LEE EPSTEIN ▪ KEVIN T. MCGUIRE ▪ THOMAS G. WALKER

Constitutional Law for a Changing America

Institutional Powers and Constraints

TWELFTH EDITION

Constitutional Law for a Changing America

Twelfth Edition

In honor of my parents, Ann and Kenneth Spole—L.E.
To Fiona, Millie, and Carson—K.T.M.
To Carley, Clayton, Coleman, and Evan—T.G.W.

Constitutional Law for a Changing America

Institutional Powers and Constraints

Twelfth Edition

Lee Epstein
Washington University in St. Louis

Kevin T. McGuire
University of North Carolina at Chapel Hill

Thomas G. Walker
Emory University

Sage | CQPRESS

FOR INFORMATION:

2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

Unit No 323-333, Third Floor, F-Block
International Trade Tower Nehru Place
New Delhi 110 019
India

18 Cross Street #10-10/11/12
China Square Central
Singapore 048423

Acquisitions Editor: Anna Villarruel
Content Development Editor: Cassie Carey
Production Editor: Astha Jaiswal
Copy Editor: Colleen Brennan
Typesetter: C&M Digitals (P) Ltd.
Cover Designer: Gail Buschman
Marketing Manager: Jennifer Haldeman

Printed in the United States of America

ISBN: 9781071934470

This book is printed on acid-free paper.

25 26 27 28 29 10 9 8 7 6 5 4 3 2 1

BRIEF CONTENTS

Chronological Table of Cases xiii

Tables, Figures, and Boxes xv

Preface xix

Acknowledgments xxi

About the Authors xxiii

PART I • THE U.S. CONSTITUTION 1

An Introduction to the U.S. Constitution 3

CHAPTER 1 • Understanding the U.S. Supreme Court 13

PART II • INSTITUTIONAL AUTHORITY 49

Structuring the Federal System 51

CHAPTER 2 • The Judiciary 57

CHAPTER 3 • The Legislature 119

CHAPTER 4 • The Executive 181

CHAPTER 5 • Interbranch Interactions 257

PART III • NATION-STATE RELATIONS 317

Allocating Government Power 319

CHAPTER 6 • Federalism 325

CHAPTER 7 • The Commerce Power 383

CHAPTER 8 • The Power to Tax and Spend 485

PART IV • ECONOMIC LIBERTIES 547

Economic Liberties and Individual Rights 549

CHAPTER 9 • The Contract Clause 553

CHAPTER 10 • Economic Substantive Due Process 581

CHAPTER 11 • The Takings Clause 629

Reference Material 665

Appendix 1. Constitution of the United States 667

Appendix 2. The Justices 679

Appendix 3. Glossary 685

Appendix 4. Online Case Archive Index 689

Index 693

DETAILED CONTENTS

Chronological Table of Cases xiii

Tables, Figures, and Boxes xv

Preface xix

Acknowledgments xxi

About the Authors xxiii

PART I • THE U.S. CONSTITUTION 1

An Introduction to the U.S. Constitution 3

The Road to the U.S. Constitution 3

Underlying Principles of the Constitution 7

CHAPTER 1 • Understanding the U.S. Supreme Court 13

Processing Supreme Court Cases 13

Supreme Court Decision Making: Legalism 24

Supreme Court Decision Making: Realism 35

Conducting Research on the Supreme Court 44

ANNOTATED READINGS 47

PART II • INSTITUTIONAL AUTHORITY 49

Structuring the Federal System 51

Origins of the Separation of Powers/Checks and Balances System 51

Separation of Powers and the Constitution 52

Contemporary Thinking on the Constitutional Scheme 54

CHAPTER 2 • The Judiciary 57

Establishment of the Federal Judiciary 57

Judicial Review 63

Marbury v. Madison 64

Martin v. Hunter's Lessee 72

Eakin v. Raub 78

Constraints on Judicial Power: Article III 83

Ex parte McCardle 85

Baker v. Carr 95

Nixon v. United States 100

Lujan v. Defenders of Wildlife 106

Constraints on Judicial Power: Judicial Self-Restraint and
the Separation of Powers System 114
ANNOTATED READINGS 117

CHAPTER 3 • The Legislature 119

Article I: Historical Overview 119
Powell v. McCormack 126
U.S. Term Limits, Inc. v. Thornton 130
Gravel v. United States 135
Introduction to Legislative Powers 140
Enumerated Powers 141
Implied Powers and the Necessary and Proper Clause 141
McCulloch v. Maryland 142
McGrain v. Daugherty 153
Watkins v. United States 156
Barenblatt v. United States 161
Trump v. Mazars USA, LLP 165
South Carolina v. Katzenbach 171
Congress's Interpretation of the Constitution 177
ANNOTATED READINGS 178

CHAPTER 4 • The Executive 181

The Structure of the Presidency 181
Bush v. Gore 183
The President's Constitutional Authority and Tools for Executing It 192
The Faithful Execution of the Laws: Defining the Contours
of Presidential Power 197
In re Neagle 199
Domestic Powers of the President 205
Clinton v. City of New York 206
Morrison v. Olson 211
Myers v. United States 217
Humphrey's Executor v. United States 221
United States v. Nixon 225
Mississippi v. Johnson 231
Clinton v. Jones 233
Trump v. Vance 238
Trump v. United States 242
Ex parte Grossman 248
Murphy v. Ford 251
The Role of the President in External Relations 252
ANNOTATED READINGS 254

CHAPTER 5 • Interbranch Interactions 257

Debates over Interbranch Interactions 257
Domestic Powers 258
Gundy v. United States 262
*Immigration and Naturalization Service v. Chadha; the U.S. House of
Representatives v. Immigration and Naturalization Service;
the U.S. Senate v. Immigration and Naturalization Service* 267
Bowsher v. Synar 272

Powers over Foreign Affairs 275
Prize Cases 278
Ex parte Milligan 281
Korematsu v. United States 286
Youngstown Sheet & Tube Co. v. Sawyer 292
Dames & Moore v. Regan 297
Zivotofsky v. Kerry, Secretary of State 300
Hamdi v. Rumsfeld 307
ANNOTATED READINGS 316

PART III • NATION-STATE RELATIONS 317

Allocating Government Power 319

The Framers and Federalism 320
The Tenth and Eleventh Amendments 321

CHAPTER 6 • Federalism 325

The Doctrinal Cycle of Nation-State Relations 326
McCulloch v. Maryland 327
Dred Scott v. Sandford 333
Coyle v. Smith 338
Garcia v. San Antonio Metropolitan Transit Authority 344
New York v. United States 348
Printz v. United States 354
Murphy v. National Collegiate Athletic Association 359
The Eleventh Amendment and Sovereign Immunity 362
Alden v. Maine 363
National Preemption of State Laws 367
State of Missouri v. Holland 367
Crosby v. National Foreign Trade Council 369
Arizona v. United States 376
ANNOTATED READINGS 381

CHAPTER 7 • The Commerce Power 383

Foundations of the Commerce Power 383
Gibbons v. Ogden 385
Attempts to Define the Commerce Power in the Wake of the Industrial Revolution 389
United States v. E. C. Knight Co. 391
Stafford v. Wallace 395
Champion v. Ames 398
Hammer v. Dagenhart 401
The Supreme Court and the New Deal 405
A. L. A. Schechter Poultry Corp. v. United States 411
National Labor Relations Board v. Jones & Laughlin Steel Corporation 419
United States v. Darby 424
Wickard v. Filburn 428
The Era of Expansive Commerce Clause Jurisprudence 430
Heart of Atlanta Motel, Inc. v. United States 432

Limits on the Commerce Power: The Republican Court Era 437
United States v. Lopez 438
United States v. Morrison 444
Gonzales v. Raich 450
National Federation of Independent Business v. Sebelius 456
Commerce Power of the States 462
Cooley v. Board of Wardens 464
Southern Pacific Company v. Arizona 468
National Pork Producers Council v. Ross 471
Hunt v. Washington State Apple Advertising Commission 474
Maine v. Taylor 477
Granholm v. Heald 481
ANNOTATED READINGS 484

CHAPTER 8 • The Power to Tax and Spend 485

The Framers and Defining the Financial Powers 485
Direct Taxes and the Power to Tax Income 487
Pollock v. Farmers' Loan & Trust Co. 490
Taxation of Exports 494
United States v. United States Shoe Corp. 495
Intergovernmental Tax Immunity 497
South Carolina v. Baker 499
Davis v. Michigan Dept. of Treasury 501
Taxation as a Regulatory Power 504
McCray v. United States 505
Bailey v. Drexel Furniture Co. 508
Sonzinsky v. United States 510
Taxing and Spending for the General Welfare 512
United States v. Butler 513
Steward Machine Co. v. Davis 517
South Dakota v. Dole 521
National Federation of Independent Business v. Sebelius 524
Restrictions on the Revenue Powers of the States 530
Michelin Tire Corp. v. Wages 531
Complete Auto Transit v. Brady 534
South Dakota v. Wayfair 537
Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon 541
ANNOTATED READINGS 545

PART IV • ECONOMIC LIBERTIES 547

Economic Liberties and Individual Rights 549

CHAPTER 9 • The Contract Clause 553

The Framers and the Contract Clause 553
John Marshall and the Contract Clause 555
Fletcher v. Peck 556
Trustees of Dartmouth College v. Woodward 560
Decline of the Contract Clause: From the Taney Court to the New Deal 564
Proprietors of Charles River Bridge v. Proprietors of Warren Bridge 564
Stone v. Mississippi 570
Home Building & Loan Assn. v. Blaisdell 572

Modern Applications of the Contract Clause 576
Sveen v. Melin 577
ANNOTATED READINGS 580

CHAPTER 10 • Economic Substantive Due Process 581

Development of Substantive Due Process 583
The Slaughterhouse Cases (Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughter House Company) 584
Munn v. Illinois 590
Allgeyer v. Louisiana 595
The Roller-Coaster Ride of Substantive Due Process: 1898–1923 597
Lochner v. New York 598
Muller v. Oregon 603
The Heyday of Substantive Due Process: 1923–1936 608
Adkins v. Children's Hospital 608
The Depression, the New Deal, and the Decline of Economic Substantive Due Process 611
Nebbia v. New York 612
West Coast Hotel v. Parrish 616
Williamson v. Lee Optical Company 620
Substantive Due Process: Contemporary Relevance 621
BMW of North America v. Gore 621
ANNOTATED READINGS 627

CHAPTER 11 • The Takings Clause 629

Protecting Private Property from Government Seizure 629
What Is a Taking? 632
United States v. Causby 632
Penn Central Transportation Company v. City of New York 635
Nollan v. California Coastal Commission 639
Lucas v. South Carolina Coastal Council 642
Horne v. Department of Agriculture 646
What Is a Public Use? 650
Berman v. Parker 651
Kelo v. City of New London 654
What Is Just Compensation? 660
United States v. 564.54 Acres of Land 660
ANNOTATED READINGS 663

Reference Material 665

Appendix 1. Constitution of the United States 667

Appendix 2. The Justices 679

Appendix 3. Glossary 685

Appendix 4. Online Case Archive Index 689

Index 693

CHRONOLOGICAL TABLE OF CASES

The Marshall Court (1801–1835)

Marbury v. Madison (1803)
Fletcher v. Peck (1810)
Martin v. Hunter's Lessee (1816)
Trustees of Dartmouth College v. Woodward (1819)
McCulloch v. Maryland (1819)
Gibbons v. Ogden (1824)
Eakin v. Raub (1825)

Taney and Civil War Courts (1836–1888)

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge (1837)
Cooley v. Board of Wardens (1852)
Dred Scott v. Sandford (1857)
Prize Cases (1863)
Ex parte Milligan (1866)
Mississippi v. Johnson (1867)
Ex parte McCardle (1869)
The Slaughterhouse Cases (1873)
Munn v. Illinois (1877)
Stone v. Mississippi (1880)

Conservative Court Eras (1889–1937)

In re Neagle (1890)
United States v. E. C. Knight Co. (1895)
Pollock v. Farmers' Loan & Trust Co. (1895)
Allgeyer v. Louisiana (1897)
Champion v. Ames (1903)
McCray v. United States (1904)
Lochner v. New York (1905)
Muller v. Oregon (1908)
Coyle v. Smith (1911)
Hammer v. Dagenhart (1918)
State of Missouri v. Holland (1920)
Stafford v. Wallace (1922)
Bailey v. Drexel Furniture Co. (1922)
Adkins v. Children's Hospital (1923)
Ex parte Grossman (1925)
Myers v. United States (1926)
McGrain v. Daugherty (1927)
Home Building & Loan Assn. v. Blaisdell (1934)
Nebbia v. New York (1934)
A. L. A. Schechter Poultry Corp. v. United States (1935)
Humphrey's Executor v. United States (1935)
United States v. Butler (1936)

Roosevelt and World War II Court Eras (1937–1953)

West Coast Hotel v. Parrish (1937)
National Labor Relations Board v. Jones & Laughlin Steel Corporation (1937)
Steward Machine Co. v. Davis (1937)
Sonzinsky v. United States (1937)
United States v. Darby (1941)
Wickard v. Filburn (1942)
Korematsu v. United States (1944)
Southern Pacific Company v. Arizona (1945)
United States v. Causby (1946)
Youngstown Sheet & Tube Co. v. Sawyer (1952)

The Warren Court Era (1953–1969)

Berman v. Parker (1954)
Williamson v. Lee Optical Company (1955)
Watkins v. United States (1957)
Barenblatt v. United States (1959)
Baker v. Carr (1962)
Heart of Atlanta Motel, Inc. v. United States (1964)
South Carolina v. Katzenbach (1966)
Powell v. McCormack (1969)

Republican Court Eras (1969–)

Gravel v. United States (1972)

United States v. Nixon (1974)

Murphy v. Ford (1975)

Michelin Tire Corp. v. Wages (1976)

Complete Auto Transit v. Brady (1977)

Hunt v. Washington State Apple Advertising Commission (1977)

Penn Central Transportation Company v. City of New York (1978)

United States v. 564.54 Acres of Land (1979)

Dames & Moore v. Regan (1981)

Immigration and Naturalization Service v. Chadha (1983)

Garcia v. San Antonio Metropolitan Transit Authority (1985)

Maine v. Taylor (1986)

Bowsher v. Synar (1986)

South Dakota v. Dole (1987)

Nollan v. California Coastal Commission (1987)

South Carolina v. Baker (1988)

Morrison v. Olson (1988)

Davis v. Michigan Dept. of Treasury (1989)

New York v. United States (1992)

Lucas v. South Carolina Coastal Council (1992)

Lujan v. Defenders of Wildlife (1992)

Nixon v. United States (1993)

Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon (1994)

United States v. Lopez (1995)

U.S. Term Limits, Inc. v. Thornton (1995)

BMW of North America v. Gore (1996)

Clinton v. Jones (1997)

Printz v. United States (1997)

United States v. United States Shoe Corp. (1998)

Clinton v. City of New York (1998)

Alden v. Maine (1999)

United States v. Morrison (2000)

Crosby v. National Foreign Trade Council (2000)

Bush v. Gore (2000)

Hamdi v. Rumsfeld (2004)

Granholm v. Heald (2005)

Gonzales v. Raich (2005)

Kelo v. City of New London (2005)

Arizona v. United States (2012)

National Federation of Independent Business v. Sebelius (2012)

Zivotofsky v. Kerry, Secretary of State (2015)

Horne v. Department of Agriculture (2015)

Murphy v. National Collegiate Athletic Association (2018)

Sveen v. Melin (2018)

South Dakota v. Wayfair (2018)

Gundy v. United States (2019)

Trump v. Mazars; Trump v. Deutsche Bank AG (2020)

Trump v. Vance (2020)

National Pork Producers Council v. Ross (2023)

Trump v. United States (2024)

TABLES, FIGURES, AND BOXES

Part I

Figure I-1	The Structure and Powers of Government under the Articles of Confederation	5
Table I-1	The Virginia Plan, the New Jersey Plan, and the Constitution	6
Figure I-2	The Separation of Powers/ Checks and Balances System: Some Examples	9

Chapter 1

Figure 1-1	The Processing of Cases	14
Figure 1-2	The American Court System	15
Figure 1-3	A Page from Justice Harry Blackmun's Docket Books	17
Box 1-1	The Amicus Curiae Brief	19
Table 1-1	Methods of Constitutional Interpretation as Applied to the Issue of State-Imposed Congressional Term Limits	25
Table 1-2	Precedents Overruled, 1953–2022 Terms	32
Figure 1-4	Percentage of Cases in Which Each Chief Justice Voted in the Liberal Direction, 1953–2022 Terms	36
Figure 1-5	Court Decisions on Economics and Civil Liberties, 1953–2022 Terms	37
Table 1-3	Percentage of Votes to Invalidate Laws as Unconstitutional, 2005–2022 Terms	38
Table 1-4	Reporting Systems	45

Part II

Chapter 2

Table 2-1	Presidential Nominees to the Supreme Court Rejected by the Senate	60
Box 2-1	Jurisdiction of the Federal Courts as Defined in Article III	61
Figure 2-1	The Federal Court System under the Judiciary Act of 1789	62
Box 2-2	Aftermath . . . *Marbury v. Madison*	71
Table 2-2	Major Controversies over Judicial Review	77
Box 2-3	Judicial Review in Global Perspective	84
Table 2-3	A Sample of Congressional Proposals Aimed at Limiting or Eliminating the U.S. Supreme Court's Appellate Jurisdiction in the Wake of Controversial Constitutional Decisions	88
Figure 2-2	Maps of Districts in Tennessee, 1901 and 1950	96
Box 2-4	Aftermath . . . Walter Nixon	104
Box 2-5	Justice Brandeis, Concurring in *Ashwander v. Tennessee Valley Authority*	115

Chapter 3

Table 3-1	U.S. Supreme Court Justices Who Served in the U.S. Congress or in State Legislatures	124
Table 3-2	Duly Elected Members of Congress Excluded	125

Box 3-1	Aftermath . . . Adam Clayton Powell Jr.	130
Table 3-3	Speech or Debate Clause Cases after *Gravel v. United States*	138
Box 3-2	Aftermath . . . Mike Gravel	139
Table 3-4	Sources of Congressional Power	140
Box 3-3	Jefferson and Hamilton on the Bank of the United States	143
Figure 3-1	The History of the First and Second Banks of the United States	145
Box 3-4	Aftermath . . . James McCulloch and the Second National Bank	150
Box 3-5	Investigations of "Un-Americanism"	157
Table 3-5	White and Nonwhite Voter Registration Statistics, 1960, 1964, 1970, 2000	170

Chapter 4

Box 4-1	Aftermath . . . *Bush v. Gore*	190
Box 4-2	Line of Succession	193
Table 4-1	An Overview of Doctrine on Presidential Immunity from the Judicial Process	230
Box 4-3	Aftermath . . . *Clinton v. Jones*	237
Box 4-4	Nixon Pardon Proclamation	250

Chapter 5

Table 5-1	The Court's Decisions in *Panama* and *Schechter Poultry*	260
Table 5-2	Powers Delegated by Congress to Select Agencies	261
Box 5-1	Aftermath . . . Lambdin P. Milligan	285
Box 5-2	Aftermath . . . Fred Korematsu	291
Table 5-3	Cases Growing Out of the War on Terrorism	308

Part III

Table III-1	The Constitutional Allocation of Government Power	320

Chapter 6

Table 6-1	A Comparison of Dual and Cooperative Federalism	325
Table 6-2	Doctrinal Cycles of Nation-State Relations	326
Table 6-3	Selected Events Leading to the Civil War	331
Table 6-4	From the Marshall Court to the Taney Court: Personnel and Partisan Changes	332
Table 6-5	Examples of Domestic Policy Preemption Decisions	374

Chapter 7

Box 7-1	Aftermath . . . Reuben Dagenhart	404
Figure 7-1	The Great Depression and Political Change	406
Box 7-2	New Deal Legislation	407
Box 7-3	The Four Horsemen	408
Box 7-4	The Supreme Court and the New Deal	410
Table 7-1	Supreme Court Decisions and New Deal Programs	410
Figure 7-2	Public Support for Roosevelt's 1937 Court-Packing Plan	417
Box 7-5	Excerpts from the White House Broadcast, March 9, 1937	417
Table 7-2	Supreme Court Expansion of the Commerce Powers, 1937–1942	425
Box 7-6	Aftermath . . . Heart of Atlanta Motel	436
Table 7-3	Support for Expansive Federal Commerce Power in Key Cases after *Garcia*	438
Box 7-7	Aftermath . . . *United States v. Morrison*	448
Table 7-4	Evolution of Interstate Commerce Doctrine	449
Table 7-5	Examples of Supreme Court Decisions Striking Down State and Local Restrictions on Interstate Commerce	478

Chapter 8

Box 8-1	Direct and Indirect Taxes: Apportionment versus Geographical Uniformity	488
Table 8-1	Direct and Indirect Taxing Methods Example	488
Figure 8-1	Federal Tax Revenues: The Impact of the Sixteenth Amendment	495

Part IV

Chapter 9

Box 9-1	Aftermath . . . The Yazoo Lands Controversy	559
Box 9-2	Daniel Webster	565

Chapter 10

Table 10-1	The Legal Tools of the Laissez-Faire Courts, 1890s to 1930s: Some Examples	583
Box 10-1	The Brandeis Brief	606
Table 10-2	The Supreme Court: From *Bunting* to *Adkins*	611

Chapter 11

Box 11-1	Aftermath . . . *Lucas v. South Carolina Coastal Council*	646
Box 11-2	Aftermath . . . *Kelo v. City of New London*	659

PREFACE

THREE DECADES have passed since *Constitutional Law for a Changing America: Institutional Powers and Constraints* 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, Did William Marbury receive his commission? What happened to Fred Korematsu? Is the Heart of Atlanta Motel still in operation?—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 twelfth edition, we have strengthened the distinctive features of the earlier versions by ensuring that the scope and content of the volume is up-to-date, comprehensive, and accessible to readers. The enduring issues of American constitutional law continue to be highlighted prominently alongside more recent innovations in the Supreme Court's policies.

Among the additions are cases that touch on executive, legislative, and judicial power, as well as federalism. Thus, for example, in Chapter 2 we revisit the decision in *Lujan v. Defenders of Wildlife*, a case that presents the question of when litigants have legal standing to go to court. Likewise, Chapter 4 excerpts *Trump v. United States*, the Court's recent decision concerning the immunity from legal liability that presidents enjoy when engaged in official acts. *Sonzinsky v. United* States, presented in Chapter 8, is an older case that speaks to a policy issue of more recent concern, the control of gun violence. Here, the Court addresses whether Congress can use its taxing power as a way of discouraging the use of weapons commonly used in criminal activity. Finally, we include in Chapter 7 one of the Court's latest decisions on the dormant commerce clause. In *National Pork Producers Council v. Ross*, the justices resolve a clash between a state's right to establish rules for the sale of products within a state and the national interest in protecting against states interfering with interstate commerce.

We continue to incorporate classic cases, and each and every excerpted opinion has been reviewed with a fresh eye. Some opinions have been streamlined to improve readability, while others have been expanded to ensure that they appropriately underscore 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. 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. The "Aftermath" boxes remain an important device for conveying the real-world consequences of the Court's decisions. Photographs—both historic and contemporary—have long been an inviting feature of the text, and we have included a number of new images and replaced several others.

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 arguments and ineffective ones. 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 invites 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 eleven editions, 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, John Gruhl, 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, Seth Barrett Tillman, 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 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 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, Scott Greenan, and most recently Anna Villarruel. 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. Scott guided us carefully through much of this edition, and we are thrilled that Anna has now taken on these duties with the same energy and dedication that we have always found among CQ's staff. 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, Colleen Brennan. 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 production editors Aparajita Srivastava and Astha Jaiswal, and Cassie Carey, the editorial associate who worked on photo acquisition and other forms of author support. They 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.

L.E., St. Louis, MO
K.T.M., Chapel Hill, NC
T.G.W., Atlanta, GA

ABOUT THE AUTHORS

Lee Epstein (PhD, Emory University) is the Ethan A. H. Shepley Distinguished University Professor at Washington University in St. Louis. She is a fellow of the American Academy of Arts and Sciences and the American Academy of Political and Social Science. She is author, coauthor, and/or editor of nineteen books, including *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th edition, with Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker and *The Choices Justices Make* with Jack Knight, which won the C. Herman Pritchett Award for the best book on law and courts. Recent books/monographs include *The Behavior of Federal Judges* with William M. Landes and Richard A. Posner, *An Introduction to Empirical Legal Research* with Andrew D. Martin, *The Oxford Handbook of U.S. Judicial Behavior* with Stefanie A. Lindquist, and *The Strategic Analysis of Judicial Behavior: A Comparative Perspective* with Keren Weinshall.

Kevin T. McGuire (PhD, The Ohio State University) is Professor of Political Science at the University of North Carolina at Chapel Hill. A former Fulbright Scholar at Trinity College, Dublin, he is the author of *Understanding the U.S. Supreme Court: Cases and Controversies* and *The Supreme Court Bar: Legal Elites in the Washington Community*. He is the editor of *New Directions in Judicial Politics* and coeditor, with Kermit L. Hall, of *Institutions of American Democracy: The Judiciary*.

Thomas G. Walker (PhD, University of Kentucky) is the Goodrich C. White Professor Emeritus at Emory University, where he won several teaching awards for his courses on constitutional law and the judicial process. His book *A Court Divided*, written with Deborah J. Barrow, won the prestigious V. O. Key Award for the best book on Southern politics. He is the author of *Eligible for Execution* and coauthor of *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th edition, with Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth.

PART ONE

THE U.S. CONSTITUTION

An Introduction to the U.S. Constitution

1. UNDERSTANDING THE U.S. SUPREME COURT

iStock.com/DanBrandenburg

AN INTRODUCTION TO THE U.S. CONSTITUTION

ACCORDING TO President Franklin D. Roosevelt, "Like the Bible, it ought to be read again and again."[1] Senator Henry Clay said it "was made not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity."[2] Justice Hugo Black, who famously extoled its "plain words, easily understood,"[3] carried a copy with him virtually all the time. The object of all this admiration? The U.S. Constitution. To be sure, the Constitution has its flaws and its share of detractors, but most Americans take great pride in their charter. President Calvin Coolidge, for example, asserted that "[t]o live under the American Constitution is the greatest political privilege that was ever accorded to the human race."[4] And why shouldn't Americans be proud? It is, after all, the world's oldest written constitution.[5]

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

[1]Fireside chat, March 9, 1937.

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

[3]Hugo L. Black, "The Bill of Rights," *New York University Law Review* 35 (1960): 874.

[4]Dinner at the White House, on December 12, 1924.

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

THE ROAD TO THE U.S. CONSTITUTION

While the fledgling United States was fighting for its independence from England, it was being run (and the war conducted) by the Continental Congress. Although this body had no formal authority, it met in session from 1774 through the end of the war in 1781, establishing itself as a de facto government. But it may have been something more than that: About a year into the Revolutionary War, the Continental Congress took steps toward nationhood. On July 2, 1776, it passed a resolution declaring the "United Colonies free and independent states." Two days later, on July 4, it formalized this proclamation in the Declaration of Independence, in which the nation's founders used the term *United States of America* for the first time.[6] But even before the adoption of the Declaration of Independence, the Continental Congress had selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee labored for several months to produce a proposal for a national charter, the Articles of Confederation.[7] Congress passed the proposal and submitted it to the states for ratification in November 1777. Ratification was achieved in March 1781, when Maryland—a two-year holdout—gave its approval.

The Articles of Confederation, however, had little effect on the way the government operated; instead, the

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

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

articles more or less institutionalized practices that had developed under the Continental Congress. Rather than provide for a compact between the people and the government, the 1781 charter institutionalized "a league of friendship" among the states, an agreement that rested on strong notions of state sovereignty. Indeed, the Declaration of Independence referenced "the thirteen *united* States of America," the lowercase "u" serving as a self-conscious reflection of a joint pronouncement of individual states, rather than an assertion of national awareness. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it, not from the people.

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

- Because it allowed Congress only to requisition funds and not to tax, the federal government was virtually broke. Lacking any formal power to compel states to provide the requested revenue, Congress frequently found that its requests for funds went unheeded. Indeed, from 1781 to 1783 the national legislature requested $10 million from the states and received only $1.5 million. Given the foreign debts the United States had accumulated during the Revolution, this problem was particularly troublesome.

- Because Congress lacked any concrete way to regulate foreign commerce, treaties between the United States and other countries were of limited value. Some European nations (e.g., England and Spain) took advantage by imposing restrictions on trade that made it difficult for America to export goods.

- Because the government lacked coercive power over the states, cooperation among them dissipated quickly. The states resorted to protectionism—policies designed to aid a local economy by making interstate commerce more expensive. By discouraging the benefits of free trade, states ended up hurting one another economically. In short, they acted more like thirteen separate countries than a union or even a confederation.

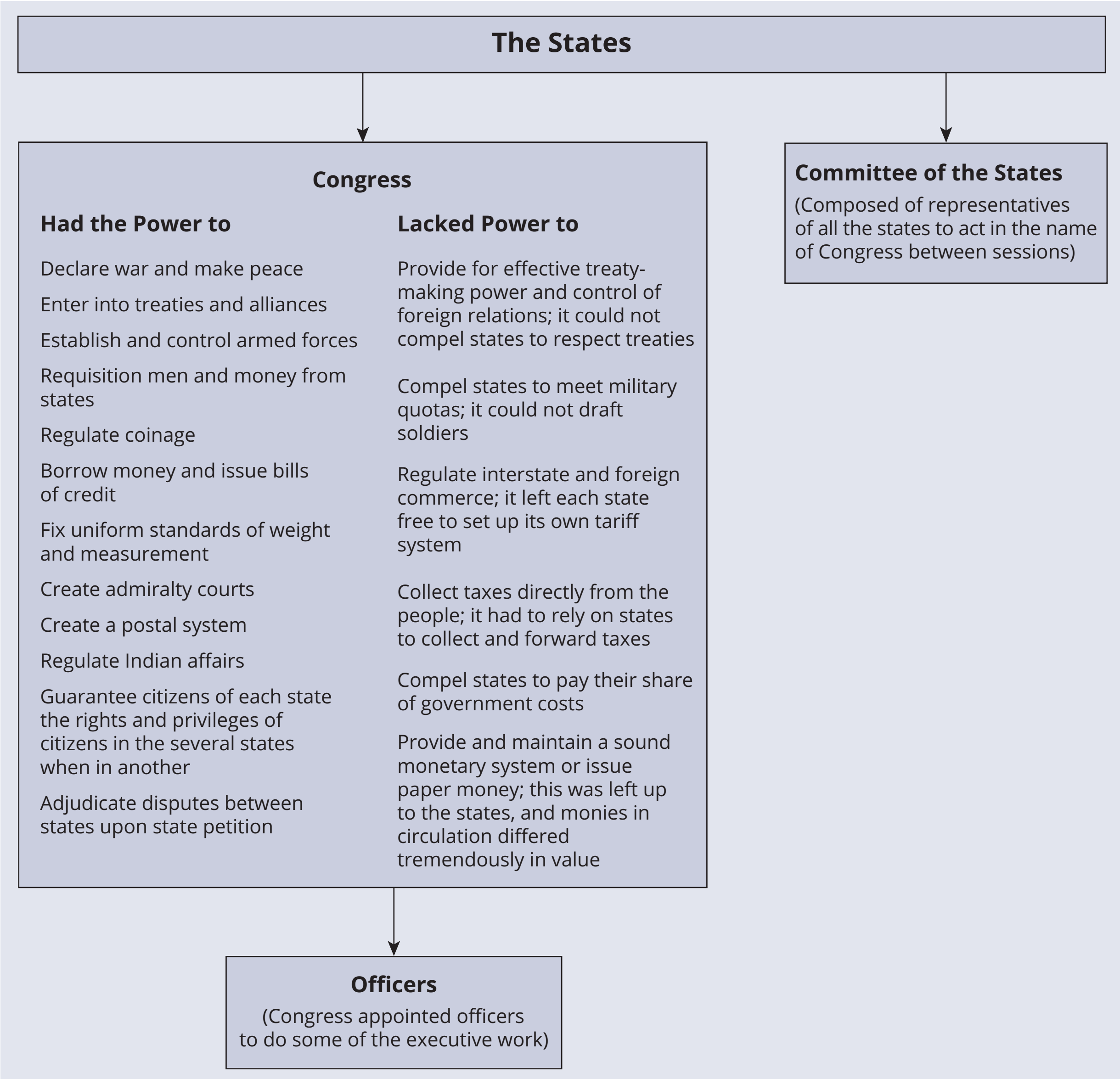
- Because the exercise of most national authority required the approval of nine states and because the passage of amendments required unanimity, the articles stymied Congress. Indeed, given the divisions among the states at the time, the approval of nine states for any action of substance was rare, and the required unanimity for amendment was never obtained.

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

In the mid-1780s, as the articles' shortcomings were becoming more and more apparent, interest in revising the system of government began to take shape. In 1785, hoping to facilitate interstate trade, representatives of Maryland and Virginia met at George Washington's estate to hammer out an agreement regulating commerce along their mutual waterway of the Potomac River. Eager to capitalize on that momentum, those states proposed a national conference to "remedy defects of the federal government." That session, held in Annapolis in September 1786, included representatives from only five states, but among its attendees were James Madison of Virginia and Alexander Hamilton of New York. That convention urged the states to send delegations to another meeting scheduled for the following May in Philadelphia. Their plea could not have come at a more opportune time. Just the month before, a former Revolutionary War captain, Daniel Shays, had led disgruntled farmers in an armed rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers.

Shays' Rebellion was suppressed by state forces, but it was seen as yet another sign that the Articles of Confederation needed amending. In February 1787

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



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

Congress issued a call for a convention to reevaluate the current national system. It was clear, however, that Congress did not want to scrap the articles; in fact, it stated that the delegates were to meet "for the sole and express purpose of revising the Articles of Confederation."

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

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

The delegates had much to accomplish during the convention period. Arguments between large states and small states over the structure of the new government and its relationship to the states threatened to deadlock the meeting. Indeed, it is miraculous that the delegates were able to frame a new constitution, which they did in just four months. One can speculate that the founders succeeded in part because they were able to close their meetings to the public, a feat almost inconceivable today; a contemporary convention of the states would doubtless receive extensive media coverage. Moreover, it is hard to imagine that delegates from fifty states could agree even to frame a new charter, much less do it in four months.

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

These questions have been the subject of lively debates among scholars. Many agree with historian Melvin I. Urofsky, who wrote of the Constitutional Convention, "Few gatherings in the history of this or any other country could boast such a concentration of talent." And, "despite [the framers'] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment."[8] Indeed, they were an impressive group. Indeed, Thomas Jefferson, who was observing from afar as the U.S. Minister to France, declared,

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

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

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

"I have no doubt that all their other measures will be good and wise. It is really an assembly of demigods."[9] Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—all white men, many of whom had been educated at the country's best schools—skeptics suggest that the document the framers produced was biased in various ways. In 1987 Justice Thurgood Marshall said that the Constitution was "defective from the start," that despite its first words, "We the People," it excluded "the majority of American citizens" because it left out blacks and women. He further alleged that the framers "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[10]

Historian Charles Beard expressed a similar view in his controversial work *An Economic Interpretation of the Constitution of the United States*, which depicts the framers as self-serving. Beard says the Constitution was an "economic document" devised to protect the "property interests" of those who wrote it. Various scholars have refuted this view, and Beard's work, in particular, has been largely negated by other studies.[11] Still, by today's standards it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class.

Given these charges, how has the Constitution survived for so long, especially considering the U.S. population's increasing diversity? The answer lies in part with the Supreme Court, which generally has analyzed the document in light of its contemporary context. That is, some justices have viewed the Constitution—often written in abstract terms that embrace broad principles—as a living document and have sought to adapt it to their own times. In addition, the founders provided for an amending process to ensure the document's continuation. That we can alter the Constitution to fit changing needs and expectations is obviously important. Thus, for example, Americans have amended the Constitution to abolish slavery and guarantee the citizenship rights of Blacks, to grant women the right to vote, to impose—and repeal—Prohibition, and to limit presidential tenure.

This is not to suggest that controversies surrounding the Constitution no longer remain. To the contrary, charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome and requires extraordinary majorities that almost never exist. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers' biases.

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

UNDERLYING PRINCIPLES OF THE CONSTITUTION

The framers of the Constitution were faced with a quandary: how to construct a government that both enlarged and limited national power. Being well versed in the political philosophies of the Enlightenment, the framers drew a blueprint that was clearly informed by the ideas of the leading lights of their age, writers such as Locke, Montesquieu, and Rousseau. That influence is evident in several fundamental principles that underlie, but are not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers/checks and balances system, which governs relations among the branches of government; federalism, which governs relations between the states and the national government; and the principle of individual rights and liberties, which governs relations between the government and the people.

[9]Letter from Thomas Jefferson to John Adams, 30 August 1787, https://founders.archives.gov/documents/Jefferson/01-12-02-0075.

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

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

The Separation of Powers/ Checks and Balances System

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

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

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

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

But institutional powers are only one side of the coin. We should also consider the other side—constraints on those powers. As depicted in Figure I-2, the framers not only endowed each branch with distinct power and authority over its own sphere but also provided explicit checks on the exercise of those powers such that each branch can impose limits on the primary functions of the others. In addition, the framers included balances by making the institutions responsible to different sets of constituencies and selecting them on different timetables. They took these steps because they feared the concentration and abuse of power.

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

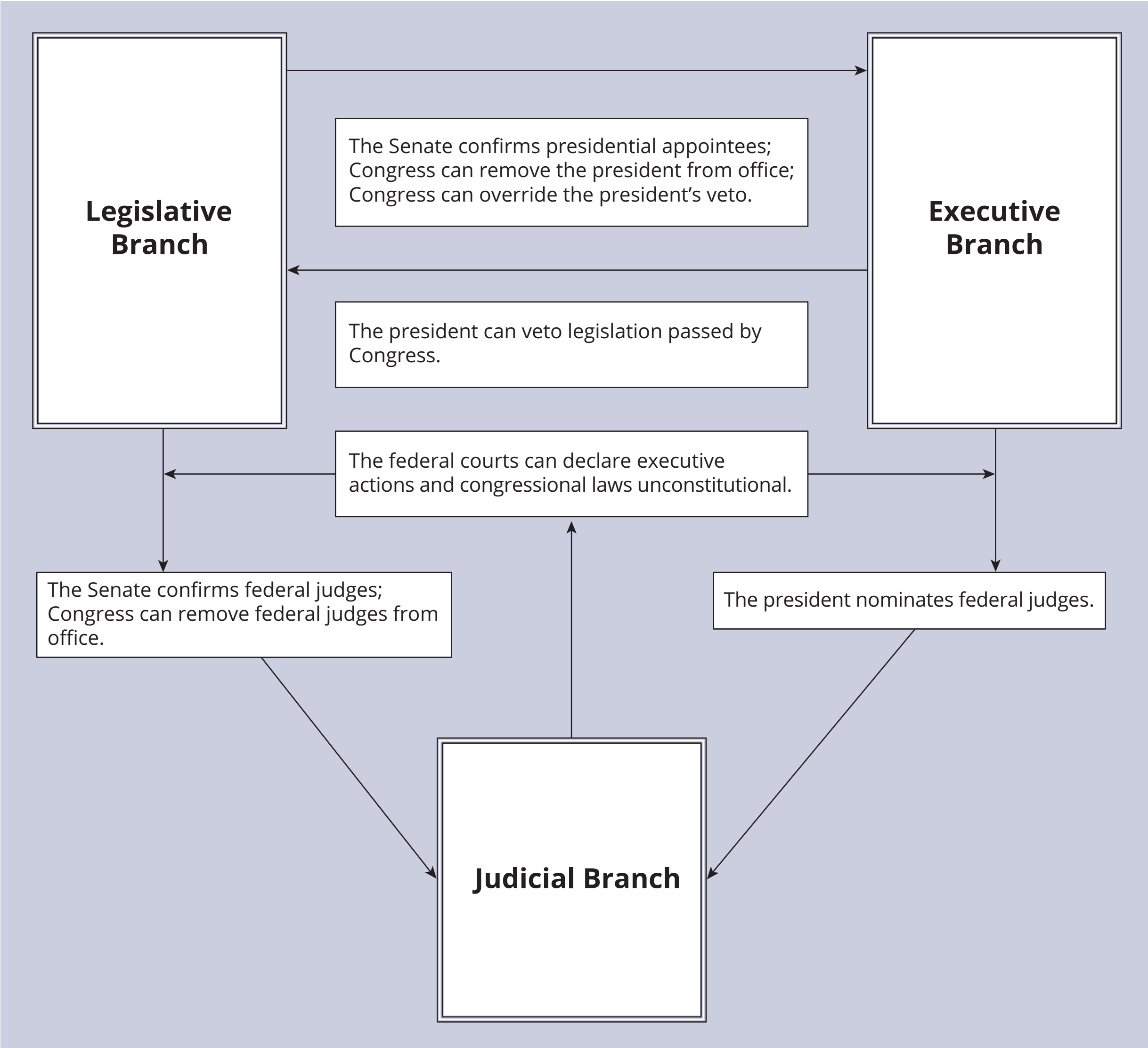
- May the president authorize the use of military commissions to try suspected terrorists?
- Does the president enjoy immunity from criminal liability for official acts?
- May Congress write into laws legislative veto provisions by which to nullify actions of the executive branch?
- May Congress pass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

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

Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the federal government and the states. As already noted, the

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



national legislature was not just weak—it was more or less an apparatus controlled by the states. After all, states had set up the Articles of Confederation, and, therefore, the states empowered Congress.

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

- The Constitution grants certain legislative, executive, and judicial powers to the national government. Those not granted to the national government are reserved to the states.

- The Constitution makes the national government supreme. The Constitution, all laws passed pursuant to it, and treaties are the supreme law of the land. American citizens, most of whom are also state citizens, and state officials owe their primary allegiance to the national government.

- The Constitution denies some powers to both national and state governments, some only to the national government, and still others only to the state governments.

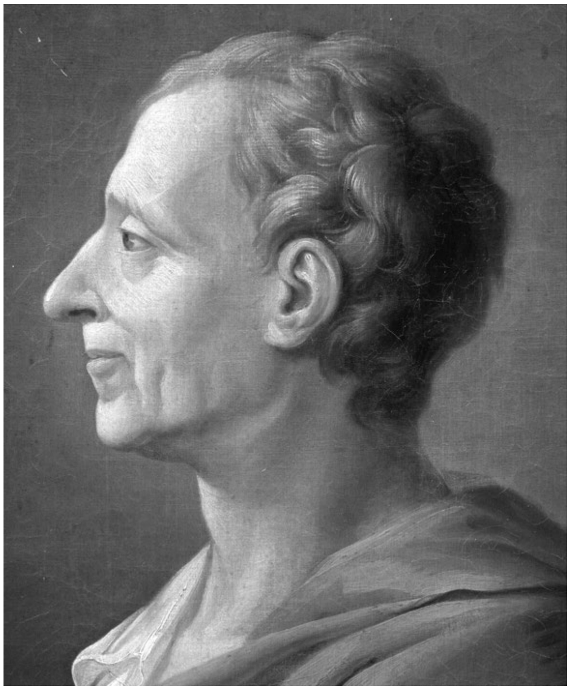
In dividing authority between a national government and smaller constituent governments, the framers drew inspiration from Montesquieu's *The Spirit of the Laws* (1748). Montesquieu proposed "an assemblage of societies, that constitute a new one"; those individual societies (or states) could be responsive to local concerns, while the larger government could promote national security. Although Americans today tend to take this system of federalism for granted, it was quite novel when it was introduced. Indeed, it was perhaps the most innovative feature of the Constitution. As James Madison later explained, "The compound [government] is without a model, and to be explained by itself, not by similitudes or analogies."[12]

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

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

Individual Rights and Liberties

For many of the framers, the most important purpose of the new Constitution was to safeguard individual rights and



Maarten van Vliet, via Wikimedia Commons

Charles-Louis de Secondat, Baron de Montesquieu, the eighteenth-century French political philosopher whose treatise *The Spirit of the Laws* argued that liberty was best protected in a government that divided power and permitted policy makers to check one another. His ideas regarding the separation of powers and federalism were a principal influence on the framers.

liberties. They created a limited government that would wield only those powers delegated to it and that could be checked by its own component parts—the states and the people. The majority of the founders felt it unnecessary to load the Constitution with specific individual rights, such as those later spelled out in the Bill of Rights. As Alexander Hamilton put it, "The Constitution is itself . . . a Bill of Rights." Under it, the government could exercise only those functions specifically bestowed on it; all other rights remained with the people. Stated differently, by enumerating national power and explicitly listing what it *could* do, the Constitution implicitly conveyed what the new government *could not* do. As Hamilton wrote, "[W]hy declare that things shall not be done which there is no power to do?" For his part, James Madison was skeptical that a Bill of Rights would actually curb governmental excesses. States had such provisions in their own constitutions, and these "parchment barriers" had often proved to be ineffective at limiting governmental oppression; they were, he suggested, "greatly overrated."

For this reason and possibly others—some scholars argue that the framers were too exhausted to continue—the

---

[12]Quoted in "James Madison, Outline," September 1829, in *The Founders' Constitution*, eds., Philip B. Kurland and Ralph Lerner (Chicago, IL: University of Chicago Press, September 1987), https://press-pubs.uchicago.edu/founders/documents/v1ch7s27.html.

Constitution was sent to the states without a list of rights. That omission became the source of major controversy and served as the vehicle by which states exacted a compromise over the Constitution's ratification.

By January 1788 four states had ratified the Constitution, but then the pace began to slow. A movement opposed to ratification was growing in size and marshaling arguments to deter state convention delegates. What these opponents, the so-called Anti-Federalists, most feared was the Constitution's new balance of powers. They believed that strong state governments would provide the best defense against the accumulation of too much power by the national government and that the Constitution tipped the scales the other way. These fears were countered by the self-labeled Federalists, who favored ratification of the Constitution.

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*—as we shall see throughout this book—continue to provide great insight into the objectives and intent of the nation's founders.[13]

The debates between the Federalists and their opponents were often highly philosophical, with emphasis on the appropriate roles and powers of national institutions. Within the states, however, ratification drives were full of the stuff of ordinary politics—deal making. The Massachusetts ratifying convention provides a case in point. After three weeks of debate among delegates, Federalist leaders realized that they would achieve victory only if they could obtain Governor John Hancock's support. They called on Hancock at home and proposed that he endorse ratification on condition that a series of amendments be drawn up for consideration by Congress. The governor agreed as long as he would become president of the United States if Virginia failed to ratify or if George Washington refused to serve. Or he would accept the vice presidency. With the deal cut, Hancock went to the convention to propose a compromise—the ratification of the Constitution with amendments. The delegates went along with the plan, making Massachusetts the sixth state to ratify.[14]

[13] *The Federalist Papers* are available at https://www.congress.gov/resources/display/content/The+Federalist+Papers.

[14] Joseph T. Keenan, *The Constitution of the United States* (Chicago, IL: Dorsey Press, 1988), 32–33.

This compromise—the call for a bill of rights—caught on, and Madison began to advocate it whenever close votes were likely. As it turned out, he and other Federalists needed to mention the point quite often: of the nine 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 an addition. In the Virginia ratification debates, the Anti-Federalist Patrick Henry made an impassioned plea for a Bill of Rights, arguing that the Constitution should "[s]ecure to us the great important rights of humanity." Other states began revising their own wish lists of specific rights they wanted included in the document.[15]

The Federalists realized that if they did not accede to state demands, either the Constitution would not be ratified or a new constitutional convention would be necessary. Because neither alternative was particularly attractive, it was agreed that the document would be amended as soon as the new government came into power. And with that promise came the ratification of the Constitution by the requisite number of states just a year after it was written. The ratification of the Bill of Rights, on December 15, 1791, quieted those who had voiced objections. But the guarantees these ten amendments provide continue to serve as fodder for debate and, most relevant here, for Supreme Court litigation. Many of these debates involve the construction of specific guarantees, such as free speech and free exercise of religion, under which individuals seek relief when governments allegedly infringe on their rights.

The debates also involve clashes between the authority of the government to protect the safety, health, morals, and general welfare of citizens and the right of individuals not to be deprived of their liberty without due process of law. These disputes arise from specific and often difficult questions. For example, may government force a business owner to pay employees a certain wage, or does that requirement infringe on the employer's liberty? May government force home owners to vacate their houses if it needs the property to construct a road and is willing to pay the owners "fair market value" for their property, or does that interfere with a right contained in the Fifth Amendment? The answers to these questions and others like them reveal the contours of government power in relation to individual rights.

[15] Alpheus T. Mason, ed., *The States Rights Debate*, 2nd ed. (New York: Oxford University Press, 1972), 92–93.

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 of 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 2023 term,[1] more than four thousand cases arrived at the Supreme Court's doorstep, but the justices decided only fifty-five with signed opinions.[2] 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? What about those the Court agrees to resolve?

Deciding to Decide: The Supreme Court's Caseload

As the figures for the 2023 term indicate, the Court heard and decided only about 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

[1]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.

[2]The number of cases filed was calculated by the authors from the data at https://www.supremecourt.gov/docket/docket.aspx. The number of signed opinions is available at https://www.supremecourt.gov/opinions/slipopinion/23 and https://empiricalscotus.com/2023-stats/.

Figure 1-1 The Processing of Cases

OCCURS THROUGHOUT TERM

Court Receives Requests for Review (4,000–6,000)
- appeals (e.g., suits under the Voting Rights Acts)
- certification (requests by lower courts for answers to legal questions)
- petitions for writ of certiorari (most common request for review)
- requests for original review

OCCURS THROUGHOUT TERM

Cases Are Docketed
- original docket (cases coming under its original jurisdiction)
- appellate docket (all other cases)

OCCURS THROUGHOUT TERM

Justices Review Docketed Cases
- chief justice prepares discuss lists (approximately 20–30 percent of docketed cases)
- chief justice circulates discuss lists prior to conferences; the associate justices can add but not subtract cases

THURSDAYS OR FRIDAYS

Conferences
- selection of cases for review, for denial of review
- Rule of Four: four or more justices must agree to review most cases

BEGINS MONDAYS AFTER CONFERENCE

Announcement of Action on Cases

Clerk Sets Date for Oral Argument
- usually not less than three months after the Court has granted review

Attorneys File Briefs
- appellant must file within forty-five days from when the Court granted review
- appellee must file within thirty days of receipt of appellant's brief

SEVEN TWO-WEEK SESSIONS, FROM OCTOBER THROUGH APRIL ON MONDAYS, TUESDAYS, WEDNESDAYS

Oral Arguments
- Court typically hears two cases per day, with each case usually receiving one hour of the Court's time

THURSDAYS OR FRIDAYS

Conferences
- discussion of cases
- tentative votes

Assignment of Majority Opinion

Drafting and Circulation of Opinions

Issuing and Announcing of Opinions

Reporting of Opinions
- *U.S. Reports* (U.S.) (official reporter system)
- *Lawyers' Edition* (L.Ed.)
- *Supreme Court Reporter* (S.Ct.)
- *U.S. Law Week* (U.S.L.W.)
- electronic reporter systems (WESTLAW, LEXIS)
- Supreme Court website *(http://www.supremecourt.gov/)*

for review had risen to 6,302—nearly nine times greater than in 1930.[3]

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

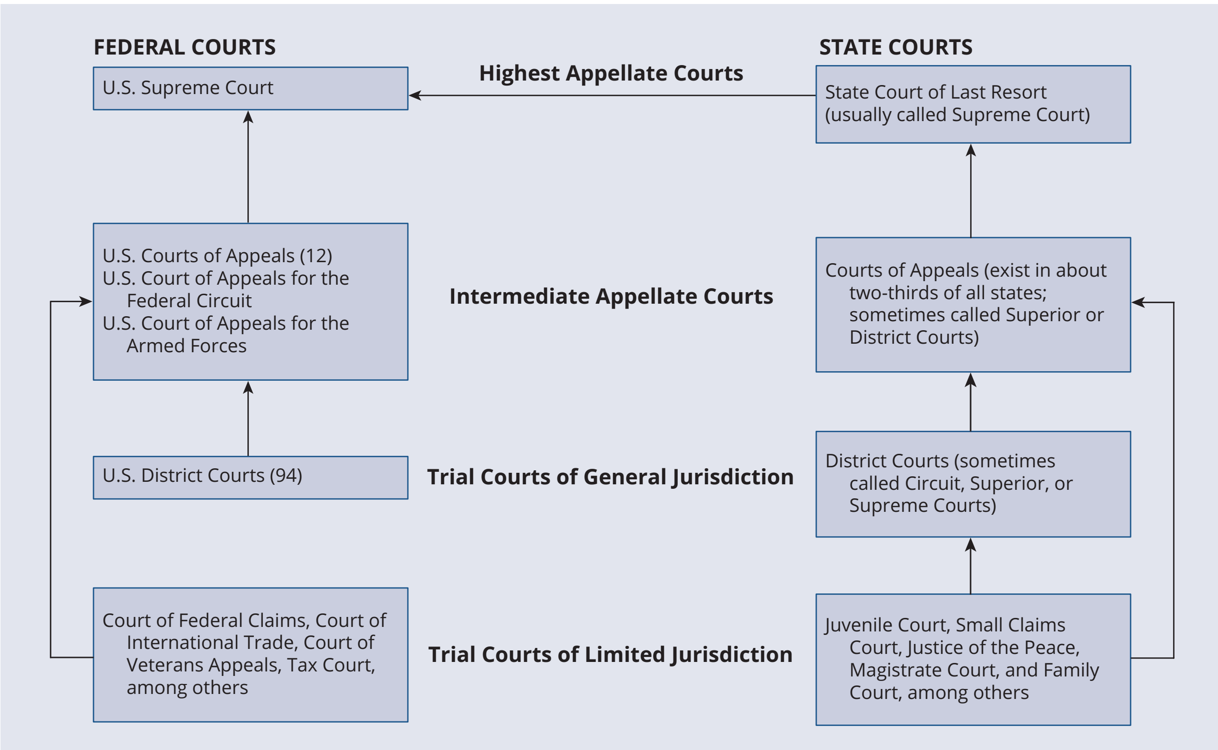
Cases come to the Court in one of four ways: either by a request for review under the Court's original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (*see Figure 1-1*). Chapter 2 explains more about the Court's original jurisdiction, as it is central to understanding the landmark case of *Marbury v. Madison* (1803). Here, it is sufficient to note that original cases are those that 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

[3]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 1-2 The American Court System



their dispute: appeal as a matter of right, certification, or certiorari. Cases falling into the first category (normally called "on appeal") involve issues Congress has determined are so important that a ruling by the Supreme Court is necessary. Before 1988 these included cases in which a lower court declared a state or federal law unconstitutional or in which a state court upheld a state law challenged on the ground that it violated the U.S. Constitution. Although the justices were 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—fewer than one per decade.[4] 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 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 60 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 petitions—about four to six thousand in recent terms—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 1/8-by-9 1/4-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines." Exceptions are made for litigants who cannot afford to pay the Court's administrative fees, currently $300. The rules governing these petitions, known as *in forma pauperis* briefs, are somewhat looser, allowing indigents to submit briefs on 8½-by-11-inch paper. The Court's major concern, or so it seems, is that the document "be legible."[5]

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 (2024), 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.[6] Upon receiving the preliminary or pool memos, the

[4]See Marcia Coyle, "Supreme Court Asked to Take Certified Question for Only Fifth Time in Six-Plus Decades," *National Law Journal*, August 3, 2009.

[5]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/2023RulesoftheCourt.pdf.

[6]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://blackmun.wustl.edu. See also Ryan C. Black and Christina L. Boyd, "The Role of Law Clerks in the U.S. Supreme Court's Agenda-Setting Process," *American Politics Research* 40 (2012): 147–173.

individual justices may ask their own clerks for their thoughts about the petitions. The justices then use the pool memos, along with their clerks' reports, as a basis for making their own independent determinations about which cases they believe are worthy of a full hearing.

During this process, the chief justice plays a special role, serving as yet another checkpoint on petitions. Before the justices meet to make case selection decisions—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.[7]

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.

[7]For information on the discuss list, see Ryan C. Black and Christina L. Boyd, "Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process," *Social Science Quarterly* 94 (2013): 1124–1144; and Gregory A. Caldeira and John R. Wright, "The Discuss List: Agenda Building in the Supreme Court," *Law and Society Review* 24 (1990): 807–836.

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, DC.

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, and AFF = affirm the decision of the court below.

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.[8]

Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process. Many cases in the lower courts raise similar legal questions, and when judges reach different conclusions on those issues, there is *conflict*—disagreement among judges about the meaning of federal law. Under Rule 10, the Court considers conflict, such as when a U.S. "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when decisions of state courts of law collide with one another or the federal courts.[9]

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.[10] 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 simply too many.[11]

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."[12]

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.[13] 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

[8]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.

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

[10]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.

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

[12]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.

[13]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 HUDSON GOODWIN | PROCTER LLP
901 New York Avenue, N.W. Washington, D.C. 20001 (202) 346–4000

wsheehan@goodwinprocter.com

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

Counsel for Amici Curiae

the Court will hear the case. This suggests that the Court reacts to the presence of amicus briefs rather than what they have to say. Regardless of whether a brief argues for or against granting review, it is a signal to the justices that the case affects some broader segment of society. Because amicus curiae briefs filed at the certiorari stage are somewhat uncommon—less than 10 percent of all petitions are accompanied by amicus briefs—they do draw the justices' attention. If major organizations are sufficiently interested in an appeal to pay the cost of filing briefs in support of (or against) Court review, then the petition for certiorari is probably worth the justices' serious consideration.

In addition, we have strong reasons to suspect that a third political factor—the ideology of the justices—affects actions on certiorari petitions. Specifically, the members of the Court favor reviewing lower court decisions that run contrary to their preferences. Researchers tell us, for example, that the justices during the liberal period under Chief Justice Earl Warren (1953–1969) were more likely to grant review to cases in which the lower court reached a conservative decision so that they could reverse that legal policy, while those of the moderately conservative Court during the years of Chief Justice Warren E. 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."[14]

The Role of Attorneys

Once the Supreme Court agrees to decide a case, the clerk of the Court informs the parties. Each party presents its side of the dispute to the justices in written and oral arguments.

Written Arguments

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

As is the case for cert petitions, the Court maintains specific rules covering the presentation and format of merits briefs. For example, the briefs of both parties must be submitted in forty copies and may not exceed thirteen thousand 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 is that 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.[15]

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.

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

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

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.[16]

In some important cases, the Court will allocate additional time for argument. In the 2011 term, the Court took the unusual step of 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 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

[16]Recently, however, the Court has adopted the practice of allowing each justice, in order of seniority, the opportunity to ask additional questions at the end of those thirty minutes, which has extended slightly the length of some arguments.

side that receives more questions tends to lose.[17] 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 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 or political advantage.

This system generally works well, and the justices have not experienced many information leaks. One notable exception occurred in the spring of 2022, when the news website Politico published a leaked copy of the draft opinion in *Dobbs v. Jackson Women's Health Organization*, the decision that overturned *Roe v. Wade* (1973). Such a breach of secrecy was virtually unprecedented for an institution whose decisions are ordinarily closely guarded.

After the public announcement of a decision, clerks and even justices have sometimes thrown their own sunshine on the Court's deliberations. *National Federation of Independent Business v. Sebelius* (2012) *(excerpted in Chapters 7 and 8)*, 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.[18]

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 or her 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

[17]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.

[18]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/.

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 factors into account.[19] First and perhaps foremost, the chief tries to equalize the distribution of the Court's workload. After all, 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."[20] 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. In such cases, for example, Chief Justice Roberts disproportionately favored Justice Anthony Kennedy, who was widely regarded as the ideological center of the Court. 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 William J. Brennan Jr. to Byron 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."[21]

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

[19]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.

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

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

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 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.[22] 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 reason is that the justices are obliged to be "principled in their decision-making process." That is, "if they are to have the continued respect of their colleagues, the wider legal community, citizens, and leaders," the Court members cannot follow their own personal preferences, the whims of the public, or other non–legally relevant factors.[23]

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 consulting other jurisdictions.[24]

Table 1-1 provides a brief summary of each method, using the debate over congressional term limits as an example (in what follows, we supply more details). To understand this debate, you should know that several clauses in Article I of the Constitution contain requirements that all prospective members of Congress must meet: A senator must be at least thirty years old, and a representative must be twenty-five years old. Every

[22]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).

[23]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, IL: University of Chicago Press, 1999), 176.

[24]For overviews (and critiques) of these and other approaches, see 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 as Applied to the Issue of State-Imposed Congressional Term Limits

Method	Example
Originalism 1. **Original intent.** Asks what the framers wanted to do.	"The framers would have been shocked by the notion of a state interfering with the ability of the people to choose whom they please to govern them." OR "The framers would have been shocked by the notion of the U.S. Supreme Court interfering with the decision of the people of a state to limit the terms of their representatives and senators."
2. **Original meaning.** Considers what a clause meant to (or how it was understood by) those who enacted it (or at the time of its enactment).	"It would have been more expedient for the framers simply to allow existing state law to define the qualifications for the elected, as they did with the qualifications for voters. But instead by establishing certain qualifications as necessary for office, the framers meant to exclude all others." OR "In the immediate post-ratification period, the qualifications clauses were understood to specify minimum, not exclusive, (dis)qualifications."
Textualism. Places emphasis on what the Constitution says.	"The qualifications clauses establish national, uniform qualifications for federal representatives and senators. Neither provision, on its face, grants either Congress or the states any authority to impose additional qualifications." OR "Nothing in the text of the qualifications clauses excludes states from adopting term limits as a method for rejecting candidates for federal legislative office."
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.	"That election to the national legislature should be open to all people of merit provides a critical foundation for democracy. Allowing individual states to craft their own qualifications for Congress would erode this structure." OR "Although the Constitution does set forth a few nationwide disqualifications for the office of presidential elector, in line with federalism principles, these disqualifications do not prohibit the states from adding any other eligibility requirements. Instead, Article II leaves the states free to establish qualifications for their delegates to the Electoral College."
Stare decisis. Looks to what courts have written about the clause.	"In *Powell v. McCormack,* the Court said that qualifications fixed in Article I are exclusive and unalterable." OR "In *Powell,* the Court said that Congress may not alter the qualifications clauses; it did not limit the authority of the states to impose certain requirements. And, in fact, previous rulings suggest that the states enjoy this very power."
Pragmatism. Considers the effects of various interpretations, suggesting that courts should adopt the one that avoids bad consequences.	"Failure to interpret the qualifications clauses as fixed would encourage states to engage in bad practices, such as adding many more ballot requirements (e.g., barring lawyers from the ballot)." OR "Term limits, which could be eliminated if the qualifications clauses are interpreted as fixed, are an effective solution to the growing problem of long-term, entrenched incumbents—professional legislators who make remaining in office their life's work and thus deprive voters of genuine electoral choices."
Consulting other jurisdictions. Examines practices in the United States and even abroad.	"No state passed term limits provisions in the years following the adoption of the Constitution. Moreover, every Court that has considered the qualifications clauses has concluded that they are fixed." OR "In response to the unprecedented level of incumbent reelection, since 1990 more than 22 million votes have been cast in fifteen states in favor of term limits."

Source: We adopt the framework for this table from Eugene Volokh, "Using the Second Amendment as a Teaching Tool—Modalities of Constitutional Argument," http://www.law.ucla.edu/volokh/2amteach/interp.htm and the briefs and opinions in *U.S. Term Limits, Inc. v. Thornton* (1995).