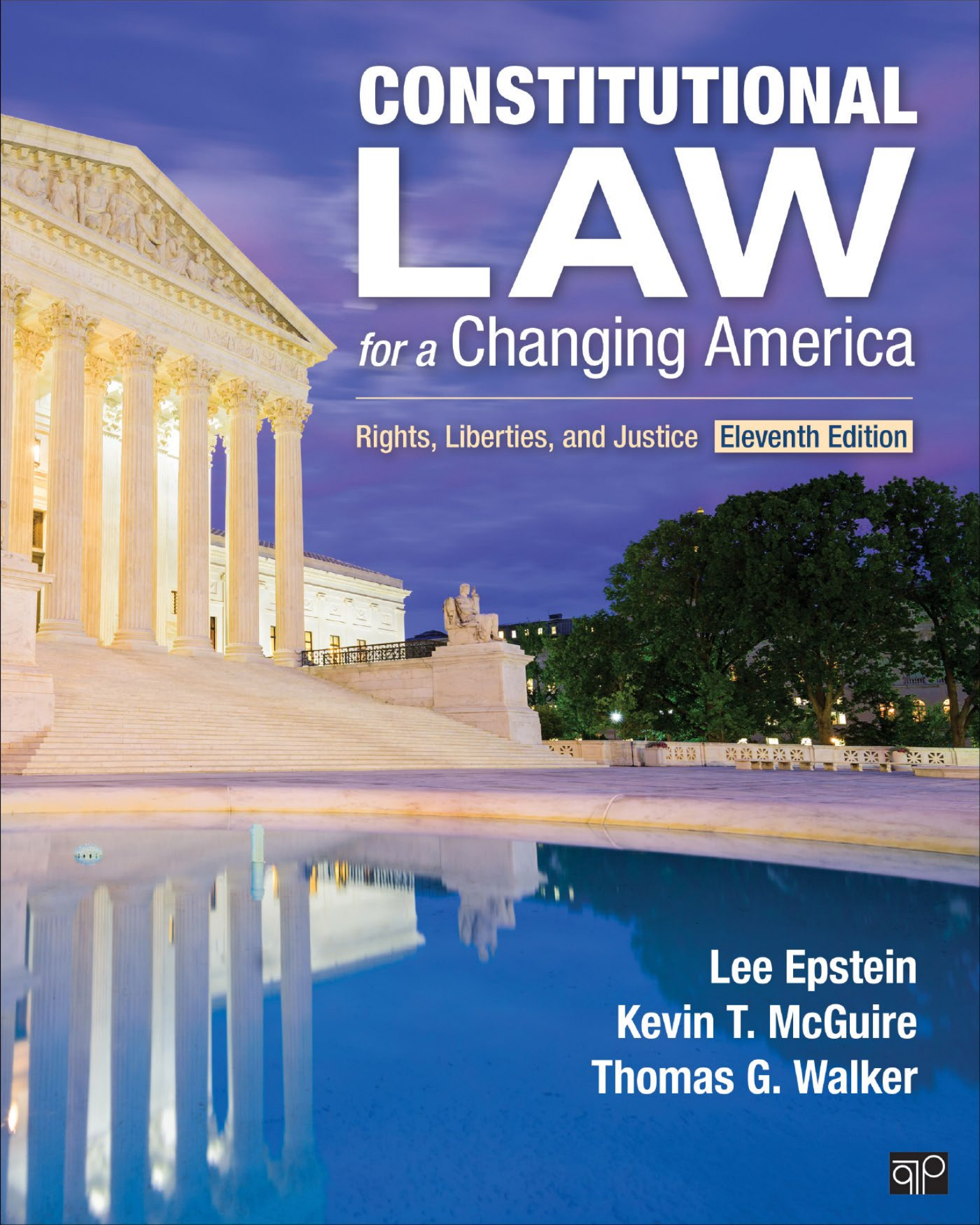
CONSTITUTIONAL
LAW
for a Changing America
Rights, Liberties, and Justice
Eleventh Edition
Lee Epstein
Kevin T. McGuire
Thomas G. Walker

Constitutional Law for a Changing America

Eleventh Edition

In honor of our parents
Ann and Kenneth Spole
Toddy McGuire
Josephine and George Walker

Constitutional Law for a Changing America

Rights, Liberties, and Justice

Eleventh Edition

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SAGE | CQ PRESS

FOR INFORMATION:

CQ Press
An Imprint of SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
18 Cross Street #10-10/11/12
China Square Central
Singapore 048423

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Names: Epstein, Lee, 1958- author. | McGuire, Kevin T., author. | Walker, Thomas G., 1945- author.

Title: Constitutional law for a changing America : rights, liberties, and justice / Lee Epstein, Washington University in St. Louis; Kevin T. McGuire, The University of North Carolina at Chapel Hill; Thomas G. Walker, Emory University.

Description: Eleventh edition. | Thousand Oaks, California: CQ Press, an Imprint of SAGE Publications, Inc., [2021] | Includes bibliographical references and index.

Identifiers: LCCN 2021012701 | ISBN 9781544391250 (paperback) | ISBN 9781544391267 (epub) | ISBN 9781544391274 (epub) | ISBN 9781544391281 (pdf)

Subjects: LCSH: Civil rights—United States. | Constitutional law—United States. | LCGFT: Casebooks (Law)

Classification: LCC KF4748 .E67 2021 | DDC 342.73—dc23
LC record available at https://lccn.loc.gov/2021012701

This book is printed on acid-free paper.

Acquisitions Editor: Scott Greenan
Content Development Editor: Jennifer Jovin-Bernstein
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Typesetter: C&M Digitals (P) Ltd.
Cover Designer: Scott Van Atta
Marketing Manager: Jennifer Jones

21 22 23 24 25 10 9 8 7 6 5 4 3 2 1

CONTENTS

CHRONOLOGICAL TABLE OF CASES

TABLES, FIGURES, AND BOXES

Chapter 14

Chapter 15

PREFACE

THREE DECADES have passed since *Constitutional Law for a Changing America: Rights, Liberties, and Justice* made its debut in a discipline already supplied with many fine casebooks by law professors, historians, and social scientists. We believed then, as we do now, that a fresh approach was needed because, as professors who regularly teach courses on public law, and as scholars concerned with judicial processes, we saw a growing disparity between what we taught and what our research taught us.

We had adopted books for our classes that focused primarily on Supreme Court decisions and how the Court applied the resulting legal precedents to subsequent disputes, but as scholars we understood that to know the law is to know only part of the story. A host of political factors—internal and external—influence the Court's decisions and shape the development of constitutional law. These include the ways lawyers and interest groups frame legal disputes, the ideological and behavioral propensities of the justices, the politics of judicial selection, public opinion, and the positions elected officials take, to name just a few.

Because we thought no existing book adequately combined legal factors with the influences of the political process, we wrote one. In most respects, our book follows tradition: readers will see that we include excerpts from the classic cases, as well as the more recent leading precedents, that best illustrate the development of constitutional law. But our focus is different, as is the appearance of this volume. We emphasize the arguments raised by lawyers and interest groups and the politics surrounding litigation. We include tables and figures on Court trends and other materials that bring out the rich legal, social, historical, economic, and political contexts in which the Court reaches its decisions. As a result, students and instructors will find this work both similar to and different from casebooks they may have read before.

Integrating traditional teaching and research concerns was only one of our goals. Another was to animate the subject of constitutional law. As instructors, we find our subject inherently interesting—to us, con law is exciting stuff. Many of the books available, however, could not be less inviting in design, presentation, or prose. That kind of book seems to dampen enthusiasm. We have written a book that we hope mirrors the excitement we feel for our subject. We describe the events that led to the suits and include photographs of litigants and relevant exhibits from the cases. Moreover, because students often ask us about the fates of particular litigants—for example, what happened to the "Scottsboro boys"?—and hearing that colleagues elsewhere are asked similar questions, we decided to attach "Aftermath" boxes to a selected set of cases. In addition to providing final chapters to these stories, the focus on the human element leads to interesting discussions about the impact of judicial policy on the lives of ordinary Americans. We hope these materials demonstrate to students that Supreme Court cases are more than just legal names and citations, that they involve real people engaged in real disputes.

IMPORTANT REVISIONS

In preparing this eleventh edition, we have strengthened the distinctive features of the earlier versions by making changes at all three levels of the book—organization, chapters, and cases. In past editions, we covered freedom of speech in a single chapter. Because we wanted to highlight some of the foundational issues and contrast them with contemporary disputes over expression, we have separated our coverage of speech into two chapters—much like we separated the subject of discrimination in the last edition. Chapter 5 offers an overview of the enduring topics of free expression, and Chapter 6 reorganizes cases around modern legal questions about speech. Among those recent conflicts is *Janus v. American Federation of State, County, and Municipal Employees*, which asks whether the government is compelling speech by obligating an employee to pay dues to a union whose views that employee opposes. Our coverage of religion in Chapter 4 has likewise expanded, revisiting some previous cases (such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*) and incorporating some new ones (such as *American Legion v. American Humanist Association*).

Chapter 11 includes a closer examination of one of the problems at the intersection of the Fourth Amendment and modern technology (*Carpenter v. United States*). And the coverage of voting and representation in Chapter 15 now includes *Rucho v. Common Cause*, the Court's major decision regarding political gerrymandering.

As with each edition, all chapters have been thoroughly revised and updated to include important opinions handed down through the most recent term, in this case, the 2019 term. Since Chief Justice John G. Roberts Jr. took office in 2005, the Court has taken up many pressing issues of the day, including gun control (*District of Columbia v. Heller*), affirmative action (*Fisher v. University of Texas*), search and seizure (*Safford Unified School District #1 v. Redding*), campaign finance regulation (*Citizens United v. Federal Election Commission*), the establishment of religion (*Town of Greece v. Galloway*), and, of course, same-sex marriage (*Obergefell v. Hodges*). The chapters that follow contain excerpts of these and other important decisions of the Roberts Court. In some instances—such as our discussion of the Sixth Amendment and fair trials—we underscore the contributions of Justice Brett Kavanaugh, one of the Court's newest members.

As for the cases: we reviewed each and every excerpted opinion to ensure, among other matters, that they appropriately highlight the key issues. We also carefully read through our summaries of the lawyers' arguments to confirm that they meet our objective of highlighting the array of important claims before the Court, and not simply those the justices chose to highlight.

In addition to the lawyers' arguments, we have retained and enhanced other features pertaining to case presentation that have proved to be useful. The "Aftermath" boxes remain an important device for conveying the real-world consequences of the Court's decisions. We continue to excerpt concurring and dissenting opinions; in fact, virtually all cases analyzed in the text now include one or the other or both. Although these opinions lack the force of precedent, they are useful in helping students to see alternative points of view.

We also continue to provide universal resource locators (URLs) to the full texts of the opinions and, where available, to a website containing audio recordings of oral arguments in many landmark cases. We have taken this step for much the same reason that we now highlight attorneys' arguments: reading decisions in their entirety and listening to oral arguments can help students to develop the important skill of differentiating between compelling and less compelling arguments. Finally, we continue to retain the historical flavor of the decisions, reprinting verbatim the original language used in *U.S. Reports* to introduce the justices' writings. Students will see that during most of its history, the Court used the courtesy title "Mr." to refer to justices, as in "Mr. Justice Holmes delivered the opinion of the Court" or "Mr. Justice Harlan, dissenting." In 1980 the Court dropped the "Mr." This point may seem minor, but we think it is evidence that the justices, like other Americans, updated their usage to reflect fundamental changes in American society—in this case, the emergence of women as a force in the legal profession and shortly thereafter on the Court itself.

Past editions have included a comparative component that explores how other high courts around the world have addressed some of the same issues that have confronted the U.S. Supreme Court. This feature of the text has invited students to compare and contrast U.S. Supreme Court decisions over a wide range of issues, such as the death penalty and libel, with policies developed in other countries. The use of foreign law sources in their opinions has generated disagreement among some of the justices, and we have found that this material inspires lively debates in our classes. This information is now in the Resource Center. We hope it will continue to serve as a useful resource for generating discussion in your classes, just as it has in our own.

TEACHING RESOURCES

This text includes an array of instructor teaching materials designed to save you time and to help you keep students engaged. To learn more, visit sagepub.com or contact your SAGE representative at sagepub.com/findmyrep.

ACKNOWLEDGMENTS

Although the first edition of this volume was published thirty years ago, it had been in the works for many more. During those developmental years, numerous people provided guidance, but none as much as Joanne Daniels, a former editor at CQ Press. It was Joanne who conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. And it was Joanne

who brought that concept to our attention and helped us develop it into a book. We are forever in her debt.

Because this new edition charts the same course as the first ten, we remain grateful to all of those who had a hand in the previous editions. They include David Tarr and Jeanne Ferris at CQ Press, Jack Knight at Duke University, Joseph A. Kobylka of Southern Methodist University, Jeffrey A. Segal of the State University of New York at Stony Brook, and our many colleagues who reviewed and commented on our work: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, James Cauthen, Phillip J. Cooper, Sue Davis, John Fliter, John Forren, John B. Gates, Edward V. Heck, Joshua Kaplan, Peter Kierst, David Korman, Cynthia Lebow, John A. Maltese, Wendy Martinek, Wayne McIntosh, Susan Mezey, Richard J. Pacelle Jr., C. K. Rowland, Chris Shortell, Joseph Smith, Donald R. Songer, Harry P. Stumpf, and Artemus Ward. We are also indebted to the many scholars who took the time to send us suggestions, including (again) Greg Caldeira, as well as Akiba J. Covitz, Jolly Emrey, Alec C. Ewald, Leslie Goldstein, and Neil Snortland. Many thanks also go to Jeff Segal for his frank appraisal of the earlier volumes; to Jeff Segal (again), Rebecca Brown, David Cruz, Micheal Giles, Linda Greenhouse, Dennis Hutchinson, Adam Liptak, and Judges Frank H. Easterbrook and Richard A. Posner for their willingness to share their expertise in all matters of constitutional law; to Judith Baer and Leslie Goldstein for their help with the revision of the discrimination chapter in previous editions and their answers to innumerable e-mail messages; to Jack Knight for his comments on the drafts of several chapters; and to Harold J. Spaeth for his wonderful Supreme Court Database.

Most of all, we acknowledge the contributions of our editors at CQ Press, Brenda Carter, Charisse Kiino, and, most recently, Scott Greenan. Brenda saw *Constitutional Law for a Changing America* through the first five editions; Charisse came on board on the fifth and worked with us throughout the eighth. Both were just terrific, somehow knowing exactly when to steer us and when to steer clear. We are thrilled that Scott is now running the show; his energy and dedication to the project are exactly what any book moving into its eleventh edition needs! We are equally indebted to Carolyn Goldinger, our copy editor on the first four editions and on the sixth edition. Her imprint, without exaggeration, remains everywhere. Over the years, she made our prose more accessible, questioned our interpretation of certain events and opinions—and was all too often right—and made our tables and figures understandable. There is not a better copy editor in this business. Period.

For this edition, we express our sincere thanks to our copy editor, Amy Marks. Her expertise and attention to detail not only enhanced our prose but also worked to improve the accuracy and relevance of what we wrote. We also express many thanks to Veronica Stapleton Hooper, our production editor, and Lauren Younker, an editorial assistant who worked on photo acquisition and other forms of author support. Both are really great at their jobs!

Finally, we acknowledge the support of our home institutions and of our colleagues and friends. 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 parents for their unequivocal support.

Shortly before the fifth edition went to press, we learned that the *Constitutional Law for a Changing America* volumes had won the award for teaching and mentoring presented by the Law and Courts section of the American Political Science Association. Each and every one of the editors and scholars we thank above deserves credit for whatever success our books have enjoyed. Any errors of omission or commission, however, 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, kmcguire@unc.edu, or polstw@emory.edu.

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PART ONE

THE SUPREME COURT AND THE CONSTITUTION

An Introduction to Rights and Liberties

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

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AN INTRODUCTION TO RIGHTS AND LIBERTIES

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

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

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

THE ROAD TO THE BILL OF RIGHTS

Before the adoption of the Declaration of Independence, the Continental Congress selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee proposed a national charter, the Articles of Confederation, which Congress approved and submitted to the states for ratification in November 1777. Ratification was achieved in March 1781.

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

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

A Call for Explicit Limits

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

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

Debates between the Federalists and their opponents were often highly philosophical, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were marked by the stuff of ordinary politics—deal making. Massachusetts provides a case in point. After three weeks of debate among delegates, Federalist leaders there realized that they would never achieve victory without the support of Governor John Hancock. They went to his house and proposed that he endorse ratification on the condition that a series of amendments be tacked on for consideration by Congress. The governor agreed, but in return he wanted to become president of the United States if Virginia failed to ratify or George Washington refused to serve. Or he would accept the vice presidency. With the deal cut, Hancock went to the state convention to propose a compromise—the ratification of the Constitution with amendments. The delegates agreed, and Massachusetts became the sixth state to ratify.[3]

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

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

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

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

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

Table I-1 The Ratification of the Constitution			
State	**Date of Action**	**Decision**	**Vote**
Delaware	December 7, 1787	Ratified	30–0
Pennsylvania	December 12, 1787	Ratified	46–23
New Jersey	December 18, 1787	Ratified	38–0
Georgia	January 2, 1788	Ratified	26–0
Connecticut	January 8, 1788	Ratified	128–40
Massachusetts	February 6, 1788	Ratified with amendments	187–168
Maryland	April 28, 1788	Ratified	63–11
South Carolina	May 23, 1788	Ratified with amendments	149–73
New Hampshire	June 21, 1788	Ratified with amendments	57–46
Virginia	June 26, 1788	Ratified with amendments	89–79
New York	July 26, 1788	Ratified with amendments	30–27
North Carolina	August 4, 1788	Rejected	75–193
	November 21, 1789	Ratified with amendments	194–77
Rhode Island	May 29, 1790	Ratified with amendments	34–32

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

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

Records of the 1787 constitutional debates indicate that, in fact, the delegates to the Constitutional Convention considered specific individual guarantees on at least four separate occasions.[4] On August 20, Charles Pinckney submitted a proposal that included several guarantees, such as freedom of the press and the eradication of religious tests, but the various committees never considered his plan. On September 12, 14, and 16, just before the close of the convention, some delegates tried, again without success, to persuade the convention to enumerate specific guarantees. At one point, the Virginian George Mason—author of his own state's Declaration of Rights—said that a bill of rights "would give great quiet to the people; and with the aid of the state delegations, a bill might be prepared in a few hours." This motion was defeated unanimously by those remaining in attendance. On the convention's last day, Edmund Randolph made a desperate plea that the delegates allow the states to submit amendments and then convene a second convention. Although he favored a bill of rights, Pinckney responded, "Conventions are serious things, and ought not to be repeated."

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

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

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

Drafting and Ratifying

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

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

The legislators rejected this proposal, preferring a catalogue of rights rather than a general statement. Madison returned to his task, eventually fashioning a list of seventeen amendments. When he took it back to the House, however, the list was greeted with suspicion and opposition. Some members of Congress, even those who had argued for a bill of rights, now did not want to be bothered with the proposals, insisting that they had more important business to settle. One suggested that other nations would not see the United States "as a serious trading partner as it was still tinkering with its constitution instead of organizing its government."[8] Finally, in July 1789, after Madison had prodded and even begged, the House considered his proposals. A special committee scrutinized them and reported a few days later; and the House adopted, with some modification, Madison's seventeen amendments. The Senate approved some and rejected others, so that by the time the Bill of Rights was submitted to the states on October 2, only twelve remained.[9]

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

THE AMENDMENT PROCESS

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

[5] *The Federalist Papers*, No. 84.

[6] Ibid.

[7] 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.

[8] Quoted in Farber and Sherry, *American Constitution*, 330.

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

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

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

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

Responding to various political pressures, members of Congress have since proposed all manner of amendments—more than 11,000, in fact—but only thirty-three have been sent to the states for ratification.[13] Twenty-seven were ratified; six were not, including the child labor amendment (proposed in 1924), which would have prohibited the "labor of persons under eighteen years of age," and the equal rights amendment (ERA; proposed in 1972), which stated that "equality of rights under law shall not be denied or abridged by the United States or any State on account of sex." In both instances, an insufficient number of states agreed to their ratification.[14] Suggestions for new constitutional amendments, not surprisingly, continue to be advanced. In 2019, for example, a U.S. senator proposed to abolish the Electoral College and allow for the direct popular election of the president. That same year, members of the House introduced amendments to prohibit the desecration of the American flag, to fix the size of the Supreme Court at nine justices, and to declare that "[t]he President shall have no power to grant to himself a reprieve or pardon for an offense against the United States."

Table I-2 Methods of Amending the Constitution

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

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

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

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

[13]U.S. Senate, "Measures Proposed to Amend the Constitution," https://www.cop.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm.

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

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

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

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

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

CONSTITUTIONAL CHANGE AND THE SUPREME COURT

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

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

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

Table I-3 Five Amendments That Overturned Supreme Court Decisions

Amendment	Date Ratified	Supreme Court Decision Overturned
Eleventh	February 7, 1795	*Chisholm v. Georgia* (1793). In its first major decision, the Court authorized citizens of one state to sue another state in the Supreme Court. The decision angered advocates of states' rights.
Thirteenth	December 6, 1865	*Scott v. Sandford* (1857). The Court ruled that slaves are property with which Congress may not interfere and that neither slaves nor their descendants are citizens under the Constitution. Ratified in the wake of the Civil War, the Thirteenth and Fourteenth Amendments rectified the Court's decision.
Fourteenth	July 9, 1868	*Scott v. Sandford* (1857)
Sixteenth	February 3, 1913	*Pollock v. Farmers' Loan and 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: Adapted from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments,* 7th ed. (Thousand Oaks, CA: CQ Press, 2021), tables 1–1 and 7–1.

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

Consider, for example, the Supreme Court's interpretation of the First Amendment's protection of freedom of speech. In *Austin v. Michigan v. Chamber of Commerce* (1990), the justices ruled that prohibiting corporations from using their general treasury funds to engage in political expression did not violate the freedom of expression. Twenty years later in *Citizens United v. Federal Election Commission* (2010), the Court overruled *Austin*, holding that the First Amendment protected political speech by corporations. Or take the Fourteenth Amendment, which guarantees that states cannot "deprive any person of life, liberty, or property, without due process of law." Among the issues relating to that clause is the meaning of the word *liberty.* Exactly what freedom does it protect against arbitrary governmental interference? In *Bowers v. Hardwick* (1986), the justices were asked whether that liberty included the freedom of homosexuals to engage in sexual activity, and they ruled that it did not; states were free to outlaw such behavior. That decision was abandoned in *Lawrence v. Texas* (2003), when the Court ruled that the liberty in the Fourteenth Amendment protected the right of both heterosexuals and homosexuals to engage in consensual intimate conduct. Finally, examine the Court's evolving interpretation of the Eighth Amendment's language prohibiting "cruel

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

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

One of the first we will address is the subject of Chapter 3, the Court's policy of requiring the states to abide by the U.S. Bill of Rights. Those explicit limitations were meant to safeguard personal freedoms against tyranny by the *federal* government—the First Amendment, for example, states that "Congress shall make no law . . . abridging the freedom of speech"—but not long after the Bill of Rights was adopted, there were legal efforts to compel *state* governments to adhere to it, as well. For more than one hundred years, the Supreme Court resisted those efforts before it began to apply those guarantees to the states as well. Consequently, there has been a considerable alteration in the nature of national-state relations and an expansion of the constitutional protection of liberties. The importance of these changes should not be underestimated: redrawing the scope of liberties protected by the Constitution—a product of doctrinal shifts on the Supreme Court—has resulted in most of the cases you will read in this book.

CHAPTER ONE

UNDERSTANDING THE U.S. SUPREME COURT

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

PROCESSING SUPREME COURT CASES

A great deal happens before the justices actually decide cases. As Figure 1-1 shows, the Court must first sort through a large number of potential candidates in order to identify which cases it will resolve on the merits. During the 2019 term,[16] a total of 5,411 cases arrived at the Supreme Court's doorstep, but the justices decided only 53 with signed opinions.[17] The disparity between the number of parties that want the Court to resolve their disputes and the number of disputes the Court agrees to resolve raises some important questions: How do the justices decide which cases to hear? What happens to the cases they reject? Those the Court agrees to resolve?

Deciding to Decide: The Supreme Court's Caseload

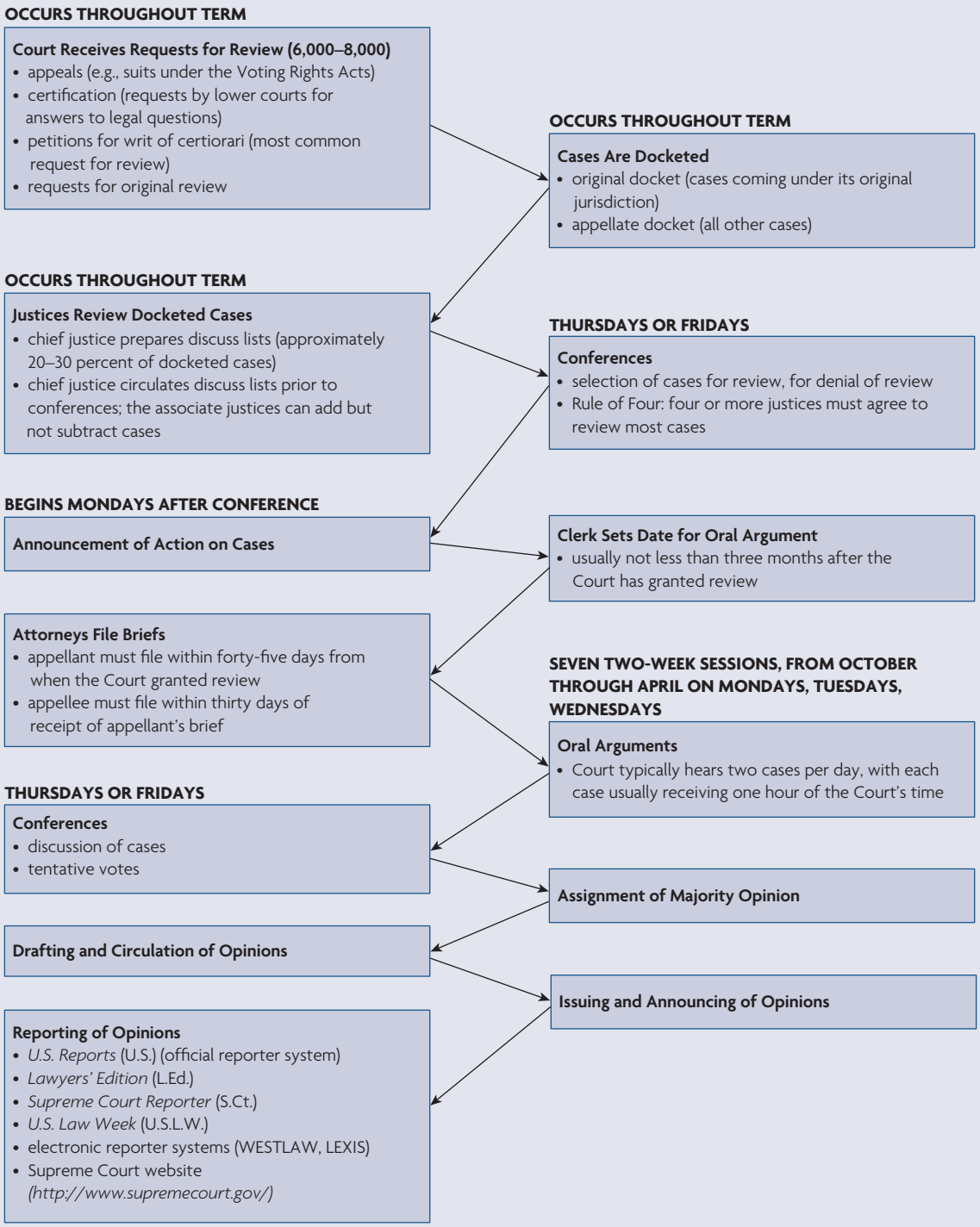
As the figures for the 2019 term indicate, the Court heard and decided slightly less than 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth century, but the number of cases the Court formally decided each year did not increase. For example, in 1930 the Court agreed to decide 159 of the 726 disputes sent to it. In 1990 the number of cases granted review fell to 141, but the sum total of petitions for review had risen to 6,302—nearly nine times greater than in 1930.[18]

[16]Because it begins in October, the Court's annual term is formally referred to as the October Term of that year, even though it spans two calendar years, ending the following spring. So, the Court's term is referred to by the year in which it commences.

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

[18]Data are from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 7th ed. (Thousand Oaks, CA: CQ Press, 2021), tables 2-5 and 2-6.

Figure 1-1 The Processing of Cases



Source: Compiled by authors.

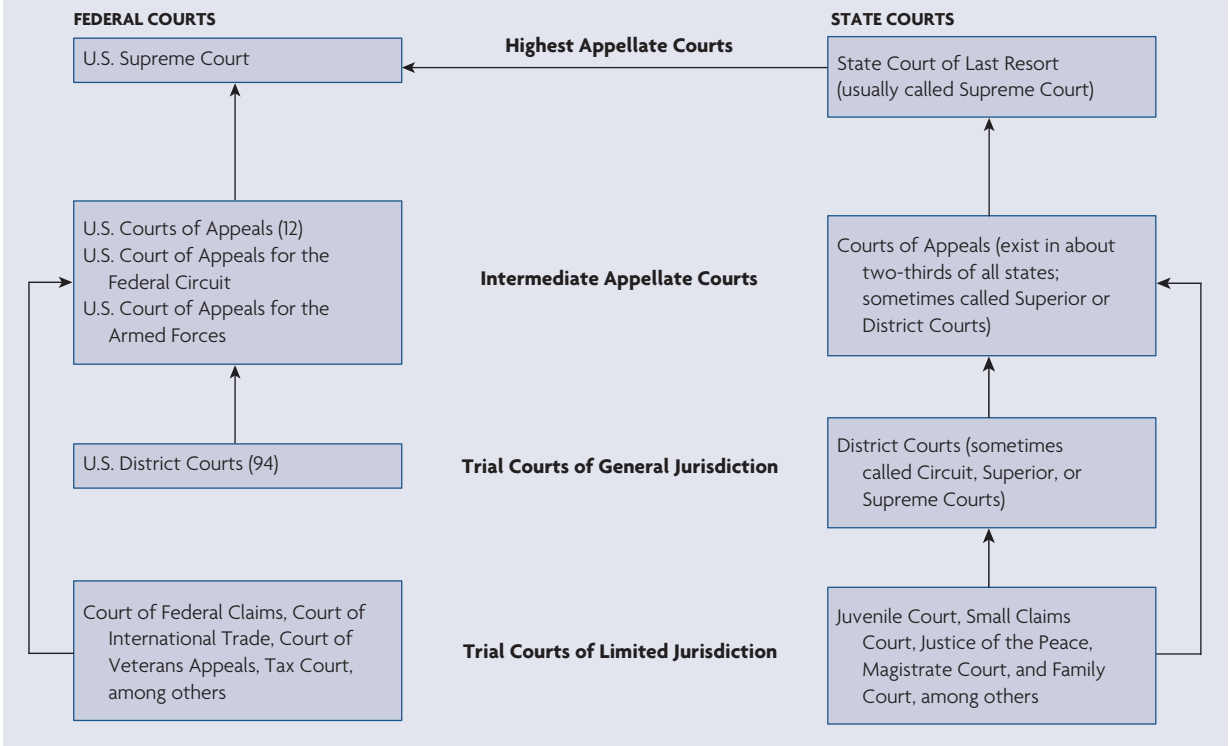
So, how cases get to the Supreme Court, how the justices select from among them, and what factors affect their choices are matters of some importance. In fact, they are fundamental to an understanding of judicial decision making and the role of the Court in American society.

How Cases Get to the Court: Jurisdiction and the Routes of Appeal. Cases come to the Court in one of four ways: either by a request for review under the Court's original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari *(see Figure 1-2)*. Chapter 2 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that no other court has heard. Article III of the Constitution authorizes such suits in cases involving ambassadors from foreign countries and those to which a state is a party. But, because Congress has authorized lower courts to consider such cases as well, the Supreme Court does not have exclusive jurisdiction over them. Consequently, the Court normally reviews, under its original jurisdiction, only those cases in which one state is suing another (usually over a disputed boundary). In recent years, original jurisdiction cases have made up only a tiny fraction of the Court's overall docket—between one and five cases per term.

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

To invoke the Court's appellate jurisdiction, litigants can take one of three routes, depending on the nature of their dispute: appeal as a matter of right, certification, or

Figure 1-2 The American Court System



Source: Compiled by authors.

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

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

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

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

In selecting cases, the justices follow a set of protocols that they have established over time. The original pool of about six to eight thousand petitions faces several checkpoints *(see Figure 1-1)* that significantly reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari arrives, the clerk's office examines it to make sure it conforms to the Court's precise rules. Briefs must be "prepared in a 6[⅛]-by-9¼-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."[19]

The clerk's office gives all acceptable petitions an identification number, called a "docket number," and forwards copies to the chambers of the individual justices. At present (2020), all the justices but Samuel Alito and Neil Gorsuch use the certiorari pool system, in which clerks from the different chambers collaborate by dividing, reading, and then writing memos on the petitions.[20] Upon receiving the preliminary or pool memos, the individual justices may ask their own clerks for their thoughts about the petitions. The justices then use the pool memos, along with their clerks' reports, as a basis for making their own independent

[19]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.

[20]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 1-3 A Page from Justice Harry Blackmun's Docket Books

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

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

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

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

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

This much we know. Because only the justices attend the Court's conferences, we cannot say precisely what transpires. We can offer only a rough picture based on scholarly writings, the comments of justices, and our examination of the private papers of a few retired justices. These sources tell us that the discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating his vote. The associate justices, who sit at a rectangular table in order of seniority, then comment on each petition, with the most senior justice speaking first and the newest member last. As Figure 1-3 shows, the justices record the certiorari votes—and, for cases they agree to decide on the merits, their subsequent votes on the outcome—in their personal records, called docket books. But, given the large number of petitions, the justices apparently discuss few cases in detail.

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

Considerations Affecting Case Selection Decisions.

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

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

[21]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.

decision-making process. Many cases in the lower courts raise similar legal questions, and when judges reach different conclusions on those issues, there is conflict—disagreement among judges about the meaning of federal law. Under Rule 10, the Court considers "conflict," such as when a U.S. "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when decisions of state courts of law collide with one another or the federal courts.[23]

To what extent do the considerations in Rule 10 affect the Court? The answer is mixed. On one hand, the Court seems to follow its dictates. The presence of actual conflict between or among federal courts substantially increases the likelihood of review; if actual conflict is present in a case, it has a 33 percent chance of gaining Court review, as compared with the usual 1 percent certiorari rate.[24] On the other hand, although the Court may look more closely at cases that present actual conflict, it does not accept all cases with conflict because there are too many.[25]

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

Why is the solicitor general so successful? One reason is that the Court is well aware of the SG's special role. A presidential appointee whose decisions often reflect the administration's philosophy, the SG also represents the interests of the United States. As the nation's highest court, the Supreme Court cannot ignore these interests. In addition, the justices rely on the solicitor general to act as a filter—that is, they expect the SG to examine carefully the cases to which the government is a party and bring only the most important to their attention. Further, because solicitors general are involved in so much Supreme Court litigation, they acquire a great deal of knowledge about the Court that other litigants do not. They are "repeat players" who can use their knowledge of Supreme Court decision making to their advantage. For example, they know how to structure their petitions to attract the attention and interest of the justices. Finally, the professionalism of the SG and the lawyers working in that office is also beneficial; the justices know that these lawyers are invested in the Court's mission. They are, as some scholars have put it, "consummate legal professionals whose information justices can trust."[26]

The second political factor is the amicus curiae (friend of the court) brief. Interest groups and other third parties usually file these briefs after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage *(see Box 1-1)*. Research by political scientists shows that amicus briefs significantly enhance a case's chances of being heard, and multiple briefs have a greater effect.[27] An interesting finding of these studies is that, even when groups file *in opposition* to granting certiorari, they increase—rather than decrease—the probability that the Court will hear the case.

What can we make of these findings? Most important is this: the justices may not be strongly influenced by the arguments contained in these briefs (If they were, why would amicus briefs opposing certiorari have the opposite effect?), but they seem to use them as cues. In other words, because amicus curiae briefs filed at the certiorari stage are somewhat uncommon—less than 10 percent of all petitions are accompanied by amicus briefs—they do draw the justices' attention. If major

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

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

[24]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.

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

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

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

BOX 1-1

The Amicus Curiae Brief

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

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

No. 12–307

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

—V.—

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

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

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

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

WILLIAM F. SHEEHAN *Counsel of Record* ANDREW HUDSONGOODWIN | PROCTER LLP
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Counsel for Amici Curiae

organizations are sufficiently interested in an appeal to pay the cost of filing briefs in support of (or against) Court review, then the petition for certiorari is probably worth the justices' serious consideration.

In addition, we have strong reasons to suspect that a third political factor—the ideology of the justices—affects actions on certiorari petitions. Specifically, the members of the Court favor reviewing lower court decisions that run contrary to their preferences. Researchers tell us, for example, that the justices during the liberal period under Chief Justice Earl Warren (1953–1969) were more likely to grant review to cases in which the lower court reached a conservative decision so that they could reverse that legal policy, while those of the moderately conservative Court during the years of Chief Justice Warren Burger (1969–1986) took cases in order to undo the liberal decisions of lower courts. It would be difficult to believe that the current justices would be any less likely than their predecessors to vote based on their ideology. These ideological considerations are brought to bear in a collegial context, and the members of the Court consider not only their preferences but also the preferences of their brethren. Scholarly studies suggest that justices engage in strategic voting behavior at the cert stage. In other words, justices are forward thinking; they consider the implications of their cert vote for the later merits stage, asking themselves, If I vote to grant a particular petition, what are the odds of my position winning down the road? As one justice explained his calculations, "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent."[28]

The Role of Attorneys

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

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

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

The clerk sends the briefs to the justices, who normally study them before oral argument. Written briefs are important because the justices may use them to formulate the questions they ask the lawyers representing the parties. The briefs also serve as a permanent record of the positions of the parties, available to the justices for consultation after oral argument when they decide the case outcome. A well-crafted brief can place into the hands of the justices arguments, legal references, and possible remedies that later may be incorporated into the opinion. Indeed, some research suggests that such briefs do exactly that.[29]

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

Oral Arguments. Attorneys also present their cases orally before the justices. Each side has thirty minutes to convince the Court of the merits of its position and to field questions from the justices, though sometimes the Court makes small exceptions to this rule. In the 2011 term, it made a particularly big one, hearing six hours of oral argument, over three days, on the Patient Protection and Affordable Care Act (also known as "Obamacare"), the health care law passed in 2010. This was unprecedented in the modern era, but not in the Court's early years. In the past, because attorneys did

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

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

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

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

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

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

WHITE: What is your constitutional position there?

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

WHITE: Why? Why is that?

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

WHITE: Emotional response by whom?

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

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

WEDDINGTON: I would say constitutional—

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

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

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

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

[30]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; and Lee Epstein, William Landes, and Richard A. Posner, "Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument," *Journal of Legal Studies* 39 (2010): 433–467.

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

The Supreme Court Decides: Some Preliminaries

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

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

The system works so well that, with only a few exceptions, the justices have not experienced information leaks—at least not prior to the public announcement of a decision. After that, clerks and even justices have sometimes thrown their own sunshine on the Court's deliberations. *National Federation of Independent Business v. Sebelius* (2012), involving the constitutionality of the health care law passed in 2010, provides a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice John G. Roberts Jr. initially voted to join the Court's four conservative justices to strike down the law but later changed his vote to join the four liberals to uphold it.[31]

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

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

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

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

[31]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/.

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

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of *Brown v. Board of Education* (1954), and Roberts did the same in the health care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, "[T]here are occasions when an opinion should carry extra weight which pronouncement by the Chief Justice gives."[33] Finally, for cases decided by a one-vote margin (usually 5–4), chiefs have been known to assign the opinion to a moderate member of the majority rather than to an extreme member. There is a strategic reason for this decision: if the writer in a close case drafts an opinion with which other members of the majority are uncomfortable, the opinion may drive justices to the other side, causing the majority to become a minority. A chief justice may try to minimize this risk by asking justices squarely in the middle of the majority coalition to write.

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

Once the justices receive the first draft of the opinion, they have many options. First, they can join the opinion, meaning that they agree with it and want no changes. Second, they can ask the opinion writer to make changes, that is, *bargain* with the writer over the content of and even the disposition—to reverse or affirm the lower court ruling—offered in the draft. The following memo sent from Brennan to White is exemplary: "I've mentioned to you that I favor your approach to this case and want if possible to join your opinion. If you find the following suggestions . . . acceptable, I can join you."[34]

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

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

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

SUPREME COURT DECISION MAKING: LEGALISM

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

As you might imagine, the responses to these questions are many, but they can be categorized into two groups. One focuses on the role of law, broadly defined, and legal methods in determining how justices interpret

[32]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; and Elliot E. Slotnick, "The Chief Justices and Self-Assignment of Majority Opinions," *Western Political Quarterly* 31 (1978): 219–225.

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

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

the Constitution, emphasizing, among other things, the importance of its words, American history and tradition, and precedent (previously decided constitutional rulings). Judge Richard Posner and his coauthors have referred to this as a legalistic theory of judicial decision making.[35] The other—what Posner et al. call a realistic theory of judging—emphasizes nonlegalistic factors, including the role of politics. "Politics" can take many forms, such as the particular ideological views of the justices, the mood of the public, and the political preferences of the executive and legislative branches.

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

Although it may be tempting to assume that the justices use the law to camouflage their politics, there are several reasons to believe that they actually do seek to follow a legal approach. One reason is that the justices themselves often say they look to the founding period, the words of the Constitution, previously decided cases, and other legalistic approaches to resolve disputes because they consider them appropriate criteria for reaching decisions. Another is that some scholars express agreement with the justices, arguing that Court members cannot follow their own personal preferences, the whims of the public, or other non–legally relevant factors "if they are to have the continued respect of their colleagues, the wider legal community, citizens, and leaders." Rather, they "must be principled in their decision-making process."[36]

Whether they are principled in their decision making is for you to determine as you read the cases to come. For you to make this determination, it is of course necessary to develop some familiarity with both legalism and realism. In the next section we turn to realism; here we begin with legalism, which, in constitutional law, centers on the methods of constitutional interpretation that the justices frequently say they employ. We consider some of the most important methods and describe the rationale for their use. These methods include original intent, original meaning, textualism, structural analysis, stare decisis, pragmatism, and polling other jurisdictions.[37] Using the Second Amendment as an example, Table 1-1 provides a brief summary of these methods, after which we supply more details on each one.

The Second Amendment of the U.S. Constitution reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller* (2008) *(excerpted in Chapter 9)*, the U.S. Supreme Court ruled that the amendment protects the right of individuals who are not affiliated with any state-regulated militia to keep handguns and other firearms in their homes for their own private use.

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

Originalism

Originalism comes in several different forms, and we discuss two below—original intent and original understanding (or meaning)—but the basic idea is that originalists attempt to interpret the Constitution in line with what it meant at the time of its drafting. One form of originalism emphasizes the intent of the Constitution's framers. The Supreme Court first invoked the term *intention of the framers* in 1796. In ***Hylton v. United States***, the Court said, "It was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of

[35]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).

[36]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.

[37]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).

Table 1-1 Methods of Constitutional Interpretation

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

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

taxation."[38] In *Hustler Magazine v. Falwell* (1988), the Court used the same grounds to find that cartoon parodies, however obnoxious, constitute expression protected by the First Amendment.

No doubt, justices over the years have looked to the intent of the framers to reach conclusions about the disputes before them.[39] But why? What possible relevance could the framers' intentions have for today's controversies? Advocates of this approach offer several answers. First, they assert that the framers acted in a calculated manner—that is, they knew what they were doing—so why should we disregard their precepts? One adherent said, "Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was."[40]

Second, it is argued that if they scrutinize the intent of the framers, justices can deduce "constitutional truths," which they can apply to cases. Doing so, proponents say, produces neutral principles of law and eliminates value-laden decisions.[41] Consider speech advocating the violent overthrow of the government. Suppose the government enacted a law prohibiting such expression and arrested members of a radical political party for violating it. Justices could scrutinize this law in several ways. A liberal might conclude, solely because of his or her liberal values, that the First Amendment prohibits a ban on such expression. Conservative jurists might reach the opposite conclusion. Neither would be proper jurisprudence in the opinion of those who advocate an original intent approach because both are value-laden and ideological preferences should not creep into the law. Rather, justices should examine the framers' intent as a way to keep the law value-free. Applying this approach to free speech, one adherent argues, leads to a clear, unbiased result:

> Speech advocating violent overthrow is . . . not [protected] "political speech" . . . as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority.[42]

Finally, supporters of this mode of analysis argue that it fosters stability in law. They maintain that, without originalism, the law becomes far too fluid, changing with the ideological whims of the justices and creating havoc for those who must interpret and implement Court decisions. Lower court judges, lawyers, and even ordinary citizens do not know if today's rights will still exist tomorrow. Following a jurisprudence of original intent would eliminate such confusion because it provides a principle that justices can follow consistently.

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

> The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[43]

By "textualist," Justice Scalia meant that he looked at the words of whatever constitutional provision he was interpreting and then interpreted them in line with what they would have ordinarily meant to the people of the time when they were written.[44] This is the "originalist" aspect of his method of interpreting the Constitution.

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

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

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

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

[42]Ibid., 31.

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

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

So, while intentionalism focuses on the intent behind phrases, an original understanding approach would emphasize "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted."[45]

Even so, as we suggested earlier, the merits of this approach are similar to those of intentionalism. By focusing on how the framers defined their own words and then applying their definitions to disputes over those constitutional provisions containing them, this approach seeks to generate value-free and ideology-free jurisprudence. Indeed, one of the most important developers of this approach, historian William W. Crosskey, specifically embraced it to counter "sophistries"—mostly, the idea that the Constitution is a living document whose meaning should evolve over time.[46]

Chief Justice William H. Rehnquist's opinion in *Nixon v. United States* (1993) provides an example. Here, the Court considered a challenge to the procedures the Senate used to impeach a federal judge, Walter L. Nixon, Jr. Rather than the entire Senate trying the case, a special twelve-member committee heard evidence and reported to the full body, which in turn used that report to convict and remove him from office. Nixon argued that this procedure violated Article I of the Constitution, which states, "The Senate shall have the sole Power to try all Impeachments." But before addressing Nixon's claim, Rehnquist sought to determine whether courts had any business resolving such disputes. He used a meaning-of-the-words approach to consider the word *try* in Article I:

> Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. . . . There are several difficulties with this position which lead us ultimately to reject it. The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as "[t]o examine" or "[t]o examine as a judge." See 2 S. Johnson, A Dictionary of the English Language (1785). In more modern usage the term has various meanings. For example, try can mean "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation. . . . " Webster's Third New International Dictionary (1971).

Nixon is far from the only example of originalism. Indeed, many Supreme Court opinions contemplate the original intent of the framers or the original meaning of the words, and at least one justice on the current Court—Clarence Thomas—regularly invokes forms of originalism to answer questions ranging from the appropriate balance of power between the states and the federal government to limits on campaign spending.

Such a jurisprudential course would have dismayed Thomas's predecessor, Thurgood Marshall, who did not believe that the Constitution's meaning was "forever 'fixed' at the Philadelphia Convention." And, considering the 1787 Constitution's treatment of women and Black people, Marshall did not find "the wisdom, foresight, and sense of justice exhibited by the framers particularly profound."[47]

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

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

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

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

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

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

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

Some scholars have echoed the sentiment. C. Herman Pritchett has noted that originalism can "make a nation the prisoner of its past, and reject any constitutional development save constitutional amendment."[49]

Another criticism often leveled at intentionalism is that the Constitution embodies not one intent but many. Jeffrey A. Segal and Harold J. Spaeth pose some interesting questions: "Who were the Framers? All fifty-five of the delegates who showed up at one time or another in Philadelphia during the summer of 1787? Some came and went. . . . Some probably had not read [the Constitution]. Assuredly, they were not all of a single mind."[50] Then there is the question of what sources the justices should use to divine the original intentions of the framers. They could look at the records of the constitutional debates and at the founders' journals and papers, but some of the documents that pass for "records" of the Philadelphia convention are jumbled, and some are even forged. During the debates, the secretary became confused and thoroughly botched the minutes. James Madison, who took the most complete and probably the most reliable notes on what was said, edited them after the convention adjourned. And then there are other writings of the period, such as the enormous number of pamphlets in circulation that argued for and against ratification of the new Constitution. Perhaps this is why in 1952 Justice Robert H. Jackson wrote:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly specification yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[51]

As hard as it may be to ascertain the intention of the framers, it may be just as difficult for the Court to determine the original meaning of their words. There were a variety of dictionaries that were available during the founding era—some general and some legal, sometimes with contrary definitions. Even conscientious efforts to divine the meaning of a word or phrase as it was used in the late eighteenth century could yield inconclusive results.

Textualism

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

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

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

Originalism and pure textualism sometimes overlap. When it comes to the right to privacy, particularly where it is leveraged to create other rights, such as legalized abortion, *some* originalists and literalists would reach the same conclusion: it does not exist. The former would argue that it was not the intent of the framers to confer privacy; the latter, that because the Constitution does not expressly mention this right, it does not exist.

Textual analysis is quite common in Supreme Court opinions. Many, if not most, opinions interpreting the

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

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

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

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

> My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that government shall not do anything to people . . . either for the views they have or the views they express or the words they speak or write. Some people would have you believe that this is a very radical position, and maybe it is. But all I am doing is following what to me is the clear wording of the First Amendment. . . . As I have said innumerable times before I simply believe that "Congress shall make no law" means Congress shall make no law. . . . Thus we have the absolute command of the First Amendment that no law shall be passed by Congress abridging freedom of speech or the press.[52]

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

Despite the seeming logic of his justifications and the high regard many scholars have for Black, his brand of jurisprudence has been vulnerable to attack. Some assert that it led him to take some rather odd positions, particularly in cases involving the First Amendment. Most analysts and justices—even those considered liberal—agree that obscene materials fall outside of First Amendment protection and that states can prohibit the dissemination of such materials. But in opinion after opinion, Black clung to the view that no publication could be banned because it was obscene.

A second objection is that literalism can result in inconsistent outcomes. Is it really sensible for Black to hold that, say, a book consisting entirely of depictions of explicit sexual activity is constitutionally protected expression while wearing a jacket that contains a single four-letter word is not?

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

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

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

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

[54]Anyone who has ever seen Shakespeare's *The Merchant of Venice* has seen this illustrated when the clever Portia, posing as judge, saves Antonio from forfeiting a "pound of flesh" for his failure to repay a loan. While other characters assume a commonly understood meaning of the word *flesh*, Portia interprets the word more strictly—to exclude "blood"—and thus makes it impossible for the bargain to be fulfilled.

[55]Frank Easterbrook, "Statutes' Domains," *University of Chicago Law Review* 50 (1983): 536.

professor Frank Easterbrook notes that the framers might have imposed the presidential age limit "as a percentage of average life expectancy" (to ensure that presidents have a good deal of practical political experience before ascending to the presidency and little opportunity to engage in politicking after they leave) or "as a minimum number of years after puberty" (to guarantee that they are sufficiently mature while not unduly limiting the pool of eligible candidates). Seen in this way, the words "thirty five Years" in the Constitution may not have much value: they may be "simply the framers' shorthand for their more complex policies, and we could replace them by 'fifty years' or 'thirty years' without impairing the integrity of the constitutional structure."[56] More generally, as Justice Oliver Wendell Holmes Jr. once put it, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[57]

Structural Analysis

Textualist and originalist approaches tend to focus on particular words or clauses in the Constitution. Structural reasoning suggests that interpretation of these clauses should follow from, or at least be consistent with, overarching structures or governing principles established in the Constitution—most notably, federalism and the separation of powers. Interestingly enough, these terms do not appear in the Constitution, but they "are familiar to any student of constitutional law,"[58] and they will become second nature to you, too, as you work your way through the material in the pages to follow. The idea behind structuralism is that these structures or relationships are so important that judges and lawyers should read the Constitution with an eye toward preserving them.

There are many famous examples of structural analyses, especially, as you would expect, in separation of powers and federalism cases. Charles Black, a leading proponent of structuralism, points to *McCulloch v. Maryland* (1819), which again serves as a useful illustration. Among the questions the Court addressed was whether a state could tax a federal entity—the Bank of the United States. Even though states have the power to tax, Chief Justice John Marshall for the Court said it could not be taxed because the states could use this power to extinguish the bank. If states could do this, they would damage what Marshall believed to be "the warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy."[59]

Here, Marshall invalidated a state action aimed at the federal government. Throughout this book, you will see the reverse, as well: the justices invoking structural-federalism arguments to defend state laws against attack by individuals. You will also spot structural arguments relating to the democratic process. We provide an example in Table 1-1, and there are many others in the pages to follow.

Despite their frequent appearance, structural arguments have their weaknesses. Primarily, as Philip Bobbitt notes, "while we all can agree on the presence of the various structures, we [bicker] when called upon to decide whether a particular result is necessarily inferred from their relationship."[60] What this means is that structural reasoning does not necessarily lead to a single answer in each and every case. *INS v. Chadha* (1983), involving the constitutionality of the legislative veto (used by Congress to veto decisions made by the executive branch), provides an example. Writing for the majority, Chief Justice Burger held that such a veto violated the constitutional doctrine of separation of powers; it eroded the "carefully defined limits of the power of each Branch" established by the framers. Writing in dissent, Justice White, too, relied in part on structural analysis but came to a very different conclusion: the legislative veto fit compatibly with the separation of powers system because it ensured that Congress could continue to play "its role as the Nation's lawmaker" in the wake of the growth in the size of the executive branch.

The gap between Burger and White reflects disagreement over the very nature of the separation of powers system, and similar disagreements arise over federalism and the democratic process. Hence, even when justices reason from structure, it is possible, even likely, that they will reach different conclusions.

Stare Decisis

Translated from Latin, the term *stare decisis* means "let the decision stand." What this concept suggests is that,

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

[57]*Towne v. Eisner* (1918).

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

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

[60]Bobbitt, *Constitutional Fate*, 84.

as a general rule, jurists should decide cases on the basis of previously established rulings, or precedent. In shorthand terms, judicial tribunals should honor prior rulings.

The benefits of this approach are fairly evident. If justices rely on past cases to resolve current cases, the law they generate becomes predictable and stable. Justice Harlan Fiske Stone acknowledged the value of precedent in a somewhat more ironic way: "The rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right."[61] The message, however, is the same: if the Court adheres to past decisions, it provides some direction to all who labor in the legal enterprise. Lower court judges know how they should and should not decide cases, lawyers can frame their arguments in accord with the lessons of past cases, legislators understand what they can and cannot enact or regulate, and so forth.

Precedent, then, can be an important and useful factor in Supreme Court decision making. It certainly seems important to the justices; the Court rarely reverses itself, having done so fewer than three hundred times over its entire history. Even modern-day Courts, as Table 1-2 shows, have been loath to overrule precedents. In the seven decades covered in the table, the Court overturned only 172 precedents, or, on average, about 2.6 per term. What is more, the justices almost always cite previous rulings in their decisions; indeed, it is the rare Court opinion that does not mention other cases.[62] Finally, several scholars have verified that precedent helps to explain Court decisions in some areas of the law. In one study, analysts found that the Court reacted quite consistently to legal doctrine presented in more than fifteen years of death penalty litigation. Put differently, using precedent from past cases, the researchers could correctly categorize the outcomes (for or against the death penalty) in 75 percent of sixty-four cases decided since 1972.[63] Scholarly work considering precedent in search and seizure litigation has produced similar findings.[64]

Table 1-2 Precedents Overruled, 1953–2019 Terms

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

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

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

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

Second, it may be difficult to locate the rule of law emerging in a majority opinion. That conflict is an important determinant of case selection is an indicator that the lines drawn by precedent can be difficult to discern; if lower courts, doing their level best, end up reaching different conclusions on the same legal question, a clear command of stare decisis may not exist. To decide whether a previous decision qualifies as a precedent, judges and commentators often say, one must strip away the nonessentials of the case and expose the basic reasons for the Supreme Court's decision. This process is generally referred to as "establishing the principle of

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

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

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

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

the case," or the ratio decidendi. Other points made in a given opinion—obiter dicta (any expression in an opinion that is unnecessary to the decision reached in the case or that relates to a factual situation other than the one actually before the court)—have no legal weight and do not bind judges. It is up to courts to separate the ratio decidendi from dicta. Not only is this task difficult, but it also provides a way for justices to skirt precedent with which they do not agree. All they need to do is declare parts of it to be dicta. Or justices can brush aside even the ratio decidendi when it suits their interests. What this means is that justices can always deal with "problematic" ratio decidendi by distinguishing a case from those already decided (or, alternatively, by refusing to decide such cases).

A scholarly study of the role of precedent in Supreme Court decision making offers a third reason. Two political scientists hypothesized that if precedent matters, it ought to affect the subsequent decisions of at least some members of the Court: if a justice dissented from a decision establishing a particular precedent, the same justice would not dissent from a subsequent application of the precedent. But, it turned out, that was not the case. Of the eighteen justices included in the study, only two occasionally subjugated their preferences to precedent.[65]

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

> Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative, but also our duty, to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.[66]

Pragmatism

Justices often look to the future, appraising alternative rulings and forecasting their consequences. This means that, quite apart from legal principle, the members of the Court often consider the effects of a decision for different segments of society—agriculture, airlines, banks, churches, energy producers, financial institutions, physicians, railroads, retirees, technology companies, among others. The Court is not necessarily interested in abstract doctrine alone; it often wants to know how its doctrines will work when put into practice.

This interpretive approach often takes the form of a balancing exercise: How should one weigh the president's interest in confidentiality against the need for information in a criminal proceeding? Which demands greater consideration—a state's safety interest in banning certain trucks from its highways or the national interest in eliminating burdens on interstate commerce? What is the appropriate balance between the state's interest in compulsory education and a religious claim to be exempt from such laws? In answering such questions, a justice will select from among plausible constitutional interpretations the one that has the best consequences and reject the ones that have the worst.

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

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

[66]Justice Powell, concurring in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). Whether the justices follow this idea—that stare decisis policy is more flexible in constitutional cases—is a matter of debate. See Lee Epstein, William M. Landes, and Adam Liptak, "The Decision to Depart (or Not) from Constitutional Precedent," *NYU Law Review* 90 (2015): 1115–1159.

When you encounter cases that engage in this sort of analysis, you might ask the same questions some critics of the approach raise: By what account of values should judges weigh costs and benefits? How do they take into account the different people whom a decision may simultaneously punish and reward?

Polling Other Jurisdictions

Aside from turning to originalism, textualism, or other historical approaches, a justice might probe English traditions or early colonial or state practices to determine how public officials of the times—or of contemporary times—interpreted similar words or phrases.[67] The Supreme Court has frequently used such evidence. When ***Wolf v. Colorado*** (1949) presented the Court with the question of whether the Fourth Amendment barred use in state courts of evidence obtained through an unconstitutional search, Justice Felix Frankfurter surveyed the law in all the states and in ten jurisdictions within the British Commonwealth. He used the information to bolster a conclusion that, although the Constitution forbade unreasonable searches and seizures, it did not prohibit state officials from using such questionably obtained evidence against a defendant. In 1952, however, when *Rochin v. California* asked the justices whether a state could use evidence it had obtained from a defendant by pumping his stomach—evidence admissible in the overwhelming majority of states at that time—Frankfurter declined to call the roll. Instead, he declared that gathering evidence by a stomach pump was "conduct that shocks the conscience" whose fruits could not be used in either state or federal courts.

When *Mapp v. Ohio* (1961) later overruled *Wolf* and held that state courts must *exclude* all unconstitutionally obtained evidence, the justices again returned to survey the field. For the Court, Justice Tom C. Clark said, "While in 1949 almost two-thirds of the States were opposed to the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the [rule]."

The point of this set of examples is not that Frankfurter or the Court was inconsistent but that the method itself—although it offers insights—is, according to some commentators, far from foolproof. First of all, the Constitution of 1787 as it initially stood and has since been amended rejects many English and some colonial and state practices. Second, even a steady stream of precedents from the states may signify nothing more than the fact that judges, too busy to give the issue much thought, imitated each other under the rubric of stare decisis. Third, if justices are searching for original intent or understanding, it is difficult to imagine the relevance of what was in the minds of people in the eighteenth century to government practices in the twentieth and twenty-first centuries. Polls are useful if we want to know what other judges, now and in the recent past, have thought about the Constitution, writ large or small. Nevertheless, they say nothing about the correctness of those thoughts—and the correctness of a lower court's interpretation may be precisely the issue before the Supreme Court.

Despite these criticisms, the Supreme Court continues to consider the practices of other U.S. jurisdictions, just as courts in other societies occasionally look to their counterparts elsewhere—including the U.S. Supreme Court—for guidance. The South African ruling in *The State v. Makwanyane* (1995) provides a vivid example. To determine whether the death penalty violated its nation's constitution, South Africa's Constitutional Court surveyed practices elsewhere, including those in the United States. Ultimately, the justices decided not to follow the path taken by the U.S. Supreme Court, ruling instead that the South African Constitution prohibited the state from imposing capital punishment. Rejection of U.S. practice was made all the more interesting in light of a speech Justice Harry Blackmun delivered only a year before *Makwanyane*.[68] In that address, Blackmun chastised his colleagues for failing to take into account a decision of South Africa's court to dismiss a prosecution against a person kidnapped from a neighboring country. This ruling, Blackmun argued, was far more faithful to international conventions than the one his court had reached in *United States v. Alvarez-Machain* (1992), which permitted U.S. agents to abduct a Mexican national.

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

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

[68] "Justice Blackmun Addresses the ASIL Annual Dinner," *American Society of International Law Newsletter,* March 1994.

Whether this practice will become more widespread or filter into other legal areas is an intriguing question, and one that has caused debate among the justices. In his book *The Court and the World*,[69] Justice Stephen Breyer contends that the cases before his Court increasingly raise questions that, like it or not, force the justices to confront "foreign realities." He suggests that in response the justices should and must expand their horizons beyond U.S. borders. Others, though, apparently agree with Justice Scalia, who argued "the views of other nations, however enlightened the Justices of this court may think them to be, cannot be imposed upon Americans through the Constitution."[70]

SUPREME COURT DECISION MAKING: REALISM

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

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

Preference-Based Approaches

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

Judicial Attitudes. Attitudinal approaches emphasize the centrality of the justices' political ideologies. Typically, scholars examining the ideologies of the justices discuss the degree to which a justice is conservative or liberal—as in "Justice X holds conservative views on issues of criminal law" or "Justice Y holds liberal views on free speech." This school of thought maintains that when a case comes before the Court, each justice evaluates the facts of the dispute and arrives at a decision consistent with his or her personal ideology.

C. Herman Pritchett was one of the first scholars to study systematically the relevance of the justices' personal attitudes.[71] Examining the Court during the 1930s and 1940s, Pritchett observed that dissent had become an institutionalized feature of judicial decisions. During the early 1900s, in no more than 20 percent of the cases did one or more justices file a dissenting opinion; by the 1940s, that figure was more than 60 percent. If precedent and other legal factors drove Court rulings, why did various justices interpreting the same legal provisions frequently reach different results? Not only that, why did the same sets of justices consistently vote together? Perhaps the justices might disagree, but why did they disagree so systematically? Pritchett concluded that the justices were not following precedent but were "motivated by their own preferences."[72]

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

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

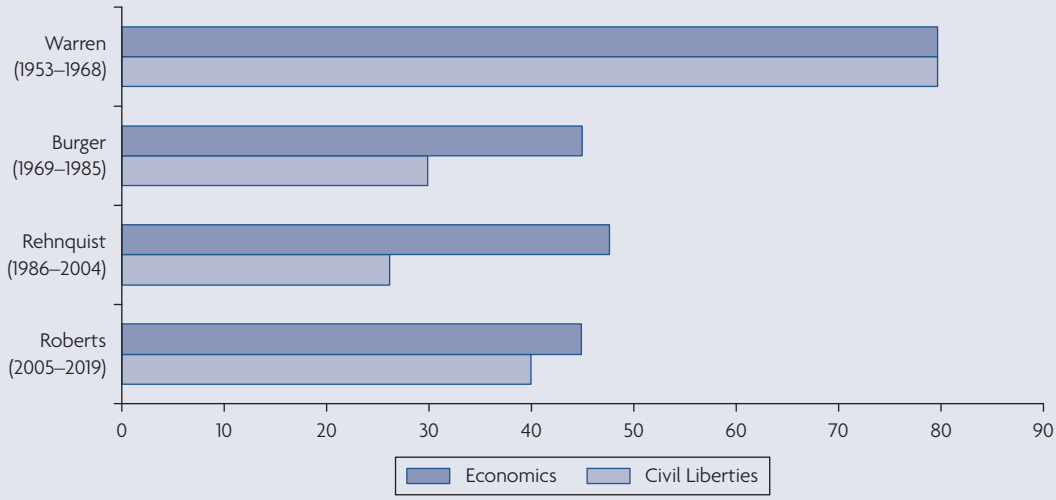
[70]*Thompson v. Oklahoma* (1987); see also Scalia's dissent in *Atkins v. Virginia* (2002).

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

[72]Pritchett, *The Roosevelt Court*, xiii.

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

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



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

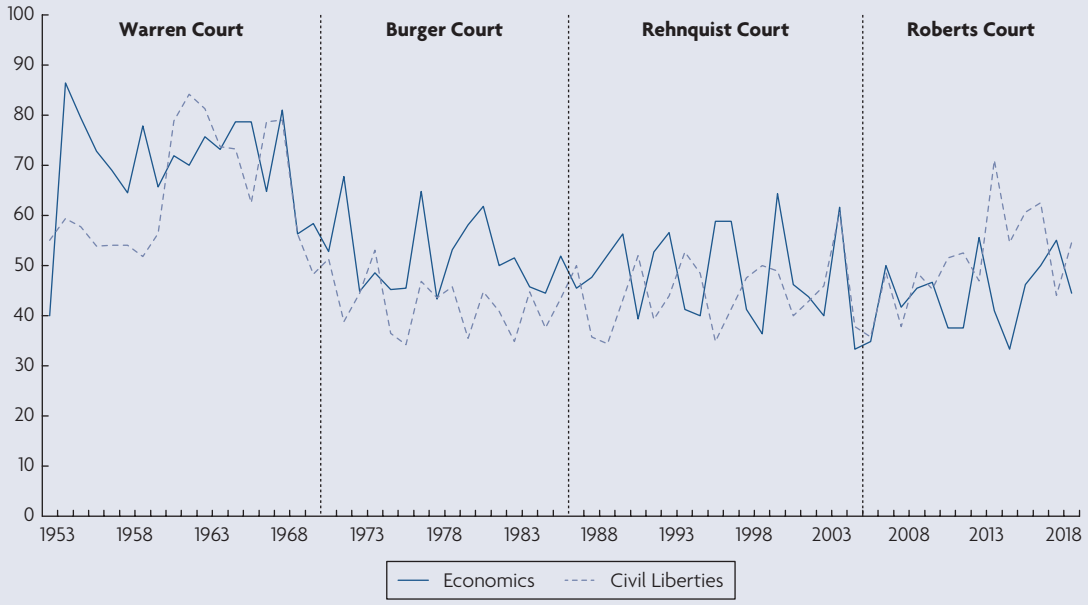
how liberal or conservative the various justices have been and attempts to predict their voting behavior based on their ideological preferences. To understand some of these differences, consider Figure 1-4, which presents the voting records of the present chief justice, John G. Roberts Jr., and his three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

The data show dramatic differences among these four important jurists, especially in cases involving civil liberties. Cases in this category include disputes over issues such as the First Amendment freedoms of religion, speech, and press; the right to privacy; the rights of the criminally accused; and illegal discrimination. The liberal position is a vote in favor of the individual who is claiming a denial of these basic rights. Warren supported the liberal side almost 80 percent of the time, but Burger and Rehnquist did so in about one-third (or less) of such cases. Roberts has voted for the liberal position a bit more often but still only 40 percent of the time.

Economics cases involve challenges to the government's authority to regulate the economy. The liberal position supports an active role by the government in controlling business and economic activity. Here, too, the four justices show different ideological positions. Warren is the most liberal of the four, ruling in favor of government regulatory activity in roughly 80 percent of the cases, while Burger, Rehnquist, and Roberts supported such government activity in less than half. The data depicted in Figure 1-4 are typical of the findings of most attitudinal studies: within given issue areas, individual justices tend to show consistent ideological predispositions.

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

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



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

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

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

On the other hand, preference-based approaches are not foolproof. First, how do we know if a particular justice is liberal or conservative? The answer typically is that we know a justice is liberal or conservative because he or she casts liberal or conservative votes. Scalia favored conservative positions on the Court because he was a conservative, and we know he was a conservative because he favored conservative positions in the cases he decided. This is circular reasoning indeed. Second, knowing that a justice is liberal or conservative or that the Court decided a case in a liberal or conservative way does not tell us much about the Court's (or the country's) actual policy positions. To say that *Roe v. Wade* is a liberal decision is to say little about the policies governing abortion in the United States. If it did, this book would be nothing more than a list of cases labeled liberal or conservative—such labels would give us no sense of more than two hundred years of constitutional interpretation.

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

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