 1791, those basic principles of the Constitution—separation of powers, federalism, and individual liberties and rights—have remained the defining features of American government. How the Constitution has been able to sustain those principles over time is a topic we consider in chapter 1.

CHAPTER ONE

# THE LIVING CONSTITUTION

HOW HAS the Constitution of the United States endured as the oldest constitution on the earth? How has it survived the stresses of massive social, political, and economic upheaval? Constitutions are more likely to endure when they are flexible—that is, when "they provide reasonable mechanisms by which to amend and interpret the text to adjust to changing conditions."[1] Thus, part of the explanation for the long-lasting success of the American Constitution is that its meaning can be changed, either by constitutional amendment or by its interpretation by the members of the U.S. Supreme Court. It is, in a sense, a living constitution.

An important qualification, however, is that these changes reflect a genuine reconfiguration of fundamental values in society, not simply the regular movement of preferences that result from shifting political winds. One of the most revered figures in American legal history is Justice Joseph Story, whose *Commentaries on the Constitution of the United States* remains an indispensable analysis of the development of American law. Story spoke to precisely this issue—the need to balance stability and change—when he wrote:

> It is obvious that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies which may, in different ages require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution.[2]

As Story recognized, a Constitution too easily adjusted promotes chaos, and one that frustrates adaptation is too rigid. To that end, the framers required constitutional amendments to have overwhelming majority support across the nation. Likewise, by providing for life tenure for the members of the Supreme Court, they ensured that constitutional interpretation would not be in chronic flux, something that might well happen if the justices were subject to being replaced every few years.

In the following sections, we trace both means of effecting constitutional change. We examine how, through the amendment process and the Court's interpretation of the law, the Constitution has maintained its vitality over time.

## THE AMENDMENT PROCESS

The framers were quite pleased with their handiwork; when the convention concluded, they "adjourned to City Tavern, dined together and took cordial leave of each other."[3] After the long, hot summer in Philadelphia,

[1]Tom Ginsburg, Zachary Elkins, and James Melton, "The Lifespan of Written Constitutions" (*UC Berkeley: Berkeley Program in Law and Economics*, 2007, retrieved from https://escholarship.org/uc/item/6jw9d0mf), 51.

[2]Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed. (Boston: Little, Brown, 1851), Book III, 564.

[3]*1787*, compiled by historians of the Independence National Historical Park (New York: Exeter Books, 1987), 191.

**Table 1-1 The Ratification of the Constitution**

| State | Date of Action | Decision margin |
|---|---|---|
| Delaware | December 7, 1787 | Ratified, 30–0 |
| Pennsylvania | December 12, 1787 | Ratified, 46–23 |
| New Jersey | December 18, 1787 | Ratified, 38–0 |
| Georgia | December 31, 1787 | Ratified, 26–0 |
| Connecticut | January 8, 1788 | Ratified, 128–40 |
| Massachusetts | February 6, 1788 | Ratified with amendments, 187–168 |
| Maryland | April 26, 1788 | Ratified, 63–11 |
| South Carolina | May 23, 1788 | Ratified with amendments, 149–73 |
| New Hampshire | June 21, 1788 | Ratified with amendments, 57–47 |
| Virginia | June 25, 1788 | Ratified with amendments, 89–79 |
| New York | July 26, 1788 | Ratified with amendments, 30–27 |
| North Carolina | August 2, 1788 | Rejected, 184–84 |
| | November 21, 1789 | Ratified with amendments, 194–77 |
| Rhode Island | May 29, 1790 | Ratified with amendments, 34–32 |

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

most of the delegates left for home, confident that the new document would receive speedy passage by the states. At first, it appeared as if their optimism was justified. As Table 1-1 depicts, before the year was out, four states had ratified the Constitution—three by unanimous votes. But after January 1788, the pace began to slow. By this time, a movement opposed to ratification was growing and marshaling arguments to deter delegates at state ratifying conventions. What these opponents, the Anti-Federalists, feared most was the Constitution's new balance of power. They believed that strong state governments provided the best defense against an inordinate concentration of power in the national government. The Constitution, they believed, tipped the scales too far in favor of federal authority.

These fears were countered by the Federalists, who supported ratification. Although their arguments and writings took many forms, among the most important was a series of eighty-five articles published in New York newspapers under the pen name "Publius." Written by John Jay, James Madison, and Alexander Hamilton, *The Federalist Papers* continue to provide insight into the objectives and intent of the founders.[4] Debates between the Federalists and their opponents often were highly philosophical in tone, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were full of the stuff of ordinary politics—deal making. Massachusetts provides a case in point. After three weeks of debate among the delegates, Federalist leaders there realized that they would never achieve victory without the support of Governor John Hancock. They went to his house and proposed that he endorse ratification on the condition that a series of amendments be tacked on for consideration by Congress. The governor agreed, but in return he wanted to become president of the United States if Virginia failed to ratify or if George Washington refused to serve. Or he would

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

accept the vice presidency. With the deal cut, Hancock went to the state convention to propose the compromise—the ratification of the Constitution with amendments. The delegates agreed, making Massachusetts the sixth state to ratify.[5]

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

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

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

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

In May 1789, one month after the start of the new Congress, Madison announced to the House of Representatives that he would draft a bill of rights and submit it within the coming month. As it turned out, the task proved a bit more difficult than he had anticipated; the state conventions had submitted nearly two hundred amendments, some of which would have decreased significantly the power of the national government. After sifting through these lists, Madison at first thought it might be best to incorporate the amendments into the Constitution's text, but he soon changed his mind. Instead, he presented the House with the following statement, echoing the views expressed in the Declaration of Independence: "That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people."[6]

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

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

[7]Farber and Sherry, *A History of the American Constitution*, 330.

only twelve remained.[8] The states ended up ratifying ten of the twelve.[9]

Despite the somewhat disorderly process, the Bill of Rights became part of the U.S. Constitution when Virginia ratified it on December 15, 1791. So, very early in the history of the republic, Americans demonstrated a capacity for amending their fundamental charter. Rather than rejecting and replacing the document, they signaled their belief that the Constitution was an effective instrument for self-government. Once written, it was not beyond the reach of alteration; it could be transformed to embrace the shared values of those who sought to change it.

The actual mechanics of adding the Bill of Rights illustrated how the framers expected constitutional change to take place. They wanted to create a government that would have some permanence; they wanted a system that would resist easy alteration. At the same time,they recognized the need for flexibility; they were well aware that one of the major limitations of the Articles of Confederation was its amending process, which required the unanimous approval of all thirteen states. The Philadelphia convention imagined an amending procedure that would be "bendable but not trendable, tough but not insurmountable, responsive to genuine waves of popular desire, yet impervious to self-serving campaigns of factional groups."[10]

The specific mechanism they established in Article V was a two-stage process *(see Table 1-2)*. Proposing a constitutional amendment is the first step. This may be done either by a two-thirds vote of both houses of Congress or by two-thirds of the states petitioning for a constitutional convention. To date, all proposed constitutional amendments have been the products of congressional action. A second constitutional convention has never been called.[11] The second step is ratification. Here, too, the framers allowed two options. Proposed amendments may be ratified by three-fourths of the state legislatures or by three-fourths of special state-ratifying conventions. Only the Twenty-first Amendment, which repealed Prohibition, was ratified by state conventions. The others were all ratified by the required number of state legislatures.

Responding to various political pressures, members of Congress have since proposed all manner of amendments—more than 11,000, in fact—but only thirty-three have been sent to the states for ratification. Among the six that did not receive the approval of enough states were the child labor amendment (proposed in 1924), which would have placed restraints on "the labor of persons under 18 years of age," and the equal rights amendment (ERA; proposed in 1972), which stated, "Equality of rights under law shall not be denied or abridged by the United States or any State on account of sex." Suggestions for new constitutional amendments, not surprisingly, continue to be advanced.

Unlike the Congress, the president and the Supreme Court are not participants in the process, but they can certainly have an influence. Presidents often instigate and support proposals for constitutional amendments. Indeed, from George Washington to Donald Trump, virtually every chief executive has wanted some alteration to the Constitution. In other instances, presidential politics have led to amendments. Prior to the presidential election of 1804, members of the Electoral College cast two votes, and the first- and second-place finishers became president and vice president, respectively. In 1796, that process resulted in John Adams, the candidate of the Federalist Party, being chosen as president and his opposition, the Democratic-Republican's Thomas Jefferson, being selected as his vice president. Four years later, that same procedure resulted in a tie that was broken by the House of Representatives in favor of Thomas Jefferson—after thirty-five votes. The Twelfth Amendment sought to avoid these complications by requiring electors to

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

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

[10]Keenan, *The Constitution of the United States*, 41.

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

**Table 1-2 Methods of Amending the Constitution**

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

cast one vote for president and one for vice president. Similarly, after Franklin D. Roosevelt was elected to an unprecedented fourth term in 1944—and died shortly after his last inauguration—Congress introduced what became the Twenty-second Amendment, limiting presidential tenure to two terms.

For its part, the Supreme Court has played a role as an instigator of constitutional amendments. The Court's interpretation of laws enacted by Congress can be easily overcome by the passage of new legislation, but that is not the case when the justices interpret the meaning of the Constitution. Short of the justices changing their minds—or their replacement with new justices of a different mindset—the only way to overturn the Court's interpretation of the Constitution is by amending the Constitution itself. Occasionally, the Court's constitutional decisions have been sufficiently out of step with public preferences that they have resulted in amendments that overturned those decisions *(see Table 1-3)*. Some of these amendments—prohibiting federal law suits against states by citizens of another state or guaranteeing the right to vote to eighteen-year-olds, for example—were aimed specifically at overturning a decision of the justices. Others, like the Civil War amendments, were not designed uniquely to reverse the Court but achieved that result, nonetheless.

Given the unpopularity of a number of the modern Court's rulings, there are continued campaigns within the halls of Congress to overturn some of the justices' more controversial policies. Congress has considered a number of proposed amendments, all of which target decisions of the Court: a human life amendment that would make abortion illegal (in response to *Roe v. Wade*, 1973), a school prayer amendment that would allow students in public schools to engage in prayer (in response to ***Engel v. Vitale***, 1962, and *School District of Abington Township v. Schempp*, 1963), a flag desecration amendment that would prohibit mutilation of the American flag (in response to *Texas v. Johnson*, 1989), and a term limits amendment (to overturn the Supreme Court's ruling in *U.S. Term Limits v. Thornton*, 1995).[12]

## CONSTITUTIONAL CHANGE AND THE SUPREME COURT

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

Part of what makes the Court's changing interpretations possible is the general language in which much of the Constitution is written. In a sense, the document contains more principles and structures than it does rules and procedures. One indicator of its lack of specificity is its length. The United States has one of the world's shorter constitutions, less than 8,000 words. The constitutions of Australia, Canada, and Ireland are twice as long. Germany has a constitution that is four times the length of its U.S. counterpart, and Mexico's is seven times longer. Even a casual inspection of the U.S.

[12]Boldface type indicates that the opinions in the case can be found in the online archive at http://edge.sagepub.com/conlaw. For a complete list of cases in the archive, see the Online Case Archive List (Appendix 4) at the end of this volume.

**Table 1-3 Six Amendments That Overturned Supreme Court Decisions**

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

*Source:* Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments,* 6th ed. (Thousand Oaks, CA: CQ Press, 2015), Tables 1-1 and 7-1.

Constitution reveals that it contains provisions that can be reasonably understood in multiple ways. True, some language—such as the requirement that the president be thirty-five years old or the provision that senators serve six-year terms—is not open to widely varying interpretations, but the meaning of other elements is not as obvious; phrases such as "necessary and proper," "due process law," "cruel and unusual punishments," "establishment of religion," and "unreasonable searches and seizures" are quite open-ended. Because there are not straightforward answers to questions about how to apply such words to specific cases, their meaning, as understood by the justices, has changed over time.

Consider, for example, the Supreme Court's interpretation of the commerce clause. The inability of the national government to regulate interstate commerce was a deficiency of the Articles of Confederation, and thus the framers invested Congress with the "Power . . . To regulate Commerce . . . among the several States." What qualifies as "interstate commerce"? Early in the twentieth century, the Supreme Court made a distinction between the production and manufacturing of a good and its subsequent sale and distribution. The latter was "interstate commerce" and subject to congressional regulation, but the former was not. Given that interpretation, the justices ruled that Congress could not use its commerce power to limit manufacturing monopolies, such as the sugar industry.[13] Neither would

[13] *United States v. E.C. Knight* (1895).

the justices permit Congress to use the commerce clause to set minimum wages and maximum working hours for the coal industry.[14] Manufacturing and labor were not a part of interstate commerce and thus subject only to state regulation. Later, however, the Court reconsidered this approach. It brought to bear a new interpretation of interstate commerce, one that was sufficiently broad to permit Congress to regulate not only activities it had previously forbidden—such as labor activity—but also actions far removed from commercial activity, such as the growth of wheat that never leaves a farm.[15] Under this subsequent approach, whatever had a substantial relationship to interstate commerce was subject to regulation by Congress.

What changed? Not the text of the Constitution; it was instead how the members of the Court interpreted its words. By moving from an interpretation that confined congressional power to an alternative interpretation that took a more expansive view, the Supreme Court effectively altered the meaning of the Constitution.

More recently, the Court has brought about another revision of its understanding of the commerce clause, this time by reconsidering whether state and local governments must adhere to federal labor law. In 1976, the justices ruled that, while national wage and hours standards could be applied to private employers, Congress could not force its choices about labor policy on the states; the Tenth Amendment, which expressly reserves to the states the powers not delegated to national government, does not permit Congress to impair the policy making of states.[16] Less than ten years later, however, the justices reversed course, holding that the states were not impaired by having to abide by federal wage regulations.[17] In that short span of time, no amendments were made to the Constitution; the justices amended their interpretation of it.

We began this chapter by discussing the adoption of the Bill of Rights as an illustration of constitutional change. We end here by revisiting the Bill of Rights and its application to the states, one of the Court's most significant interpretive changes to the Constitution.

As we have noted, the Bill of Rights was designed to serve as a limitation on the power of the national government. The passage of the Fourteenth Amendment in 1868, however, introduced new provisions to the Constitution, including a stipulation that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." To some, this language meant that states would have to adhere to the Bill of Rights, just like the national government; if the due process clause protected "liberty" from infringement by the states, then that "liberty" should certainly include the basic protections already in the Constitution.

Initially, when those arguments came before the Court, the justices rejected them. They ruled, for instance, that the due process clause did not include the First Amendment's guarantee of freedom of assembly.[18] Nor did it include the Fifth Amendment's right to indictment by a grand jury.[19] The Court emphasized that the states were free to recognize those freedoms they deemed important and to develop their own guarantees against state violations of those rights.

Through a doctrine called selective incorporation, however, the justices have applied, one by one, virtually all of the provisions of the Bill of Rights to the states; when they concluded that a specific protection in one of the amendments was so fundamental that it was "implicit in the concept of ordered liberty," the states would be bound by its commands, no less than the national government *(see Table 1-4)*. The result has been a considerable alteration in the nature of national-state relations and an expansion of the constitutional protection of liberties. Redrawing the scope of liberties protected by the Constitution has been a consequence of doctrinal shifts on the Supreme Court.

The ability of the Court to change doctrine in this fashion, combined with the possibility of formal amendments, ensure that the Constitution has the flexibility necessary to be adaptable from one generation to the next. The framers constructed a resilient framework for government, and its capacity for promoting both continuity and change is a key explanation for its longevity.

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[14]*Carter v. Carter Coal Co.* (1936).

[15]*National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) and *Wickard v. Filburn* (1942), respectively.

[16]*National League of Cities v. Usery* (1976).

[17]*Garcia v. San Antonio Metropolitan Transit Authority* (1985).

[18]*United States v. Cruikshank* (1876).

[19]*Hurtado v. California* (1884).

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

| Constitutional Provision | Case | Year |
|---|---|---|
| **First Amendment** | | |
| Freedom of speech and press | *Gitlow v. New York* | 1925 |
| Freedom of assembly | *De Jonge v. Oregon* | 1937 |
| Freedom of petition | *Hague v. CIO* | 1939 |
| Free exercise of religion | *Cantwell v. Connecticut* | 1940 |
| Establishment of religion | *Everson v. Board of Education* | 1947 |
| **Second Amendment** | | |
| Right to bear arms | *McDonald v. Chicago* | 2010 |
| **Fourth Amendment** | | |
| Unreasonable search and seizure | *Wolf v. Colorado* | 1949 |
| Exclusionary rule | *Mapp v. Ohio* | 1961 |
| **Fifth Amendment** | | |
| Payment of compensation for the taking of private property | *Chicago, Burlington & Quincy Railroad v. Chicago* | 1897 |
| Self-incrimination | *Malloy v. Hogan* | 1964 |
| Double jeopardy | *Benton v. Maryland* | 1969 |
| When jeopardy attaches | *Crist v. Bretz* | 1978 |
| **Sixth Amendment** | | |
| Public trial | *In re Oliver* | 1948 |
| Due notice | *Cole v. Arkansas* | 1948 |
| Right to counsel (felonies) | *Gideon v. Wainwright* | 1963 |
| Confrontation and cross-examination of adverse witnesses | *Pointer v. Texas* | 1965 |
| Speedy trial | *Klopfer v. North Carolina* | 1967 |
| Compulsory process to obtain witnesses | *Washington v. Texas* | 1967 |
| Jury trial | *Duncan v. Louisiana* | 1968 |
| Right to counsel (misdemeanor when jail is possible) | *Argersinger v. Hamlin* | 1972 |
| **Eighth Amendment** | | |
| Cruel and unusual punishment | *Louisiana ex rel. Francis v. Resweber* | 1947 |
| **Ninth Amendment** | | |
| Privacy[a] | *Griswold v. Connecticut* | 1965 |

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

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

## ANNOTATED READINGS

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

Analyses of the framing of the Constitution include Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Routledge, 2017); Michael J. Klarman, *The Framers' Coup:The Making of the United States Constitution* (New York: Oxford University Press, 2016); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origin of the Constitution* (Lawrence: University Press of Kansas, 1987); Jack N. Rakove, *Original Meanings:Politics and Ideas in the Making of the Constitution* (New York:Knopf, 1997); David Brian Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (New York: Oxford University Press, 2013); and John R. Vile, *The Writing and Ratification of the U.S. Constitution:Practical Virtue in Action* (Lanham, MD: Rowman & Littlefield, 2012).

Books on the creation and ratification of the Bill of Rights include Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998); Neil Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997); Richard Labunksi, *James Madison and the Struggle for the Bill of Rights* (New York: Oxford University Press, 2006); Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 1999); Gerard Magliocca, *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights* (New York: Oxford University Press, 2018); and Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Boston: Northeastern University Press, 1997).

CHAPTER TWO

# UNDERSTANDING THE U.S. SUPREME COURT

THIS BOOK IS DEVOTED to providing an overview of how the U.S. Supreme Court has interpreted the Constitution. It is organized around a discussion of the principal issues that the justices have confronted, with a primary focus on the text of the Court's opinions. Making sense of these opinions often requires a blend of different types of knowledge; depending upon the case, an understanding of some leading legal concepts, an awareness of history, a grasp of the mechanics of deliberative government, an appreciation of social conditions, and some familiarity with principles of economics can each offer insight into the justices' constitutional choices. One constant across all these opinions, however, is a set of procedures by which the Supreme Court makes decisions. Like any governmental institution, the Court is bound by formal rules and informal norms; they provide structure to the business of judicial policy making, and they channel and constrain how (and in some cases, whether) the Court exercises its power. Because the opinions that you will read are the product of the justices following an established set of rules and procedures, it is important to understand how those rules and procedures guide the Court to reaching its results. In what follows, we outline the basic features of Supreme Court decision making. We begin with a discussion of how the justices select their cases. We then consider how—and why—the justices make their most significant decisions, the resolution of disputes.

## PROCESSING SUPREME COURT CASES

A great deal happens before the justices actually decide cases. As Figure 2-1 shows, the Court must first sort through a large number of potential candidates in order to identify which cases it will resolve on the merits. During the 2018–2019 term, a total of 6,442 cases arrived at the Supreme Court's doorstep, but the justices decided only sixty-six with signed opinions.[1] The disparity between the number of parties that want the Court to resolve their disputes and the number of disputes the Court agrees to resolve raises some important questions: How do the justices decide which cases to hear? What happens to the cases they reject? Those the Court agrees to resolve?

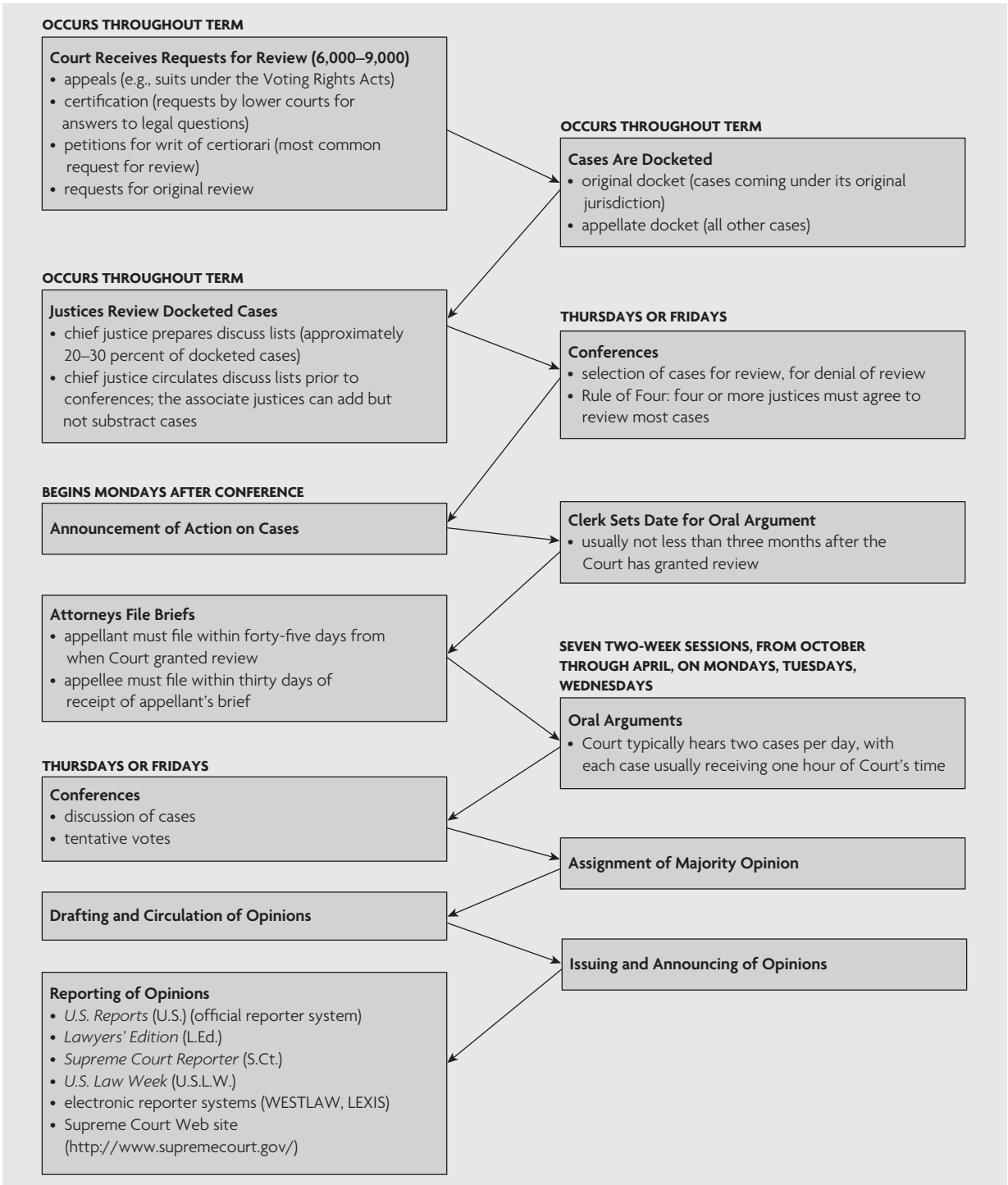
### Deciding to Decide: The Supreme Court's Caseload

As the figures for the 2018–2019 term indicate, the Court heard and decided less than 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth century, but the number of cases the Court formally decided each year did not increase. For example, in 1930 the Court agreed to decide 159 of the 726 disputes sent to it. In 1990 the number of cases granted review fell to 141, but the sum total of petitions for review had risen to 6,302—nearly nine times greater than in 1930.[2]

[1]Chief Justice John Roberts, "2019 Year-End Report on the Federal Judiciary," https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

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

## Figure 2-1 The Processing of Cases




*Source:* Compiled by authors.

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

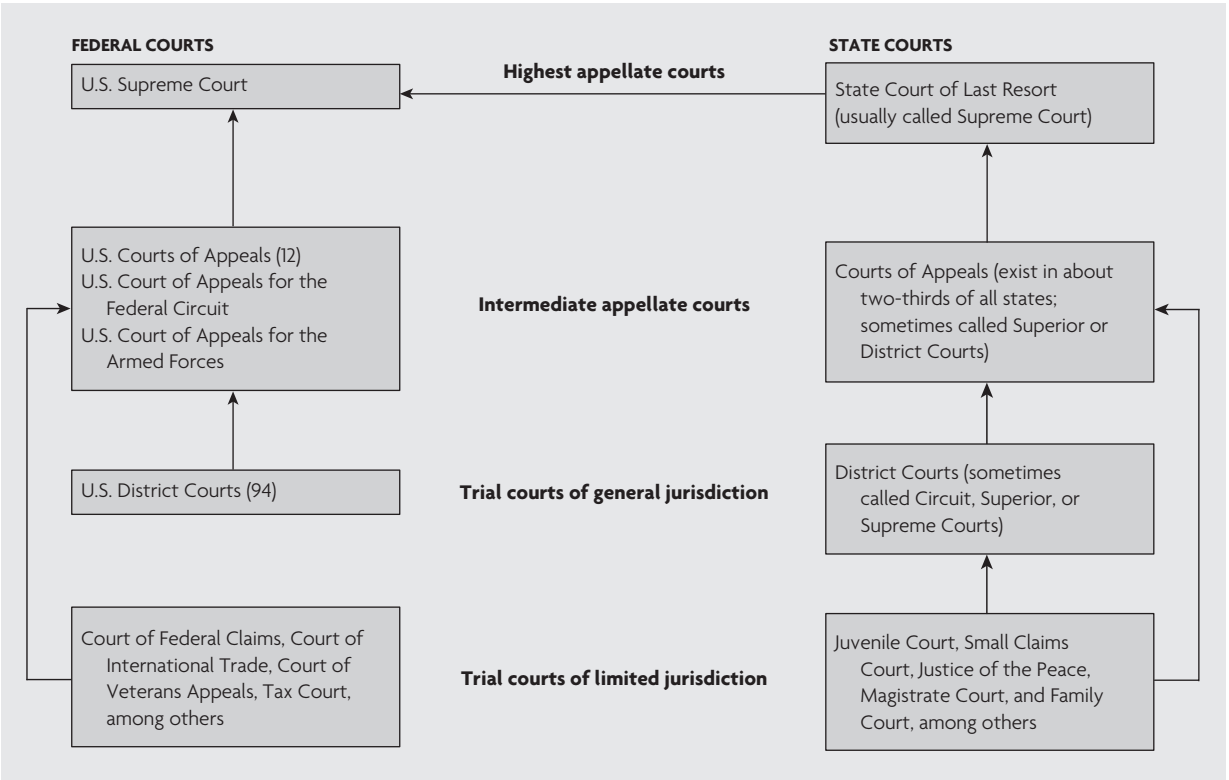
### How Cases Get to the Court: Jurisdiction and the Routes of Appeal

Cases come to the Court in one of four ways: either by a request for review under the Court's original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (*see Figure 2-2*). Chapter 3 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that no other court has heard. Article III of the Constitution authorizes such suits in cases involving ambassadors from foreign countries and those to which a state is a party. But, because Congress has authorized lower courts to consider such cases, as well, the Supreme Court does not have exclusive jurisdiction over them. Consequently, the Court normally reviews, under its original jurisdiction, only those cases in which one state is suing another (usually over a disputed boundary). In recent years, original jurisdiction cases have made up only a tiny fraction of the Court's overall docket—between one and five cases per term.

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

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

**Figure 2-2 The American Court System**




*Source:* Compiled by authors.

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

A second, but rarely used, route to the Court is certification. Under the Court's appellate jurisdiction and by an act of Congress, lower appellate courts can file writs of certification asking the justices to respond to questions aimed at clarifying federal law. Because only judges may use this route, very few cases come to the Court this way. The justices are free to accept a question certified to them or to dismiss it.

That leaves the third and most common appellate path, a request for a writ of certiorari (from the Latin meaning "to be informed"). In a petition for a writ of certiorari, the litigants seeking Supreme Court review ask the Court, literally, to become "informed" about their cases by requesting the lower court to send up the record. Most of the six thousand or more cases that arrive each year come as requests for certiorari. The Court, exercising its ability to choose which cases to review, grants "cert" to less than 1 percent of the petitions. A grant of cert means that the justices have decided to give the case full review; a denial means that the decision of the lower court remains in force.

### How the Court Decides: The Case Selection Process

Regardless of the specific design of a legal system, in many countries jurists must confront the task of "deciding to decide"—that is, choosing which cases among many hundreds or even thousands they will actually resolve. The U.S. Supreme Court is no exception; it, too, has the job of deciding to decide, or identifying those cases to which it will grant cert. This task presents something of a mixed blessing to the justices. Selecting cases to review—about 70 or so in recent terms—from the large number of requests is an arduous undertaking that requires the justices or their law clerks to look over hundreds of thousands of pages of briefs and other memoranda. The ability to exercise discretion, however, frees the Court from one of the major constraints on judicial bodies: the lack of agenda control. The justices may not be able to reach out and propose cases for review the way members of Congress can propose legislation, but the enormous number of petitions ensures that they can resolve at least some issues important to them.

In selecting cases, the justices follow a set of protocols that they have established over time. The original pool of about six to seven thousand petitions faces several checkpoints *(see Figure 2-1)* that significantly reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari arrives, the clerk's office examines it to make sure it is in proper form and conforms to the Court's precise rules. Briefs must be "prepared in a 6 1/8- by 9 1/4-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines." Exceptions are made for litigants who cannot afford to pay the Court's administrative fees, currently $300. The rules governing these petitions, known as *in forma pauperis* briefs, are somewhat looser, allowing indigents to submit briefs on 8½-by-11-inch paper. The Court's major concern, or so it seems, is that the document "be legible."[3]

The clerk's office gives all acceptable petitions an identification number, called a "docket number," and forwards copies to the chambers of the individual justices. At present (2020), all the justices but Samuel Alito and Neil Gorsuch use the certiorari pool system, in which clerks from the different chambers collaborate by dividing, reading, and then writing memos on the petitions.[4] Upon receiving the preliminary or pool memos, the individual justices may ask their own clerks for their thoughts about the petitions. The justices then use the pool memos, along with their clerks' reports, as a basis for making their own independent determinations about which cases they believe are worthy of a full hearing.

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[3]Rules 33 and 39 of the Rules of the Supreme Court of the United States. All Supreme Court rules are available at https://www.supremecourt.gov/filingandrules/2019RulesoftheCourt.pdf.

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

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

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

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

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

During this process, the chief justice plays a special role, serving as yet another checkpoint on petitions. Before the justices meet to make case selection decisions—which they do on Fridays when the Court is in session—the chief circulates a "discuss list" containing those cases he feels merit consideration; any justice may add cases to this list but may not remove any. About 20 percent to 30 percent of the cases that come to the Court make it to the list and are actually discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.[5]

This much we know. Because only the justices attend the Court's conferences, we cannot say precisely what transpires. We can offer only a rough picture based on scholarly writings, the comments of justices, and our examination of the private papers of a few retired justices. These sources tell us that the discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating his vote. The associate justices, who sit at a rectangular table in order of seniority, then comment on each petition, with the most senior justice speaking first and the newest member last. As Figure 2-3 shows, the justices record the certiorari votes—and, for cases they agree to decide on the merits, their subsequent votes on the outcome—in their personal records, called docket books. But, given the large number of petitions, the justices apparently discuss few cases in detail.

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

### Considerations Affecting Case Selection Decisions

The process described here is how the Court considers petitions, but why do the justices make the decisions that they do? Scholars have developed

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

several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.[6]

Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process. Many cases in the lower courts raise similar legal questions, and when judges reach different conclusions on those issues, there is conflict—disagreement among judges about the meaning of federal law. Under Rule 10, the Court considers "conflict," such as when a U.S. "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when decisions of state courts of law collide with one another or the federal courts.[7]

To what extent do the considerations in Rule 10 affect the Court? The answer is mixed. On one hand, the Court seems to follow its dictates. The presence of actual conflict between or among federal courts substantially increases the likelihood of review; if actual conflict is present in a case, it has a 33 percent chance of gaining Court review, as compared with the usual 1 percent certiorari rate.[8] On the other hand, although the Court may look more closely at cases that present actual conflict, it does not accept all cases with conflict because there are too many.[9]

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

Why is the solicitor general so successful? One reason is that the Court is well aware of the SG's special role. A presidential appointee whose decisions often reflect the administration's philosophy, the SG also represents the interests of the United States. As the nation's highest court, the Supreme Court cannot ignore these interests. In addition, the justices rely on the solicitor general to act as a filter—that is, they expect the SG to examine carefully the cases to which the government is a party and bring only the most important to their attention. Further, because solicitors general are involved in so much Supreme Court litigation, they acquire a great deal of knowledge about the Court that other litigants do not. They are "repeat players" who can use their knowledge of Supreme Court decision making to their advantage. For example, they know how to structure their petitions to attract the attention and interest of the justices. Finally, the professionalism of the SG and the lawyers working in that office is also beneficial; the justices know that these lawyers are invested in the Court's mission. They are, as some scholars have put it, "consummate legal professionals whose information justices can trust."[10]

The second political factor is the amicus curiae (friend of the court) brief. Interest groups and other third parties usually file these briefs after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage *(see Box 2-1)*. Research by political scientists shows that amicus briefs significantly enhance a case's chances of being heard, and multiple briefs have a greater effect.[11] An interesting finding of these studies is that, even when groups file *in opposition* to granting certiorari, they increase—rather than decrease—the probability that the Court will hear the case.

What can we make of these findings? Most important is this: the justices may not be strongly influenced by the arguments contained in these briefs

[6]Some scholars have noted a third set: procedural considerations. These emanate from Article III, which—under the Court's interpretation—places constraints on the ability of federal tribunals to hear and decide cases. Chapter 3 considers these constraints, which include justiciability (the case must be appropriate for judicial resolution by presenting a real "case" and "controversy") and standing (the appropriate person must bring the case). Unless these procedural criteria are met, the Court—at least theoretically—will deny review.

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

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

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

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

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

(if they were, why would amicus briefs opposing certiorari have the opposite effect?), but they seem to use them as cues. In other words, because amicus curiae briefs filed at the certiorari stage are somewhat uncommon—less than 10 percent of all petitions are accompanied by amicus briefs—they do draw the justices' attention. If major organizations are sufficiently interested in an appeal to pay the cost of filing briefs in support of (or against) Court review, then the petition for certiorari is probably worth the justices' serious consideration.

In addition, we have strong reasons to suspect that a third political factor—the ideology of the justices—affects actions on certiorari petitions. Specifically, the members of the Court favor reviewing lower court decisions that run contrary to their preferences. Researchers tell us, for example, that the justices during the liberal period under Chief Justice Earl Warren (1953–1969) were more likely to grant review to cases in which the lower court reached a conservative decision so that they could reverse that legal policy, while those of the moderately conservative Court during the years of Chief Justice Warren Burger (1969–1986) took cases in order to undo the liberal decisions of lower courts. It would be difficult to believe that the current justices would be any less likely than their predecessors to vote based on their ideology. These ideological considerations are brought to bear in a collegial context, and the members of the Court consider not only their preferences but the preferences of their brethren, as well. Scholarly studies suggest that justices engage in strategic voting behavior at the cert stage. In other words, justices are forward thinking; they consider the implications of their cert vote for the later merits stage, asking themselves, If I vote to grant a particular petition, what are the odds of my position winning down the road? As one justice explained his calculations, "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent."[12]

## The Role of Attorneys

Once the Supreme Court agrees to decide a case, the clerk of the Court informs the parties. The parties present their side of the dispute to the justices in written and oral arguments.

### Written Arguments

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

As is the case for cert petitions, the Court maintains specific rules covering the presentation and format of merits briefs. For example, the briefs of both parties must be submitted in forty copies and may not exceed 15,000 words. Rule 24 outlines the material that briefs must contain, such as a description of the questions presented for review, a list of the parties, and a statement describing the Court's authority to hear the case. Also worth noting: the Court's rules now mandate electronic submission of all briefs (including amicus briefs) in addition to the normal hard copy submissions.

The clerk sends the briefs to the justices, who normally study them before oral argument. Written briefs are important because the justices may use them to formulate the questions they ask the lawyers representing the parties. The briefs also serve as a permanent record of the positions of the parties, available to the justices for consultation after oral argument when they decide the case outcome. A well-crafted brief can place into the hands of the justices arguments, legal references, and possible remedies that later may be incorporated into the opinion. Indeed, some research suggests that such briefs do exactly that.[13]

In addition to the briefs submitted by the parties to the suit, Court rules allow interested persons, organizations, and government units to participate as amici curiae on the merits—just as they are permitted to file such briefs at the review stage *(see Box 2-1)*. Those wishing to submit friend of the court briefs must obtain the written permission of the parties or the Court. Only the federal government and state governments are exempt from this requirement.

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

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

# BOX 2-1

## The Amicus Curiae Brief

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

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

No. 12–307

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner*

—V.—

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

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

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

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

### Oral Arguments

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

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

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

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

**WHITE:** What is your constitutional position there?

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

**WHITE:** Why? Why is that?

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

**WHITE:** Emotional response by whom?

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

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

**WEDDINGTON**: I would say constitutional—

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

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

In the Court's early years, there was little doubt about the importance of such exchanges, and of oral arguments in general, because, as noted above, the justices did not always have the benefit of written briefs. Today, however, some have questioned the effectiveness of oral arguments and their role in decision making. Chief Justice Earl Warren contended that they made little difference to the outcome. Once the justices have read the briefs and studied related cases, most have relatively firm views on how the case should be decided, and so these arguments change few minds. Justice William J. Brennan Jr., however, maintained that they are extremely important because they help justices to clarify core arguments. Recent scholarly work seems to come down on Brennan's side. According to a study by Timothy Johnson and his colleagues, the justices are more likely to vote for the side that performs more effectively at oral argument. Along somewhat different lines, a study by Epstein, Landes, and Posner shows that orals may be a good predictor of the Court's final votes: the side that receives more questions tends to lose.[14] One possible explanation is that the

[14]Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs, II, "The Influence of Oral Arguments on the U.S. Supreme Court," *American Political Science Review* 100 (2006): 99–113; Lee Epstein, William Landes, and Richard A. Posner, "Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument," *Journal of Legal Studies* 39 (2010): 433–467.

justices use oral argument as a way to express their opinions and attempt to influence their colleagues because formal deliberation (described below) is often limited and highly structured.

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

## The Supreme Court Decides: Some Preliminaries

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

### The Conference

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

The system works so well that, with only a few exceptions, the justices have not experienced information leaks—at least not prior to the public announcement of a decision. After that, clerks and even justices have sometimes thrown their own sunshine on the Court's deliberations. *National Federation of Independent Business v. Sebelius* (2012), involving the constitutionality of the health care law passed in 2010, provides a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice John G. Roberts initially voted to join the Court's four conservative justices to strike down the law but later changed his vote to join the four liberals to uphold it.[15]

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

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

### Opinion Assignment and Circulation

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

[15]Jan Crawford, "Roberts Switched Views to Uphold Health Care Law," CBS News, *Face the Nation*, July 2, 2012, https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/.

he or she assigns the writing of the opinion. The chief may decide to write the opinion or assign it to one of the other justices who voted with the majority. When the chief justice votes with the minority, the assignment task falls to the most senior member of the Court who voted with the majority.

In making these assignments, the chief justice (or the senior associate in the majority) takes a number of factors into account.[16] First and perhaps foremost, the chief tries to equalize the distribution of the Court's workload. This makes sense: The Court will not run efficiently, given the burdensome nature of opinion writing, if some justices are given many more assignments than others. The chief may also consider the justices' particular areas of expertise, recognizing that some justices are more knowledgeable about particular areas of the law than others. By encouraging specialization, the chief may also be trying to increase the quality of opinions and reduce the time required to write them.

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of *Brown v. Board of Education* (1954), and Roberts did the same in the health care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, "[T]here are occasions when an opinion should carry extra weight which pronouncement by the Chief Justice gives."[17] Finally, for cases decided by a one-vote margin (usually 5–4), chiefs have been known to assign the opinion to a moderate member of the majority rather than to an extreme member. There is a strategic reason for this decision: if the writer in a close case drafts an opinion with which other members of the majority are uncomfortable, the opinion may drive justices to the other side, causing the majority to become a minority. A chief justice may try to minimize this risk by asking justices squarely in the middle of the majority coalition to write.

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

Once the justices receive the first draft of the opinion, they have many options. First, they can join the opinion, meaning that they agree with it and want no changes. Second, they can ask the opinion writer to make changes, that is, *bargain* with the writer over the content of and even the disposition—to reverse or affirm the lower court ruling—offered in the draft. The following memo sent from Brennan to White is exemplary: "I've mentioned to you that I favor your approach to this case and want if possible to join your opinion. If you find the following suggestions . . . acceptable, I can join you."[18]

Third, they can tell the opinion writer that they plan to circulate a dissenting or concurring opinion. A concurring opinion generally agrees with the disposition but not with the rationale; a dissenting opinion means that the writer disagrees with the disposition the majority opinion reaches and with the rationale it invokes. Finally, justices can tell the opinion writer that they await further writings, meaning that they want to study various dissents or concurrences before they decide what to do.

As justices circulate their opinions and revise them—the average majority opinion undergoes three to four revisions in response to colleagues' comments—many different opinions on the same case, at various stages of development, may be floating around the Court over the course of several months. Because this process is replicated for each case the Court decides with a formal written opinion, it is possible that scores of different opinions may be working their way from office to office at any point in time.

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

## SUPREME COURT DECISION MAKING: LEGALISM

So far, we have examined the processes the justices follow to reach decisions on the disputes brought before them.

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

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

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

We have answered basic questions about the institutional procedures the Court uses to carry out its responsibilities. The questions we have not addressed concern why the justices reach particular decisions and what forces play a role in determining their choices.

As you might imagine, the responses to these questions are many, but they can be categorized into two groups. One focuses on the role of law, broadly defined, and legal methods in determining how justices interpret the Constitution, emphasizing, among other things, the importance of its words, American history and tradition, and precedent (previously decided constitutional rulings). Judge Richard Posner and his coauthors have referred to this as a legalistic theory of judicial decision making.[19] The other—what Posner et al. call a realistic theory of judging—emphasizes nonlegalistic factors, including the role of politics. "Politics" can take many forms, such as the particular ideological views of the justices, the mood of the public, and the political preferences of the executive and legislative branches.

Commentators sometimes define these two sides as "should" versus "do." That is, they say the justices *should* interpret the Constitution in line with, say, the language of the text of the document or in accord with precedent. They reason that justices are supposed to shed all their personal biases, preferences, and partisan attachments when they take their seats on the bench. But, it is argued, justices *do not* shed these biases, preferences, and attachments; rather, their decisions often reflect the justices' own politics or the political views of those around them.

Although it may be tempting to assume that the justices use the law to camouflage their politics, there are several reasons to believe that they actually do seek to follow a legal approach. One reason is that the justices themselves often say they look to the founding period, the words of the Constitution, previously decided cases, and other legalistic approaches to resolve disputes because they consider them appropriate criteria for reaching decisions. Another is that some scholars express agreement with the justices, arguing that Court members cannot follow their own personal preferences, the whims of the public, or other non–legally relevant factors "if they are to have the continued respect of their colleagues, the wider legal community, citizens, and leaders." Rather, they "must be principled in their decision-making process."[20]

Whether they are principled in their decision making is for you to determine as you read the cases to come. For you to make this determination, it is of course necessary to develop some familiarity with both legalism and realism. In the next section we turn to realism; here we begin with legalism, which, in constitutional law, centers on the methods of constitutional interpretation that the justices frequently say they employ. We consider some of the most important methods and describe the rationale for their use. These methods include original intent, original meaning, textualism, structural analysis, stare decisis, pragmatism, and polling other jurisdictions.[21] Using the Second Amendment as an example, Table 2-1 provides a brief summary of these methods, after which we supply more details on each one.

The Second Amendment of the U.S. Constitution reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller* (2008) *(excerpted in chapter 15)*, the U.S. Supreme Court ruled that the amendment protects the right of individuals who are not affiliated with any state-regulated militia to keep handguns and other firearms in their homes for their own private use.

Legal briefs filed with the Court, as well as media and academic commentary on the case, employed diverse methods of constitutional interpretation. Notice that no method seems to dictate a particular outcome; rather, lawyers for either side of the lawsuit could plausibly employ a variety of approaches to support their side.

## Originalism

Originalism comes in several different forms, and we discuss two below—original intent and original understanding (or meaning)—but the basic idea is that

[19]Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013).

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

[21]For overviews (and critiques) of these and other approaches, see Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," *UCLA Law*, http://www2.law.ucla.edu/volokh/2amteach/interp.htm; Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); and Lackland H. Bloom, *Methods of Constitutional Interpretation: How the Supreme Court Reads the Constitution* (New York: Oxford University Press, 2009).