



CHANGING THE BALANCE OF THE COURT

When strong conservative Samuel Alito joined the Court in 2006, replacing moderate conservative Sandra Day O'Connor, it changed the ideological balance of the Court on a wide range of issues. Because the stakes were so high, the battle in the Senate over his confirmation was contentious and attracted a large audience to his televised testimony before the Judiciary Committee.

Should ideology figure in at all in presidential Supreme Court nominations and Senate confirmation votes? Or are ideological considerations inescapable in appointments to the Supreme Court? If so, how does this affect the practice of democracy in the United States?

THE COURTS

CHAPTER OUTLINE AND LEARNING OBJECTIVES

THE FOUNDATIONS OF JUDICIAL POWER

- 14.1** Describe the constitutional and political foundations of federal judicial power in the United States.

THE FEDERAL COURT SYSTEM: JURISDICTION AND ORGANIZATION

- 14.2** Describe the structure of the federal judiciary.

APPOINTMENT TO THE FEDERAL BENCH

- 14.3** Describe the background of appointees to the federal bench and the process by which they are appointed.

THE SUPREME COURT IN ACTION

- 14.4** Outline the process by which the Supreme Court makes decisions and the factors that influence judicial decision making.

THE SUPREME COURT AS A NATIONAL POLICY MAKER

- 14.5** Evaluate the role of the Supreme Court in national policy making.

The Struggle for Democracy

THE BATTLE FOR THE COURTS

Tension filled the hearing room as Samuel Alito, President Bush's strongly conservative nominee for a position on the U.S. Supreme Court, began testifying before the Senate Judiciary Committee on January 9, 2006. Knowing that federal courts were deciding cases having to do with the most contentious issues of the day—including presidential powers in times of war, affirmative action, gay and lesbian rights, the relationship between church and state, the role of the federal government in relationship to the states, and more—Republican and Democratic partisans and conservative and liberal advocacy groups were mobilized to fight over Alito's nomination. Lurking in the background was the Democrats' threat to filibuster the nomination, meaning that Alito's confirmation would need sixty votes, not a simple majority of fifty-one. Republicans claimed the filibuster could not be used when the Senate was exercising its constitutional "advice and consent" duty on judicial nominations. Most Democrats believed it was the only way to prevent the accession of judges to the federal bench who would threaten hard-won rights and protections, particularly a woman's right to terminate her pregnancy.

Partisan tensions over the judicial filibuster had been festering for years; it began in 2003 when Republicans fell seven votes short of the sixty votes needed to end Democratic filibusters blocking Senate votes on several very conservative Bush federal judicial nominees. Republicans were furious, saying they were ready to proceed with the so-called nuclear option ending filibusters on judicial nominations.¹ Democrats pointed out, in response, that Republicans had blocked many Clinton nominees during the 1990s but had not needed the filibuster because, as the majority, they could stop nominations in the Judiciary Committee, never allowing them to reach the floor for a vote.

The issue was revived when President Bush renominated conservative jurist Priscilla Owen for the Fifth Circuit court in early 2005. When Democrats announced they would again use the filibuster to block the nomination, Republican Majority Leader Bill Frist (R-TN) warned that he would begin the process of outlawing the filibuster for judicial confirmation votes. Democrats countered that they would tie up the business of the Senate for the foreseeable future if Republicans imposed the nuclear option. Partisans on both sides in the Senate and the country were itching for a fight on this issue because they believed the stakes had never been higher. A train wreck loomed.

Into the fray stepped the so-called gang of fourteen, a group of Republican and Democratic moderates who worked out a compromise. Wielding enormous power because their fourteen votes would be decisive on any vote related to this issue, they agreed that the judicial filibuster could be used only in undefined "extraordinary circumstances." Under the agreement, the Senate confirmed the long-delayed nominations of Priscilla Owen and two other nominees but took no action on two other nominees who presumably fit the "extraordinary circumstances" requirement that would allow Democrats to use the filibuster.

The temporary truce held, even when conservative jurist John Roberts was nominated for the post of Chief Justice after the death of Chief Justice William Rehnquist in late 2005, perhaps because he was a conservative replacing another conservative on the Court. Samuel Alito was another matter entirely, however, because he was to replace the retiring Sandra Day O'Connor, a relatively moderate voice and swing vote on the Court who played an important role in protecting abortion rights and affirming the use, under certain circumstances, of affirmative action in higher education admissions. In the end, however, the Democrats were unable to mount much of a challenge to Alito and he was confirmed on January 31, 2006.

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As predicted by almost everyone, Alito's ascension to the Court swung it sharply in a conservative direction on issues ranging from civil rights to environmental protection, regulation of

abortions, class-action lawsuits, and the role of corporations in campaign finance,² all matters examined in this and later chapters. The fundamental balance on the Court was not affected much when Obama nominee Sonia Sotomayor joined the Court in 2009 because she was a liberal replacing a liberal, David Souter, who retired. The same thing was true regarding the appointment of Elena Kagan in 2010; she was a liberal replacing a liberal stalwart, John Paul Stevens, so the balance on the Court was unaffected. The key appointment in determining the balance of power on the Court remained that of Alito replacing O'Connor in 2006, which created a solid conservative 5–4 majority under the able leadership of Chief Justice Roberts. When conservative stalwart Antonin Scalia died in early 2016, it appeared as if the Court might change direction.³ (One judicial scholar has characterized Alito, even more than Scalia, as “the most consistent, solid, and successful conservative on the Court.”⁴) With the death of Scalia, an appointment by Obama would have created a 5–4 liberal majority, so Senate Republicans refused to even hold hearings on his nominee for the Court in hopes that the 2016 election might produce a Republican president and maintain a GOP majority in the Senate, both of which happened. So the Court is likely to remain at least as conservative as it was before Scalia’s death.

In the system of separated powers and federalism created by the framers, the judicial branch, most especially the Supreme Court, assesses, in cases that come before it, the legitimacy of actions taken by the other two branches and by the states in light of the Constitution. It also can decide disputes on the meaning of laws passed by Congress. Although the Supreme Court does not legislate or regulate on its own, its decisions strongly influence the overall shape of federal and state policies in a number of important areas. As such, the Supreme Court is a key national policy maker, and an important political actor in Washington, every bit as much a part of the governing process as the president and Congress.⁵

THINKING CRITICALLY ABOUT THIS CHAPTER

This chapter is about the judicial branch of the federal government, with a special focus on the Supreme Court. We examine how the federal judiciary and Supreme Court are organized, what they do in the American political and government systems, and what effects their actions have on public policies and American democracy.

APPLYING THE FRAMEWORK

You will see in this chapter that the Supreme Court is embedded in a rich *governmental-political linkage-structural environment* that shapes its behavior. The other branches of government impinge on and influence its composition, deliberations, and rulings; *political linkage institutions* such as elections, interest groups, and social movements matter; and structural factors such as economic and social change influence its agenda and decisions.

USING THE DEMOCRACY STANDARD

This chapter describes how an unelected Supreme Court makes important decisions about public policies, raising questions about the degree to which popular sovereignty and majority rule prevail in our system. You will see that the Court often turns its attention to cases that involve issues of political equality and liberty, so essential to the existence of a healthy representative democracy.

THE FOUNDATIONS OF JUDICIAL POWER

14.1 Describe the constitutional and political foundations of federal judicial power in the United States.

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

—U.S. CONSTITUTION, ARTICLE III, SECTION 1

We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution.

—CHIEF JUSTICE CHARLES EVANS HUGHES (1907)

The place of the Court in our system of separation of powers and checks and balances is the result of constitutional provisions, Court interpretations, and the actions and reactions of other political actors. Following is a discussion of the foundations of its most important power, judicial review.

Constitutional Design

The Constitution speaks only briefly about the judicial branch and doesn't provide much guidance about what it is supposed to do or how it is supposed to go about its job. The document says little about the powers of the judicial branch in relationship to the other two federal branches or about its responsibilities in the area of constitutional interpretation. Article III, which establishes the federal judicial branch, is considerably shorter than Articles I and II, which focus on Congress and the president. It creates the office of "chief justice of the United States," it states that judges shall serve life terms, it specifies the jurisdiction of the Supreme Court (to be explained later), and it grants Congress the power to create additional federal courts as needed.

Article III of the Constitution is virtually devoid of detail,⁶ but the few requirements that are stated are very important. For example, the Constitution requires that federal judges serve "during good behavior," which means, in practice, until they retire or die in office, as Chief Justice William Rehnquist did in 2005 at the age of 81. Because impeachment by Congress is the only way to remove federal judges, the decision about who will be a judge is an important one because they are likely to serve for a very long time. Article III also states that Congress cannot reduce the salaries of federal judges once they are in office. This provision was designed to maintain the independence of the judiciary by protecting it from legislative intimidation.

Judicial Review

Extremely interesting is the Constitution's silence about **judicial review**, the long-established power of the Supreme Court to declare state and federal laws and actions null and void when they conflict with the Constitution.⁷ Debate has raged for many years over the question of whether the framers intended that the Court should have this power.⁸

The framers surely believed that the Constitution ought to prevail when other laws were in conflict with it. But did they expect the Supreme Court to make the decisions in this matter? Jefferson and Madison thought that Congress and the president were capable of rendering their own judgments about the constitutionality of their actions. Alexander Hamilton, however, believed that the power of judicial review was inherent in the notion of the separation of powers and was essential to balanced government. As he suggested in *The Federalist* No. 78, the very purpose of constitutions is to place limitations on the powers of government, and only the Court can ensure such limits in the United States. The legislative branch, in particular, is unlikely to restrain itself without the helping hand of the judiciary.

judicial review

The power of the Supreme Court to declare actions of the other branches and levels of government unconstitutional.

There is reason to believe that Hamilton's view was the prevailing one for a majority of the framers.⁹ They were firm believers, for instance, in the idea that there was a "higher law" to which governments and nations must conform. Their enthusiasm for written constitutions was based on their belief that governments must be limited in what they could do in the service of some higher or more fundamental law, such as that pertaining to individual rights. The attitudes of the time, then, strongly supported the idea that judges, conversant with the legal tradition and free from popular pressures, were best able to decide when statutory and administrative laws were in conflict with fundamental law.¹⁰

JUDICIAL REVIEW ESTABLISHED: *MARBURY V. MADISON* Chief Justice John Marshall boldly claimed the power of judicial review for the U.S. Supreme Court in the case of *Marbury v. Madison* in 1803.¹¹ The case began with a flurry of judicial appointments by President John Adams in the final days of his presidency, after his Federalist Party had suffered a resounding defeat in the election of 1800. The apparent aim of these so-called midnight appointments was to establish the federal courts as an outpost of Federalist Party power (federal judges are appointed for life) in the midst of rising Jeffersonian sentiment. After the 1800 election, control of the presidency and the Congress was firmly in Republican hands.

William Marbury was one of Adams's midnight appointments, but he was less lucky than most. His judgeship commission was signed and sealed, but it had not been delivered to him before the new administration took office. Jefferson, knowing what Adams and the Federalists had been up to, ordered Secretary of State James Madison not to deliver the commission. Marbury sued Madison, claiming that the secretary of state was obligated to deliver the commission and asked the Supreme Court to issue a *writ of mandamus*, a legal order commanding Madison to do so.

Marshall faced a quandary. If the Court decided in favor of Marbury, Madison would almost surely refuse to obey, opening the Court to ridicule for its weakness. The fact that Marshall was a prominent Federalist might even provoke the Jeffersonians to take more extreme measures against the Court. But if the Court ruled in favor of Madison, it would suggest that an executive official could defy without penalty the clear provisions of the law.

Marshall's solution was worthy of Solomon. The Court ruled that William Marbury was entitled to his commission and that James Madison had broken the law in failing to deliver it. By this ruling, the Court rebuked Madison. However, the Court simultaneously ruled that it could not compel Madison to comply with the law because the Judiciary Act of 1789, which granted the Court the power to issue writs of mandamus, was unconstitutional. The act was unconstitutional, Marshall said, because it expanded the **original jurisdiction** of the Supreme Court, as defined in Article III.

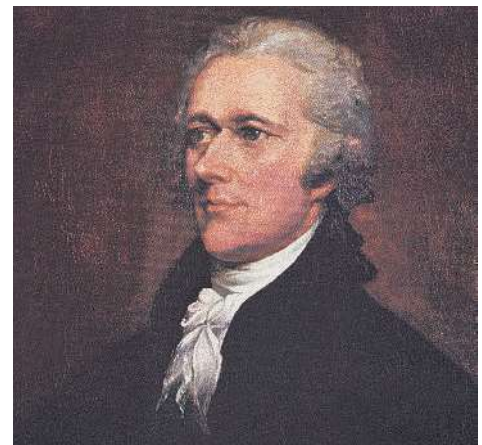
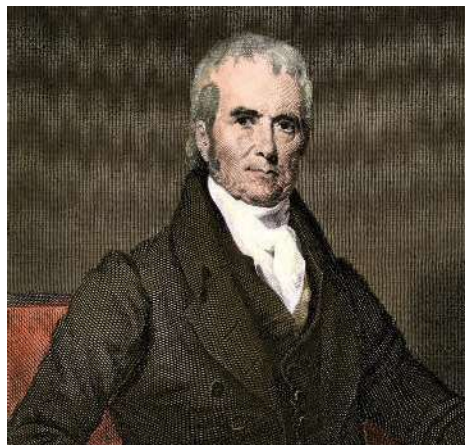
original jurisdiction

The authority of a court to be the first to hear a particular kind of case.

ADVOCATES OF JUDICIAL REVIEW

Although the Constitution is silent on the issue of judicial review, many of the Founders probably agreed with Alexander Hamilton (right), who argued that the Supreme Court's power to interpret the Constitution and declare state and federal laws and actions unconstitutional is inherent in the notion of the separation of powers. However, it was not until the Supreme Court's 1803 *Marbury v. Madison* decision that Chief Justice John Marshall (left) affirmed the Court's power of judicial review.

How might the absence of the power of judicial review hinder the classic American system of checks and balances?



On the surface, the *Marbury* decision was an act of great modesty. It suggested that the Court could not force the action of an executive branch official. Beneath the surface, however, the Court's decision in *Marbury*, in claiming that judicial review was the province of the judicial branch alone, was not modest in the least. In Marshall's written opinion, "It is emphatically the province and duty of the judicial department to say what the law is." In making this claim, he was following closely Hamilton's argument in *The Federalist* No. 78.

JUDICIAL REVIEW INVOKED Until quite recently, the Supreme Court used the power of judicial review with great restraint, perhaps recognizing that its regular use would invite retaliation by the other branches. Judicial review of a congressional act was not exercised again until 54 years after *Marbury* and was used to declare acts of Congress unconstitutional only about 241 times from then through 2013. However, the Court has been much less constrained about overruling the laws of states and localities; it did so more than 1,100 times during this same period.¹²

During the 1990s and early 2000s, the Rehnquist Court was much more inclined to review and overturn congressional actions, especially in cases involving federalism and the powers of Congress under the commerce clause, trimming back the power of the federal government relative to the states. Indeed, it invalidated congressional actions at a rate double that of the Warren Court of the 1960s, considered by many to be the most "activist" Court since the early 1930s.¹³

The Court has been less inclined to exercise judicial review on presidential actions, though some important ones have occurred during our history.¹⁴ In recent years, however, the Court seems more willing to do so. On four occasions between 2004 and 2006, when George W. Bush was president and Sandra Day O'Connor had yet to leave the Court, it invalidated presidential actions pertaining to the treatment of detainees designated as enemy combatants.¹⁵ With a conservative 5–4 majority in control of the Court and a Democratic president in office, it issued a number of rulings curbing presidential powers. In 2014, it ruled that President Obama had abused his power to make recess appointments to the executive branch. In 2015, it halted the EPA's action to limit toxic emissions from

DETENTION

Though the Court initially deferred to the president, military authorities, and Congress on how such detainees should be treated and how long they can be held in custody, it has since 2004 allowed greater access of suspected terrorism detainees to certain legal protections and to the American judicial system. In this photograph, a detainee captured in the first months on the war against the Taliban in Afghanistan is "escorted" to his cell at Guantanamo Bay, Cuba, by military police.

Did the Court go too far in allowing a range of legal protections for terrorism detainees? Should presidents be given wide latitude in providing national security or should Congress and the Court act as checks on presidential actions?



coal-fired power plants under provisions of the Clean Air Act, dealing a blow to one of President Obama's most cherished initiatives. In agreeing to hear a case in 2016 on Texas's challenge to President Obama's action to defer deporting undocumented immigrants, the Court requested briefs that would address the question of whether the president had failed in his constitutional duties "to take care that the laws be faithfully executed," a direct challenge from one constitutional branch to another. Soon after agreeing to hear this case, however, Justice Scalia died and so did the seemingly durable 5–4 conservative majority. After Scalia's death, a deadlocked 4–4 Court could not reach a decision, leaving the decision of the lower federal courts in place denying the president the power to take action on his own on immigration. The future of presidential executive action will depend on who replaces Scalia on the Court.

JUDICIAL REVIEW AND DEMOCRACY Judicial review involves the right of a body shielded from direct accountability to the people—federal judges are appointed, not elected, and serve for life (barring impeachment for unseemly, unethical, or illegal behavior)—to set aside the actions of government bodies whose members are elected. Many believe that judicial review has no place in a democratic society. One prominent democratic theorist has described the issue this way:

But the authority of a high court to declare unconstitutional legislation that has been properly enacted by the coordinate constitutional bodies ... in our system, the Congress and the president—is far more controversial.... The contradiction remains between imbuing an unelected body—or in the American case, five out of nine justices on the Supreme Court—with the power to make policy decisions that affect the lives and welfare of millions of Americans. How, if at all, can judicial review be justified in a democratic order?¹⁶

Political scientists and legal scholars use the phrase the "counter-majoritarian difficulty," coined by Alexander Bickel in 1962, to describe this enduring problem in the American political system; Bickel described judicial review as a "deviant institution in American democracy."¹⁷ On the other hand, some observers believe that judicial review is the only way to protect the rights of political and racial minorities, to check the potential excesses of the other two government branches and the states, and to preserve the rules of the democratic process.

Many political scientists believe that the problem of democratic accountability of a nonelected judiciary with life tenure is less dire than it seems on the surface because the Supreme Court and other federal courts are influenced, directly and indirectly, by elected officials, public opinion, and other important actors in American society.¹⁸ We will revisit this issue later in the chapter.

THE FEDERAL COURT SYSTEM: JURISDICTION AND ORGANIZATION

14.2 Describe the structure of the federal judiciary.

Our country has one judicial system for the national government (the federal court system) and another in each of the states. In each state, courts adjudicate cases on the basis of the state's own constitution, statutes, and administrative rules.¹⁹ In total, the great bulk of laws, legal disputes, and court decisions (roughly 99 percent) are located in the states. Most important political and constitutional issues, however, eventually reach the federal courts. This chapter focuses on the federal courts. The following sections look at the jurisdiction of the federal courts and the organization of the federal court system.

The Jurisdiction of the Federal Court

The jurisdiction of the federal judiciary—that is, the kinds of cases they have the authority to hear and make rulings about—include the following:

- The Constitution, including cases involving disputes about the meaning of some clause or provision in the document such as freedom of speech in the First Amendment, the scope of the commerce clause, or the power of the president to make recess appointments to the executive branch
- Federal statutes, including disputes about the meaning of a law passed by Congress and signed by the president, such as the extent to which the EPA can require gas mileage standards for automobiles
- Ambassadors and diplomats, including disputes about the meaning and extent of diplomatic immunity
- Treaties such as hearing cases about the extent to which states must follow the provisions of a treaty that the United States signs with a foreign government
- Admiralty and maritime issues, that is, disputes between parties that involve shipping and commerce on the high seas
- Controversies in which the U.S. government is a party, including suits brought against a government agency for a perceived violation of some fundamental freedom such as speech or ownership and use of private property
- Disputes between the states, including cases involving the proper location of borders between states or the split of sales taxes between states when products are bought, sold, and shipped across state lines
- Disputes between a state and a citizen of another state, including cases like those involving same-sex marriage in which a person claims that he or she has not been accorded equal protection when travelling to or moving to a different state.
- Disputes between a state (or citizen of a state) and foreign states or citizens, including most usually, claims that a person or firm in another country is infringing on a copyright or patent.

The Organization of the Federal Court System

The only court specifically mentioned in the Constitution's Article III is the U.S. Supreme Court. The framers left to Congress the tasks of designing the details of the Supreme Court and establishing "such inferior courts as the Congress may from time to time ordain and establish." Beginning with the Judiciary Act of 1789, Congress has periodically reorganized the federal court system. The end result is a three-tiered pyramidal system (see Figure 14.1), with a handful of offshoots. At the bottom are ninety-four U.S. district courts, with at least one district in each state. In the middle are thirteen U.S. courts of appeals. At the top of the pyramid is the U.S. Supreme Court. These courts are called **constitutional courts** because they were created by Congress under Article III. Congress has also created a number of courts to adjudicate cases in highly specialized areas of concern, such as taxes, monetary claims against the government, and maritime law. These courts were established under Article I, which specifies the duties and powers of Congress, and are therefore called **legislative courts**.

U.S. DISTRICT COURTS Most cases in the federal court system are first heard in one of the ninety-four U.S. district courts. District courts are courts of original jurisdiction, that is, courts where cases are first heard. U.S. district courts do not hear appeals from other courts. They are also trial courts; some use juries—either **grand juries**, which bring indictments, or **petit (trial) juries**, which decide cases—and in some, cases are heard only by a judge.

Most of the business of the federal courts takes place at the district level. In 2015, about 374,000 cases were filed; roughly 75 percent of them were civil cases, and 25

constitutional courts

Federal courts created by Congress under the authority of Article III of the Constitution.

grand juries

Groups of citizens who decide whether there is sufficient evidence to bring an indictment against accused persons.

legislative courts

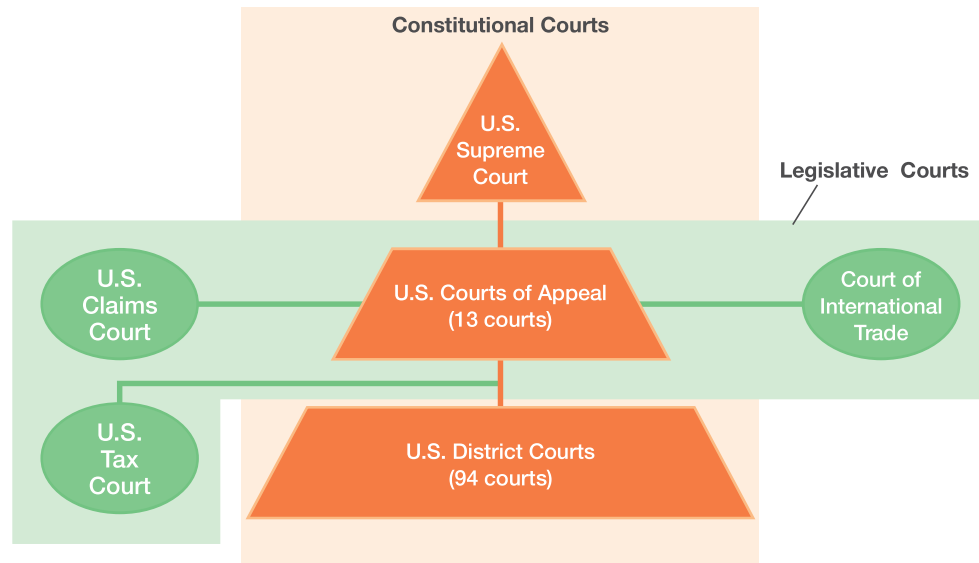
Highly specialized federal courts created by Congress under the authority of Article I of the Constitution.

petit (trial) juries

Juries that hear evidence and sit in judgment on charges brought in civil or criminal cases.

FIGURE 14.1 THE FEDERAL COURT SYSTEM

The federal court system is a three-tiered pyramidal system, with the Supreme Court at the top. Below it are thirteen U.S. courts of appeals and ninety-four U.S. district courts, with at least one district in each state. Additional courts hear cases in highly specialized areas such as taxes, international trade, and financial claims against the U.S. government.



SOURCE: Administrative Office of the U.S. Courts, “About Federal Courts: Court Role and Structure,” *Annual Report 2015*.

percent were criminal cases.²⁰ Civil cases include everything from antitrust cases brought by the federal government, to copyright infringement suits (as when Apple sued Amazon for its use of the term “Appstore” on the Amazon website), and commercial and contract disputes between citizens (or businesses) of two or more states. Criminal cases include violations of federal criminal laws such as bank robbery, interstate drug trafficking, and kidnapping.

Most civil and criminal cases are concluded at this level. In a relatively small number of disputes, however, one of the parties to the case may feel that a mistake has been made in trial procedure or in the law that was brought to bear in the trial, or one of the parties may feel that a legal or constitutional issue is at stake that was not taken into account at the trial stage or was wrongly interpreted. In such cases, one of the parties may appeal to a higher court—a U.S. Court of Appeals.

U.S. COURTS OF APPEALS (CIRCUIT COURTS) The United States is divided into twelve geographic **circuit courts** (see the map in Figure 14.2) that hear appeals from U.S. district courts. The U.S. Court of Appeals for the District of Columbia (the Twelfth Circuit), not only hears appeals from the U.S. district court but also is charged with hearing cases arising from rule making by federal agencies like the Securities and Exchange Commission and the National Labor Relations Board. A thirteenth circuit court, also located in Washington, D.C.—the U.S. Court of Appeals for the Federal Circuit—hears appeals from U.S. district courts from all over the nation on patents and government contracts.

In 2015, almost 53,000 cases were filed in federal appeals courts, although only about 8,000 reached the formal hearing stage (most cases end in negotiated settlements without going to trial).²¹ Cases cannot originate in appeals courts but must come to them from district courts. Because they exist only to hear appeals, they are referred to as **appellate courts**. At the appellate level, lawyers do not examine witnesses or introduce new evidence; instead, they submit **briefs**, which set out the legal issues at stake. Judges usually convene as panels of three (on important cases,

circuit courts

The 12 geographical jurisdictions and one special court that hear appeals from the federal district courts.

appellate courts

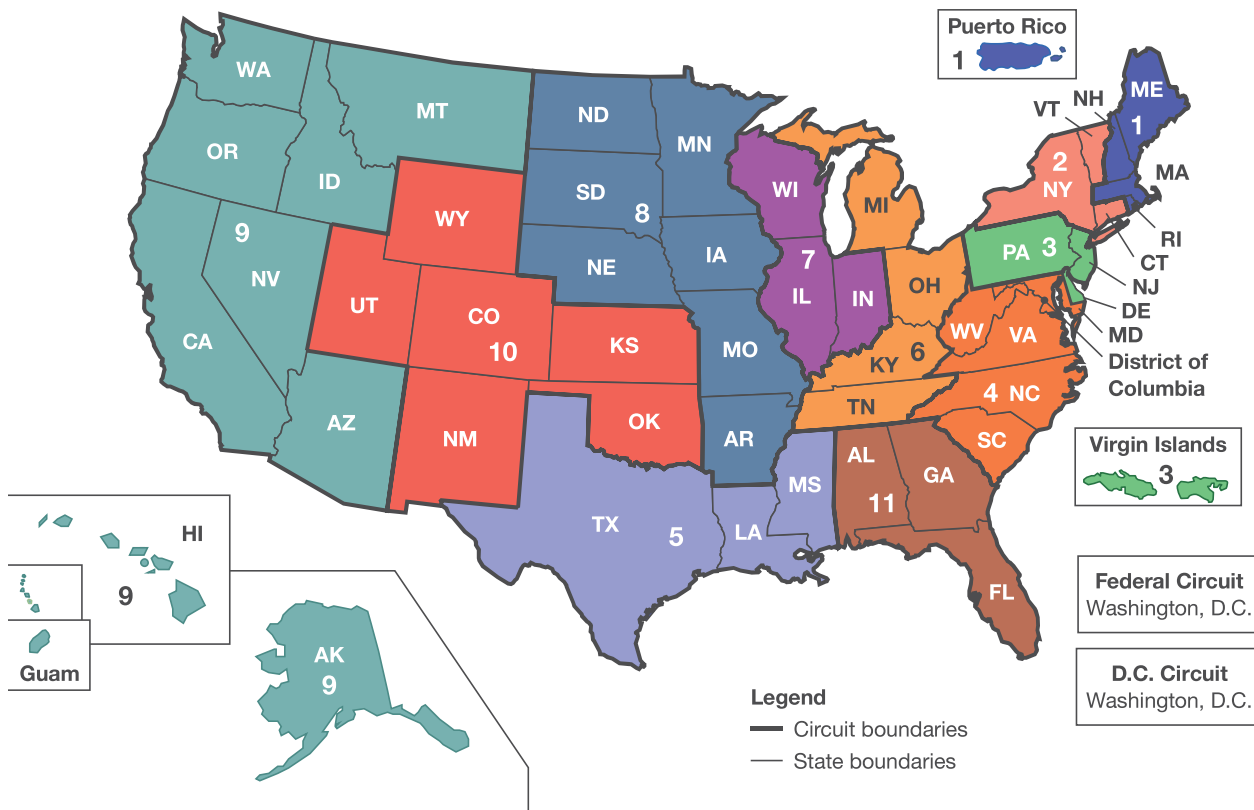
Courts that hear cases on appeal from other courts.

briefs

Documents setting out the arguments in legal cases, prepared by attorneys and presented to courts.

FIGURE 14.2 GEOGRAPHIC LOCATIONS OF U.S. CIRCUIT COURTS

The United States is divided into twelve geographic regions, each housing one U.S. court of appeals. One additional circuit, the U.S. Court of Appeals for the Federal Circuit, is located in Washington, D.C.



SOURCE: Administrative Office of the U.S. Courts, "About Federal Courts: Court Role and Structure," *Annual Report 2015*.

there are more—sometimes seven members) to hear oral arguments from the lawyers on each side of the case and to cross-examine them, not witnesses, on points of law. Weeks or even months later, after considerable study, writing, and discussion among the judges, the panel issues a ruling. In important cases, the ruling is usually accompanied by an **opinion** that sets forth the majority side's reasoning for the decision.

Once appellate decisions are published, they become **precedents** that guide the decisions of other judges in the same circuit. Although judges do not slavishly follow precedents, they tend to move away from them only when necessary and only in very small steps. This doctrine of closely following precedents as the basis for legal reasoning is known as **stare decisis**.

It is important to know that the decisions of each circuit court determines the meaning of laws for people who live in all of the states covered by that circuit. They have become more important as they have ruled on more cases recently, without review by the Supreme Court, which decides fewer than eighty cases each year.

Sometimes particular circuits play a more important role than others in changing constitutional interpretation. For example, the Fourth Circuit Court, based in Richmond, Virginia, was a leader in the trend toward reasserting the power of the states in the federal system.²² The Ninth Circuit Court, which sits in San Francisco, is known to be especially liberal on civil rights and civil liberties cases. Because the Supreme Court considers only a relative handful of cases from the appeals courts each term, the rulings of the Fourth Circuit are binding for almost thirty-three million people in the southeastern United States, while the rulings of the Ninth Circuit Court of Appeals hold for roughly sixty-four million people in the western United States, including California. Although it has had several of its rulings reversed in recent years

opinion

The explanation of the majority's and the minority's reasoning that accompanies a court decision.

precedents

Past rulings by courts that guide judicial reasoning in subsequent cases.

stare decisis

The legal doctrine that says precedent should guide judicial decision making.

by the more conservative U.S. Supreme Court, the Ninth Circuit's rulings, nevertheless, cover about 18 percent of the American population.

THE U.S. SUPREME COURT Congress decides how many judges sit on the U.S. Supreme Court. The first Court had six members. The Federalists, however, reduced the number to five in 1801 to prevent newly elected president Thomas Jefferson from filling a vacancy. In 1869, Congress set the number at its present nine members (eight associate justices and the chief justice). It has remained this way ever since, weathering the failed effort by President Franklin Roosevelt to "pack" the Court with more politically congenial justices by expanding its size to fifteen.

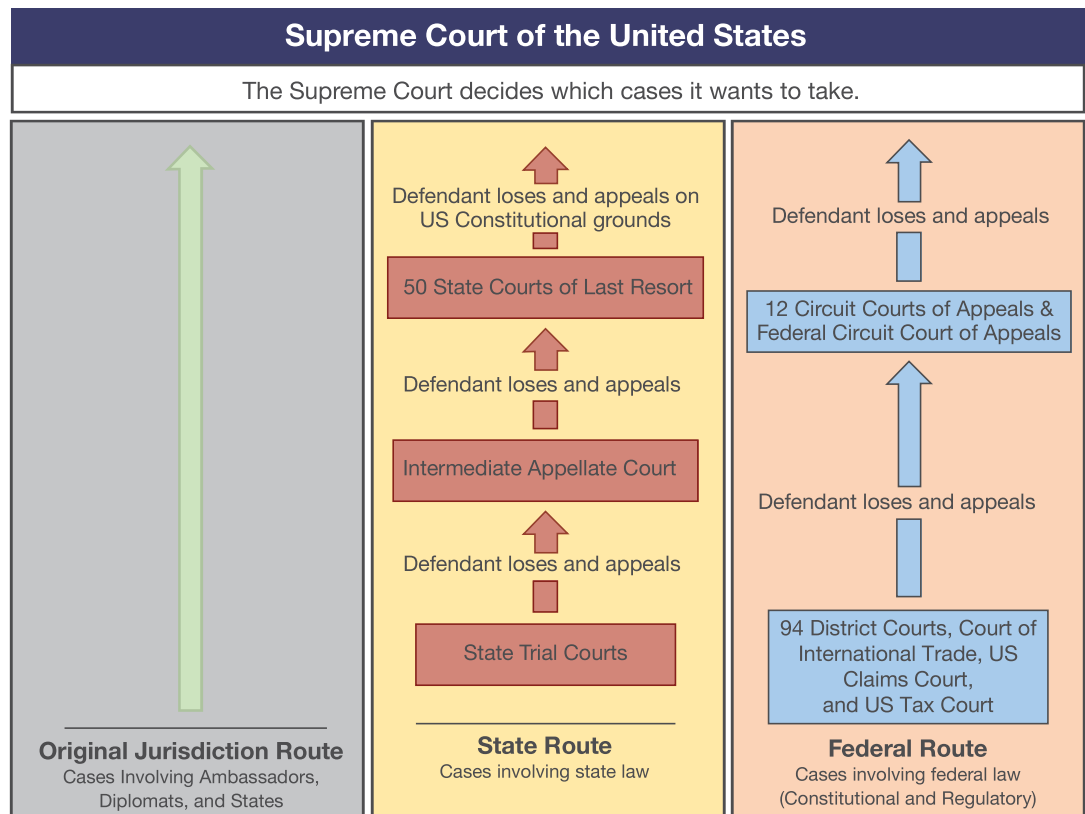
The Supreme Court is both a court of original jurisdiction and an appellate court. That is, some cases are first heard in the Supreme Court, though most heard there are on appeal. Disputes involving ambassadors and other diplomatic personnel, as well as disputes between two or more states, originate in the Supreme Court rather than in some other court, though the Court is not obliged to hear such cases.²³

In its most important role, the Supreme Court also serves as an appellate court for the U.S. courts of appeals and for the highest courts in each of the states. Cases in which a state or federal law has been declared unconstitutional can be heard by the Supreme Court, as can cases in which the highest state court has denied a claim that a state law violates federal law or the Constitution (see Figure 14.3). It also takes appeals that involve the interpretation of the meaning of federal statutes and regulations.

This last point is worth emphasizing. There is a popular misconception that the Supreme Court only takes cases having to do with constitutional questions. This is not correct. The Court takes both constitutional and statutory cases; it can rule on issues related to the constitutionality of actions by federal, state, and local governments, but

FIGURE 14.3 HOW CASES GET TO THE U.S. SUPREME COURT

The vast majority of cases that reach the Supreme Court come to it from within the federal court system. Most of the others come on appeal from the highest state courts. A handful originate in the Supreme Court itself.



it can also rule on disputes centered on the meaning of statutes and regulations.²⁴ For example, in *Grove City College v. Bell* (1984), the Court ruled that Title IX of the Federal Education Act did not mean that institutions of higher education receiving federal funds would lose all federal funding if they practiced gender discrimination (as Congress clearly intended). Rather, it ruled that only the discriminating program or department—such as an athletic department or a physics department—would lose funding. Congress cannot ignore a constitutional ruling about a law it has passed. It can and does amend statutes to satisfy the concerns of the Court—or to get around the Court—when the meaning of a law to the Court is not consistent with Congress’s understanding.

Congress determines much of the appellate jurisdiction of the Supreme Court. In 1869, following the Civil War, a Congress controlled by radical Republicans removed the Court’s power to review cases falling under the Reconstruction program for the South. In 1995, responding to a plea from Chief Justice Rehnquist to lighten the Court’s caseload, Congress dropped the requirement that the Supreme Court *must* hear cases in which a state court declares a federal statute unconstitutional. It can choose, but it is not obligated to do so.

Because it is the highest appellate court in the federal court system, the decisions and opinions of the Supreme Court become the main precedents for federal and constitutional questions for courts at all other levels. For this reason, Supreme Court decisions receive so much attention from other political actors, the media, and the public.

APPOINTMENT TO THE FEDERAL BENCH

14.3 Describe the background of appointees to the federal bench and the process by which they are appointed.

Because federal judges are appointed for life and make important decisions, it matters who they are and how they get to the bench. If they are isolated from popular influence, democracy is at risk. If they are too responsive, they ignore their judicial role to act as neutral arbiters of the meaning of the Constitution in political and government affairs.

Who Are the Appointees?

The Constitution offers no advice on what qualifications a federal judge should have. By custom and tradition, appointees to the federal bench must be lawyers, but until quite recently, they did not have to have judicial experience. Indeed, almost one-half of all Supreme Court justices during the twentieth century had no prior experience as judges. Among the ranks of the “inexperienced” are some of the most prominent and influential justices in our history, including John Marshall, Louis Brandeis, Harlan Stone, Charles Evans Hughes, Felix Frankfurter, and Earl Warren.²⁵ Former Chief Justice William Rehnquist also came to the bench without judicial experience, as did the most recently appointed justice, Elena Kagan, who served in the Clinton White House in the late 1990s after years in private practice and law school teaching.

As the federal courts—particularly the circuit courts and the Supreme Court—have become more important in determining American public policies, and as partisan and ideological conflicts have become more pronounced in the country, having judicial experience has become more important in the nomination and confirmation process. Because the stakes seem so high to many people—whether *Roe v. Wade* (1973) will be overturned, for example, or what constitutional limits can be placed on the president during a war—they want to know the judicial philosophies and general ideological outlooks of the people who will become Supreme Court and appeals court judges. One way to know this is to examine the rulings and written opinions of nominees who have been judges. The new, though unwritten, rules about prior judicial experience became apparent in the firestorm that erupted within Republican and conservative circles after President Bush nominated Harriet Miers in late 2005 to fill the Sandra Day O’Connor vacancy. Many people who were normally Bush supporters were upset by the fact that

Miers was an unknown in terms of constitutional law, having never served as a judge. They could not be sure they could trust her on the central issues of the day. They were much more comfortable with Bush nominees John Roberts and Samuel Alito, who had established extensive conservative records on the federal bench.²⁶

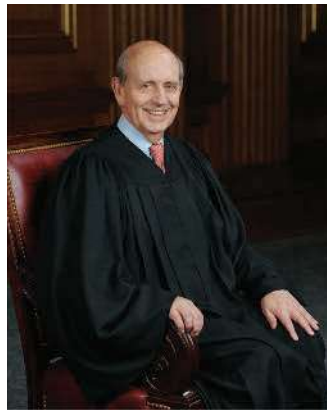
Like most lawyers, federal judges tend to come from privileged backgrounds. In addition, federal judges, and particularly Supreme Court justices, come from the most elite parts of the legal profession. For most of our history, they have been white male Protestants from upper-income or upper-middle-class backgrounds who attended the most selective and expensive undergraduate and graduate institutions.²⁷ The current Supreme Court has moved entirely away from the almost exclusive Protestant membership that marked its history. Indeed, three current members—Ginsburg, Breyer, and Kagan—are Jewish, and five—Thomas, Kennedy, Roberts, Alito, and Sotomayor—are Catholic (Scalia also was Catholic). The current Court is also more diverse in terms of race and gender than at any time in its history. On the current Supreme Court, there is one African American (Clarence Thomas), one Hispanic (Sotomayor), and three women (Ginsburg, Sotomayor, and Kagan). The racial and gender representativeness of judicial appointees at the circuit and district court levels is better, and improving rapidly, but it is still a long way from reflecting the composition of the legal profession, much less the American people as a whole.

THE EIGHT MEMBER COURT: JUSTICES OF THE SUPREME COURT IMMEDIATELY AFTER THE DEATH OF ANTONIN SCALIA

Can you imagine ways in which an 8-member Court might act differently than a 9-member Court as it deliberates and decides important cases?



Samuel A. Alito Jr.,
Born: 1950
Sworn In: 2006
Appointed By: George W. Bush



Stephen G. Breyer
Born: 1938
Sworn In: 1994
Appointed By: Bill Clinton



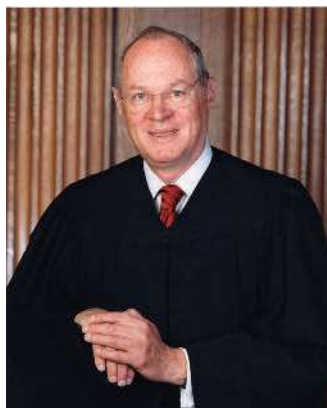
Chief Justice John Roberts
Born: 1955
Sworn In: 2005
Appointed By: George W. Bush



Ruth Bader Ginsburg
Born: 1933
Sworn In: 1993
Appointed By: Bill Clinton



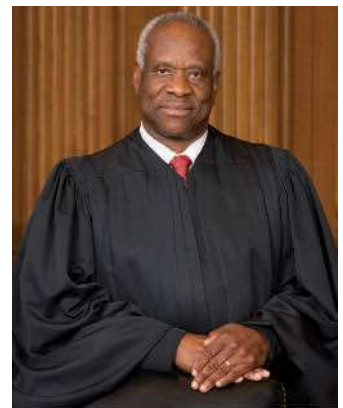
Elena Kagan
Born: 1960
Sworn In: 2010
Appointed By: Barack Obama



Anthony M. Kennedy
Born: 1936
Sworn In: 1988
Appointed By: Ronald Reagan



Sonia Sotomayor
Born: 1954
Sworn In: 2009
Appointed By: Barack Obama



Clarence Thomas
Born: 1948
Sworn In: 1991
Appointed By: George H. W. Bush

The Appointment Process

Federal judges assume office after they have been nominated by the president and confirmed by the Senate in a process that has become ever more contentious as national politics have become more partisan.²⁸ Presidents pay special attention to judicial appointments because those appointments are a way for presidents to affect public policy long after their terms are up.²⁹ Senators who are not in the president's party or who are ideologically opposed to the president often seek to block the nomination and deny the president a hold on future policy.

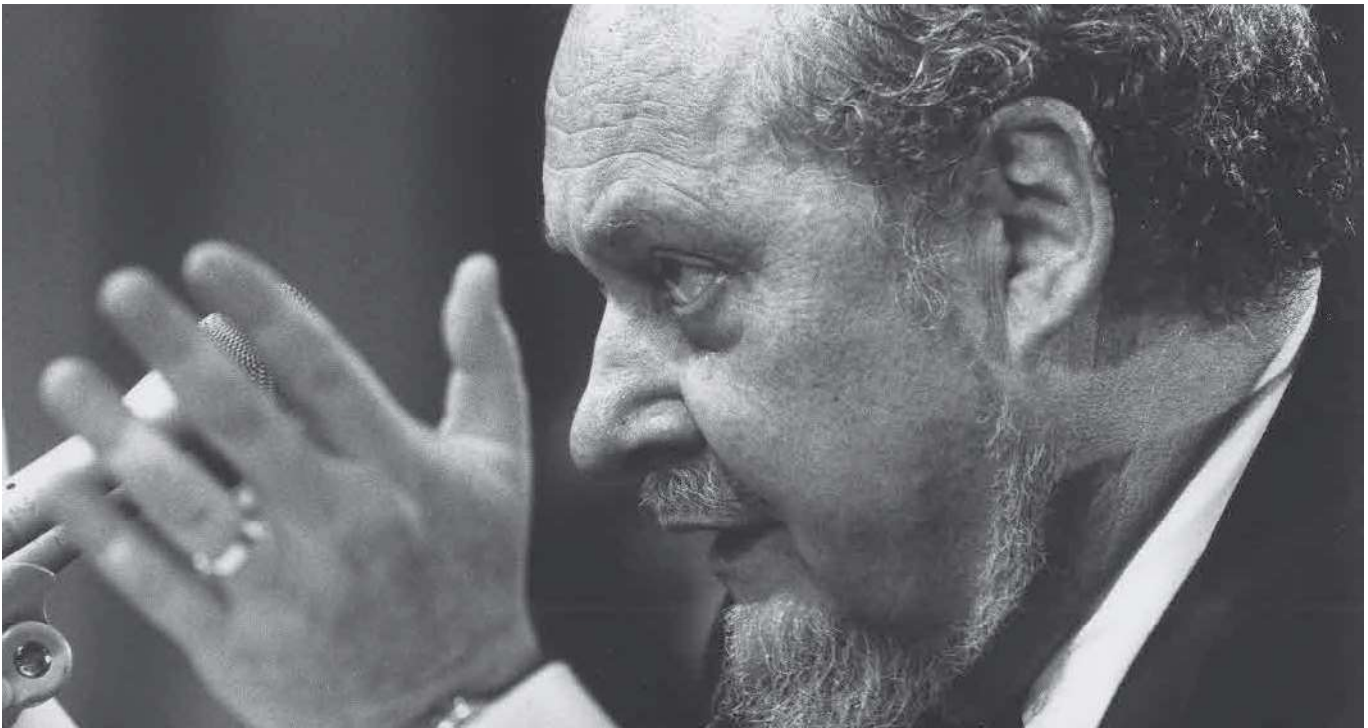
Presidents take many things into consideration besides merit.³⁰ For example, no president wants a nomination rejected by the Senate so the president and presidential advisers consult with key senators, especially those on the Judiciary Committee, before forwarding nominations. Nominations for district court judgeships are subject to **senatorial courtesy**, the practice of allowing the senior senator from the president's party to approve nominees from the state where the district court is located. Senatorial courtesy does not operate, however, in appointments to the circuit courts, whose jurisdictions span more than a single state, or to the Supreme Court, whose jurisdiction is the entire nation. There is also the blue slip, the informal Senate practice in which the Judiciary Committee solicits the opinions on the nominee from the two senators from the state where the nominee resides (submitted on blue slips of paper). Holds are also widely used. A hold is an informal practice in which a member of the majority party can inform the majority leader that he or she wishes to keep a judicial nomination from coming to the floor for a vote. (Majority leaders can choose to go along or not.) So, presidents must be extremely mindful of the views of key senators, even those in the opposing party, especially when the opposing party controls the Senate.

On occasion, despite presidential efforts to placate it, the Senate has refused to give its consent. Of the 143 nominees for the Supreme Court since the founding of the Republic, the Senate has refused to approve 28 of them, although only 5 of these refusals have occurred since 1900. Rejection of nominees has usually happened when the president was weak or when the other party was in control of the Senate. The defeat of Ronald Reagan's nominee, Robert Bork, was the product of deep ideological differences between a Republican president and a Democratic-controlled Senate. There have also been several near-defeats. George H. W. Bush's nominee, Clarence Thomas, was confirmed by a margin of only 4 votes after questions were raised about his legal qualifications and about sexual harassment charges brought by law professor Anita Hill. President Obama nominated Merrick B. Garland, the chief judge of the U.S. Court of Appeals for the D.C. Circuit, to fill the seat of deceased justice Antonin Scalia, but the Republican-led Senate refused to hold hearings or vote on his nomination in hopes that the 2016 election would put a Republican in the White House. Delaying a confirmation until after an election is an unprecedented move and one sure to increase the divide between Senate Democrats and Republicans.

As the story of Justice Alito's Senate confirmation illustrates, judicial nominees, especially for the federal circuit courts and the Supreme Court, have become very contentious, partisan battles.³¹ Fights over presidential judicial nominees raged during the Clinton presidency and during the Bush presidency, culminating in the use of the filibuster by the Democrats to block several judicial nominations and the threat by Republicans to use the nuclear option to end filibusters against conservative nominees and send their nominations to a floor vote. In 2013, frustrated by the record low rate of confirmation of President Obama's judicial (and executive branch) nominees despite a Democratic majority status in the Senate, Democrats finally exercised the nuclear option by outlawing the use of the filibuster on nominations for federal district and circuit court judgeships—for now, the filibuster can still be used for Supreme Court nominations—and for high-level executive branch

senatorial courtesy

The tradition that a judicial nomination for a federal district court seat be approved by the senior senator of the president's party from the state where a district court is located before the nominee is considered by the Senate Judiciary Committee.



BORK REJECTED

The Democratic Senate's rejection in 1987 of conservative legal scholar Robert Bork, President Reagan's nominee for a vacant seat on the Supreme Court, helped trigger the long ideological and partisan battle over the composition of the Supreme Court that persists to the present day. Here, Bork explains his judicial philosophy to members of the Senate Judiciary Committee.

Should senators base their vote for federal judicial nominees on their own personal ideological outlooks and partisan loyalties, on their best judgments about the qualifications of the nominee, or should they defer to the president on the grounds that he or she is the only nationally elected official in the government?

standing

Authority to bring legal action because one is directly affected by the issues at hand.

positions. While this change allowed President Obama to appoint a large number of federal district and circuit judges in 2013 and 2014 when his party had a majority in the Senate, the Republican capture of the Senate in the 2014 elections radically reduced his success rate on judicial appointments.

Although presidents must be concerned about the merit of their candidates and their acceptability to the Senate, they also use appointments to try to make their mark on the future. Presidents go about this in different ways.

For the most part, presidents, naturally concerned about their historical legacy, are interested in nominating judges who share their ideological and public policy commitments.³² John Adams nominated John Marshall and a number of other judges to protect Federalist principles during the ascendancy of the Jeffersonians. Franklin Roosevelt tried to fill the courts with judges who favored the New Deal. Ronald Reagan favored conservatives who were committed to rolling back affirmative action and other civil rights claims, abortion rights, protections for criminal defendants, and broad claims of **standing** in environmental cases. Both George H. W. Bush and his son George W. Bush carried on the Reagan tradition of nominating conservative judges to the federal courts.

In the first years of his administration, Bill Clinton nominated two judges with reputations as moderates for the high court: Ruth Bader Ginsburg and Stephen Breyer. Clinton was eager to avoid a bitter ideological fight in the Senate, where he was trying to forge a bipartisan coalition to support the North American Free Trade Agreement and a national crime bill. The Ginsburg nomination was also indicative of Clinton's apparent commitment to diversifying the federal court system. (More than one-half of federal court nominees during his presidency were women and minorities.)

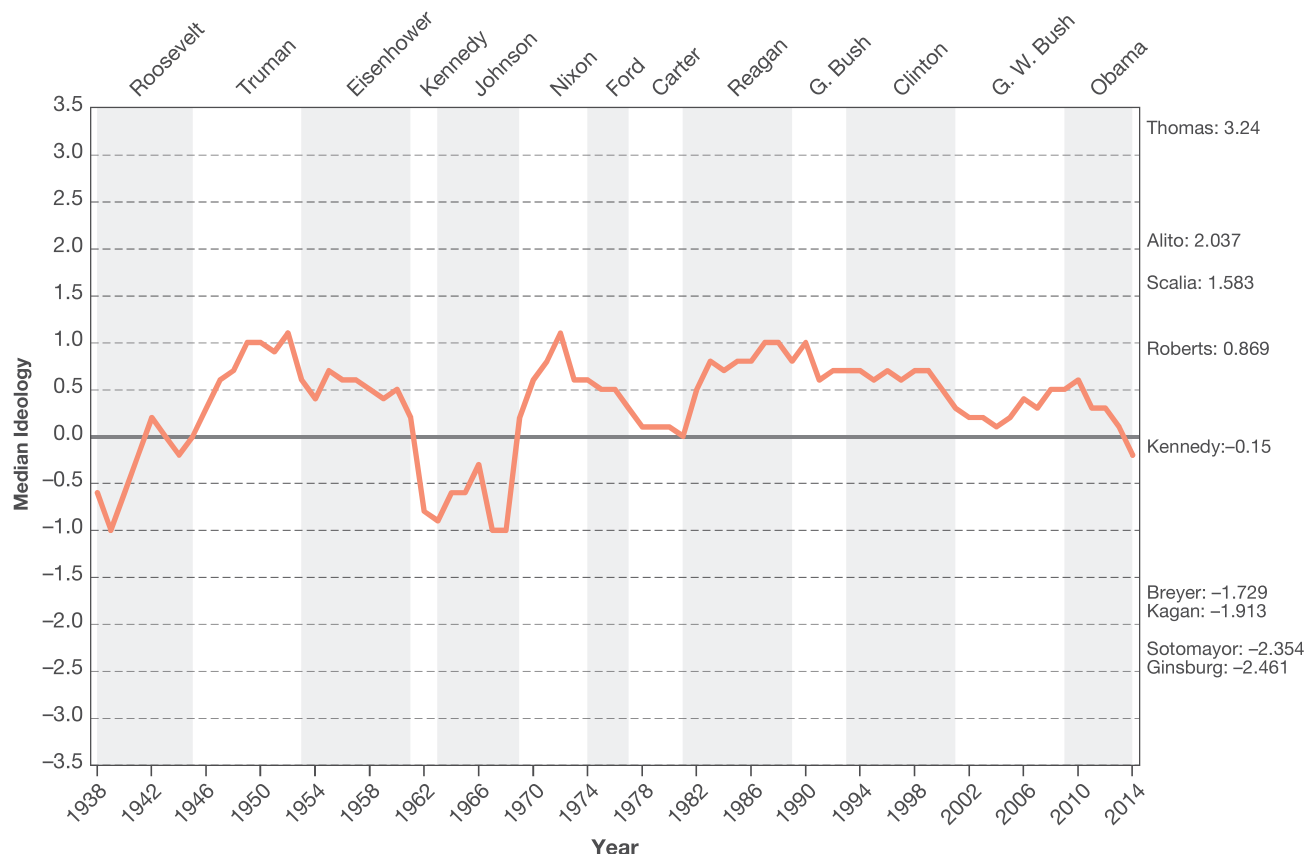
Diversity was also important to President Barack Obama. During his first year in office, he nominated twelve people for federal circuit court positions; nine of the twelve were women and/or minorities. He also was anxious to appoint the first Hispanic to the Supreme Court and did so in 2009, choosing Sonia Sotomayor.³³ He added another woman to the Court when he nominated Elena Kagan in 2010. Both were liberal on social issues but relatively favorable to business.

Presidents are often disappointed in how their nominees behave once they reach the Court. Dwight Eisenhower was dumbfounded when his friend and nominee, Earl Warren, led the Court in a liberal direction by transforming constitutional law regarding civil rights and criminal procedure. Richard Nixon was no doubt surprised by the odyssey of his nominee Harry Blackmun, who, despite a conservative judicial record before joining the Court, had become one of its most liberal justices by the time of his retirement in 1994 (he wrote the majority opinion in *Roe v. Wade* [1973]). The elder George Bush may have been shocked when his nominee, David Souter, refused to vote for the overturn of *Roe* in *Planned Parenthood v. Casey* (1992). Despite these dramatic examples, the past partisan and ideological positions of federal court nominees are a fairly reliable guide to their later behavior on the bench.³⁴ Few were surprised when five Republican justices ruled in favor of Republican George W. Bush in the disputed election of 2000 (*Bush v. Gore*, 2000). Few were surprised when the Court moved in an even more conservative direction after Bush nominees Roberts and Alito joined the Court, given the record of their past partisan activities and judicial opinions. (For an overview of the ideological leanings of the Supreme Court since 1938, see Figure 14.4.)

FIGURE 14.4 SUPREME COURT IDEOLOGY, 1938–2014

The data represented in this line graph confirms that the Supreme Court has tended to be a fairly conservative branch of government over the last 75 years, with only brief periods of ideological liberalism. Decisions of conservative-leaning Courts tend to reflect stricter readings of the Constitution and a preference for states' rights over federal power, while decisions of liberal-leaning Courts reflect the opposite tendencies. The farther distant a point on the graph above zero, the more conservative the median ideology of the Supreme Court for that year; the farther distant a point on the graph below zero, the more liberal the median ideology. "Median justices"—those in the ideological center of the nine-member Court—are frequently in a position to determine the outcome of cases.

How can a president's opportunity to nominate a new Supreme Court justice impact the trajectory of American public policy?



NOTE: At right, the ideologies of the members of the 2014 Supreme Court are noted (including Justice Scalia who died in 2016).

SOURCE: Data from Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999," *Political Analysis* 10, 2002, pp. 134–153.

THE SUPREME COURT IN ACTION

14.4 Outline the process by which the Supreme Court makes decisions and the factors that influence judicial decision making.

The Supreme Court meets from the first Monday in October until late June or early July, depending on the press of business. Let's see how it goes about accepting, processing, and deciding cases.³⁵

The Norms of Operation

A set of unwritten but clearly understood rules of behavior—*norms*—shapes how the Court operates.

SECRECY One norm is *secrecy*, which keeps the conflicts between justices out of the public eye and elevates the stature of the Court as an institution. Justices do not grant interviews very often, though several recently have authored books. Reporters are not allowed to stalk the corridors for a story. Law clerks are expected to keep confidential all memos, draft opinions, and conversations with the justices they work for. Justices are not commonly seen on the frantic Washington, D.C., cocktail party circuit. When meeting in conference to argue and decide cases, the justices meet alone, without secretaries or clerks. Breaches of secrecy have occurred only occasionally. As a result, we know less about the inner workings of the Court than about any other branch of government.

SENIORITY *Seniority* is another important norm. Seniority determines the assignment of office space, the seating arrangements in open court (the most junior are at the ends), and the order of speaking in conference (the chief justice, then the most senior, and so on down the line). Speaking first allows the senior members to set the tone for discussion.

PRECEDENT Finally, the justices are expected to stick closely to *precedent* when they decide cases. When the Court departs from a precedent, it is essentially overruling its own past actions, in effect, exercising judicial review of itself. In most cases, departures from precedent come in small steps over many years. For example, several decisions chipped away at the **separate but equal doctrine** of *Plessy v. Ferguson* (1896) before it was decisively reversed in *Brown v. Board of Education of Topeka* (1954) to end state and local laws requiring racial segregation. Times may be changing, however, as the Court has become more sharply divided along ideological lines. For example, in 2010, when ruling on *Citizens United*, which allows corporations to spend unlimited money in funding issue advertising during election campaigns, the Roberts Court showed no inclination to move slowly; it simply overruled a series of its previous rulings, one of which was only three years old.

separate but equal doctrine

The principle articulated in *Plessy v. Ferguson* (1896) that laws prescribing separate public facilities and services for nonwhite Americans are permissible if the facilities and services are equal to those provided for whites.

Control of the Agenda

The Court has a number of screening mechanisms to control which cases it will hear so that it can focus on cases that involve important federal or constitutional questions.³⁶

TECHNICAL RULES Several technical rules help keep the numbers down. Cases must be *real* and *adverse*; that is, they must involve a real dispute between two parties. The disputants in a case must have *standing*; that is, they must have a real and direct interest in the issues that are raised. The Court sometimes changes the definition of *standing* to make access for **plaintiffs** easier or more difficult. The Warren Court (1956–1969) favored an expansive definition, while the Rehnquist Court (1986–2005) favored a restricted one. Cases must also be *ripe*; that is, all other avenues of appeal must have been exhausted, and the injury must already have taken place (the Court will not

plaintiff

One who brings suit in a court.

accept hypothetical cases). Appeals must also be filed within a specified time limit, the paperwork must be correct and complete, and a filing fee of \$300 must be paid. The fee may be waived if a petitioner is poor and files an affidavit *in forma pauperis* (“in the manner of a pauper”). One of the most famous cases in American history, *Gideon v. Wainwright* (1963), which established the right of all defendants to have lawyers in criminal cases, was submitted *in forma pauperis* on a few pieces of lined paper by Clarence Earl Gideon, a Florida State Penitentiary inmate.

Though the Supreme Court can only take cases that come to it, there is considerable evidence that justices, in rulings in previous cases, often signal what kinds of cases they would like to hear in the future. Thus, in *Abood v. Detroit Board of Education* (1975), Justice Samuel Alito wrote in his majority opinion that the constitutionality of public sector unions requiring nonunion members to pay fees for union bargaining on wages, benefits, and working conditions. The Center for Individual Rights, a conservative anti-union advocacy group, filed a suit challenging such fees on behalf of a group of nonunion California teachers in a case that the Court decided to take up: *Freidrichs v. California Education Association* (2015).³⁷ Unfortunately for the plaintiffs and Justice Alito, the Supreme Court, deadlocked 4–4 after the death of conservative justice Scalia, left in place the ruling of the Ninth Circuit Court of Appeals in favor of the teachers’ union.

CERTIORARI The most powerful tool that the Court has for controlling its own agenda is the power to grant or not to grant a **writ of certiorari**. A grant of “cert” is a decision of the Court that an appellate case raises an important federal or constitutional issue it is prepared to consider.³⁸ Under the **rule of four**, petitions are granted cert if at least four justices vote in favor. There are several reasons a petition may not command four votes, even if the case involves important constitutional issues: it may involve a particularly controversial issue that the Court would like to avoid, or the Court may not yet have developed a solid majority and may wish to avoid a split decision. Few petitions survive all of these hurdles. Of the 10,000 or so cases that are filed in each session, the Court today grants cert for fewer than 70 (this number varies a bit year to year), down from the 150 that was typical in the 1970s and 1980s. In cases denied cert, the decision of the federal appeals court or the highest state court stands.

Deciding how freely to grant cert is a tricky business for the Court. Granted too often, it threatens to inundate the Court with cases. Granted too sparingly, it leaves in place the decisions of thirteen different federal appeals courts on substantial federal and constitutional questions as well as the decisions of state supreme courts, which often leads to inconsistent constitutional interpretations across the country. Because the Court now takes so few cases, more influence than ever is being exercised by the thirteen federal circuit courts. For many important cases, the federal circuit courts have become the judicial forum of last resort. However, when the Supreme Court wants to reach out and settle differences in decisions in lower federal courts or among the states, it is entirely free to do so; it controls its own agenda. This is what the Court did in 2015 in *Obergefell v. Hodges* when, confronted with conflicting federal district and circuit court rulings on whether or not states could ban same-sex marriage, it struck down all state bans on such unions.

Deciding Cases

Almost all cases granted cert are scheduled for oral argument (about ten to fifteen are decided without oral argument, depending on the session). Lawyers on each side are alerted to the key issues that the justices wish to consider, and new briefs are invited.

BRIEFS Briefs are also submitted on important cases by other parties who may be interested in the disputes. These “friend of the court,” or *amicus curiae*, briefs may be submitted by individuals, interest groups, or an agency of the federal government, including the Justice Department or even the president.

in forma pauperis

Describing a process by which indigents may file a suit with the Supreme Court free of charge.

writ of certiorari

An announcement that the Supreme Court will hear a case on appeal from a lower court; its issuance requires the vote of four of the nine justices.

rule of four

An *unwritten* practice that requires at least four justices of the Supreme Court to agree that a case warrants review by the Court before it will hear the case.

amicus curiae

Latin for “friend of the court”; a legal brief in which individuals not party to a suit may have their views heard in court.

ORAL ARGUMENTS Each case is argued for one hour, with thirty minutes given to each side in the dispute. Oral argument is not so much a presentation of arguments, however, as it is a give-and-take between the lawyers and the justices and among the justices. When the federal government is a party to the case, the solicitor general or one of his or her deputies presents the oral arguments. Some justices—Chief Justice John Roberts, for example—are famous for their relentless grilling of lawyers. Ruth Bader Ginsburg often asks that lawyers skip abstract legal fine points and put the issues in terms of their effect on ordinary people. Justice Clarence Thomas famously hardly speaks at all.

CONFERENCE After hearing oral arguments and reading the briefs in the case, the justices meet in conference to reach a preliminary decision. The custom is for each justice to state his or her position, starting with the chief justice and moving through the ranks in order of seniority. Chief justices of great stature and intellect, such as John Marshall and Charles Evans Hughes, used the opportunity to speak first as a way of structuring the case and of swaying votes. Those who did not command much respect from the other justices (e.g., Warren Burger) were less able to shape the decision process.³⁹

DECISION FACTORS Political scientists have tried to determine what factors are most important in predicting how the justices will vote.⁴⁰ One approach looks at the ideological predilections of the justices and manages to explain a great deal about their voting behavior that way.⁴¹ Another approach looks at the strategic behavior of judges, using the diaries and personal papers of retired justices to show that a great deal of negotiating and “horse trading” goes on, with justices trading votes on different cases and joining opinions they do not like so that they can have a hand in modifying them.⁴² Another approach tries to link voting behavior to social background, types of previous judicial experience, and the political environment of family upbringing.⁴³ Still another believes that justices often vote to maintain the influence and standing of the Court in American society even if it means departing from their own ideological preferences.⁴⁴ None of these approaches has been totally successful in explaining decision making by justices, though the ideological model seems to do the best job in explaining judicial behavior over the long term.⁴⁵ Because Democrats in office and in the electorate have become more liberal and because Republicans in office and in the electorate have become much more conservative, we can conclude that the most decisive dividing lines in today’s Court are partisan; appointees of Republican presidents vote in a conservative direction on most issues before the Court, while appointees of Democratic presidents vote in a liberal direction (refer again to Figure 14.4 on the ideology of the Court over time).

About all one can say is that the justices tend to form relatively stable voting blocs over time, with ideology and party increasingly the most important factor.⁴⁶ For example, on many cases involving federalism and the rights of criminal defendants during the 1990s and early 2000s, the Rehnquist Court divided into two blocs, a five-member conservative bloc (Justices Scalia, Thomas, Rehnquist, Kennedy, and O’Connor) and a four-member liberal bloc (Justices Stevens, Breyer, Ginsburg, and Souter). The Roberts Court was dominated by a solid Republican conservative majority until the death of the very conservative Antonin Scalia in early 2016, even though the Chief Justice surprisingly sided with his liberal colleagues in upholding the Affordable Care Act in 2012.

OPINIONS The vote in conference is not final, however. As Justice John Harlan once explained, “The books on voting are never closed until the decision finally comes down.”⁴⁷ The justices have an opportunity to change their votes in response to the opinion supporting the majority decision. Some conservative commentators have reported that Chief Justice Roberts initially voted in favor of declaring the

Affordable Care Act unconstitutional in 2012 before switching sides.⁴⁸ He then wrote the ruling opinion in the case that upheld Obamacare but included a section calling into question the Congress's use of the commerce clause to justify federal government actions, something that might endanger an entire range of laws favored by liberals and Democrats.

An opinion is a statement of the legal reasoning that supports the decision of the Court. There are three kinds of opinions. The **opinion of the Court** is the written opinion of the majority. A **concurring opinion** is the opinion of a justice who supports the majority decision but has different legal reasons for doing so. A **dissenting opinion** presents the reasoning of the minority. Dissenting opinions sometimes become the basis for future Court majorities.

If he votes with the majority in conference, the chief justice assigns the writing of the opinion. He can assign it to any justice in the majority; chief justices often write majority opinions themselves. Some jurists and scholars believe that this power to assign is the most important role of the chief justice, and it is guarded jealously. Warren Burger was so eager to play a role in opinion assignments that, much to the distress of his colleagues, he would often delay announcing his vote so that he could place himself with the majority. Justice William Douglas angrily charged that Burger voted with the majority in *Roe* only so that he could assign the case to a justice who was closer to the minority view.⁴⁹ If the chief justice's opinion is with the minority, the opinion is assigned by the most senior member of the majority.

The justice assigned to write the opinion does not work in isolation. He or she is assisted by law clerks and other justices, who helpfully provide memoranda suggesting wording and reasoning. Justices also consider the legal reasoning presented to the Court in *amicus curiae* briefs.⁵⁰ Most opinions go through numerous revisions and are subject to a considerable amount of bargaining among the justices.

FINAL VOTE Only when an opinion is completed is a final vote taken in conference. The justices are free to change their earlier votes: they may join the majority if they are now persuaded by its reasoning, or a concurring opinion may be so compelling that the majority may decide to replace the original majority opinion with it.

opinion of the Court

The majority opinion that accompanies a Supreme Court decision; also called the majority opinion.

concurring opinion

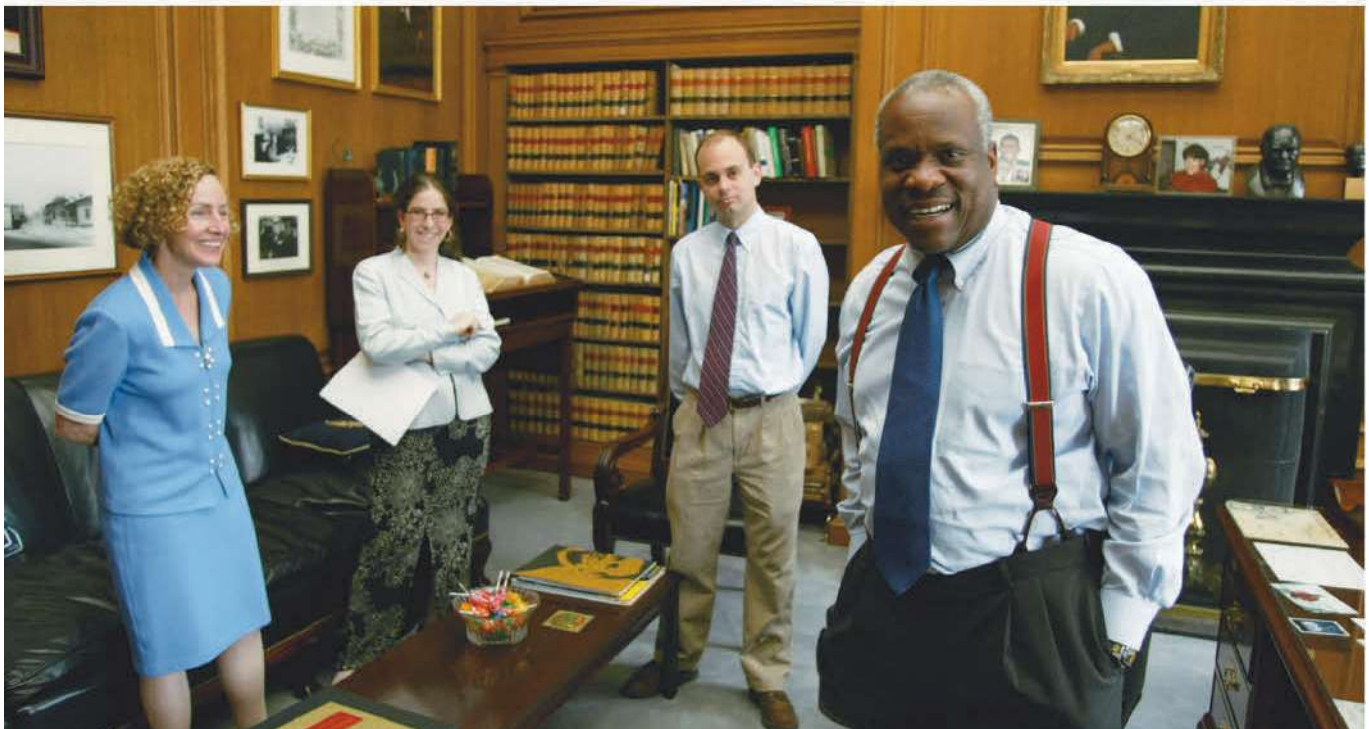
The opinion of one or more judges who vote with the majority on a case but wish to set out different reasons for their decision.

dissenting opinion

The opinion of the judge or judges who are in the minority on a particular case before the Supreme Court.

CLERKING FOR JUSTICE THOMAS

Law clerks play an extremely important role at the Supreme Court, with each justice selecting his or her own clerks from among graduates of the nation's leading law schools. Here, Justice Clarence Thomas relaxes with three of his clerks after a long day. *What is the importance of clerks to the effectiveness of the justices? Should each justice be allowed to hire more clerks so that they can decide more cases each term?*



Outside Influences on Supreme Court Decisions

The Supreme Court makes public policy when it issues its rulings and will continue to do so, but it does not do so in isolation; many other *governmental and political linkage actors and institutions* influence what it does. Indeed, many scholars suggest that what the Supreme Court does reflects the prevailing politics and opinion of the day. After all, justices are nominated by presidents and confirmed by senators whose views are known to the public and who are elected by them. As new coalitions come to power in American politics, they make appointments to the federal courts in general and the Supreme Court in particular that are in tune with the electoral coalition supporting the president and a majority of the Senate. A highly politicized judiciary, whose decisions become entangled in and engaged with the prevailing issues of the day and whose decisions reflect the views of the winners, in this view, is not to be lamented but celebrated as a reflection of democratic politics. In the view of several leading scholars, aggressive use of judicial review by the Supreme Court is simply a way for the new majority in the country to clear the way for its own policies.⁵¹ Critics of this view would point out, however, that the courts might be out of touch with the mood of the country for long periods of time because judges on federal district and circuit courts and justices on the Supreme Court serve life terms and are slow to be replaced.

Government and political influences on the Court come not only during times of partisan realignment and the appearance of new electoral coalitions but on an everyday basis. Here are important ways this happens.

GOVERNMENTAL INFLUENCES The Supreme Court must coexist with other governmental bodies that have their own powers, interests, constituencies, and visions of the public good.⁵² Recognizing this, the Court usually tries to stay somewhere near the boundaries of what is acceptable to other political actors. Being without “purse or sword,” as Alexander Hamilton put it in *The Federalist* No. 78, the Court cannot force others to obey its decisions. It can only hope that respect for the law and the Court will cause government officials to do what it has mandated in a decision. If the Court fails to gain voluntary compliance, it risks a serious erosion of its influence, for it then appears weak and ineffectual.⁵³

The President The president, as chief executive, is supposed to carry out the Court’s decrees. However, presidents who have opposed particular decisions or have been lukewarm to them have dragged their feet, as President Eisenhower did on school desegregation after the Court’s *Brown* decision in 1954.

Presidents have constitutional powers that give them some degree of influence over the Court. In addition to the Court’s dependence on presidents to carry out its decisions (when the parties to a dispute do not do it voluntarily), presidents influence the direction of the Court by their power to nominate judges when there are vacancies. Presidents can also file suits through the Justice Department, argue cases before the Court, or introduce legislation to alter the Court’s organization or jurisdiction (as Franklin Roosevelt did with his Court-packing proposal).

Congress Congress’s main influence on the Court is the Senate’s responsibility to give its “advice and consent” to presidential judicial nominees, that is, vote to confirm or to reject. The Senate can also delay consideration of presidential nominations, or even refuse to meet and hold hearings on a nominee as it did during most of 2016 with respect to Merrick Garland whose name President Obama put forward to fill the vacancy caused by Justice Scalia’s death.

Congress also can alter the size, organization, and appellate jurisdiction of the federal courts, including the Supreme Court, but it rarely does so.⁵⁴ The size of the Court has not changed since 1860. Nor, since that time, has Congress changed its jurisdiction as a reaction to its decisions, despite the introduction of many bills over the years to do so. In 2003, for example, a bill was introduced by Republicans in the House

to take away the Court's jurisdiction to hear cases challenging the inclusion of the phrase "under God" in the Pledge of Allegiance. In 2004, a resolution was introduced in the House decrying the citation of the opinions of foreign and international courts and international law in U.S. judicial pronouncements—something Justice Kennedy had done in his majority opinion in a case overturning the state of Texas's antisodomy statute in *Lawrence v. Texas* (2003)—and threatening impeachment for any federal judge doing so. (Neither bill passed.) Congress is more likely to bring pressure to bear on the courts by being unsympathetic to pleas from the justices for pay increases or for a suitable budget for clerks or office space. The Senate also plays a role in the appointment process, as we have learned, and can convey its views to the Court during the course of confirmation hearings. Finally, Congress can change statutes or pass new laws that specifically challenge Supreme Court decisions, as it did when it legislated the Civil Rights Act of 1991 to make it easier for people to file employment discrimination suits. All of this matters. There is evidence that throughout American history, the Supreme Court has exercised a great deal of restraint in its judicial review of congressional actions when Congress was clearly hostile to the Court.⁵⁵

POLITICAL LINKAGE INFLUENCES The Supreme Court is influenced not only by other government officials and institutions, but also by what we have termed *political linkage factors*.

Groups and Movements Interest groups, social movements, and the public not only influence the Court indirectly through the president and Congress but often do so directly. An important political tactic of interest groups and social movements is the **test case**. A test case is an action brought by a group that is designed to challenge the constitutionality of a law or an action by government. Groups wishing to force a court determination on an issue that is important to them will try to find a plaintiff on whose behalf they can bring a suit. When Thurgood Marshall was chief counsel for the NAACP in the 1950s, he spent a long time searching for the right plaintiff to bring a suit that would drive the last nail into the coffin of the *Plessy* separate-but-equal doctrine that was the legal basis for southern segregation. He settled on a fifth-grade girl named Linda Brown who was attending a segregated school in Topeka, Kansas. Several years later, he won the landmark case *Brown v. Board of Education of Topeka* (1954).

Many test cases take the form of **class-action suits**. These are suits brought by an individual on behalf of a class of people who are in a similar situation. A suit to prevent the dumping of toxic wastes in public waterways, for example, may be brought by an individual in the name of all the people living in the area who are adversely affected by the resulting pollution. Class-action suits were invited by the Warren Court's expansion of the definition of *standing* in the 1960s. The Rehnquist Court later narrowed the definition of *standing*, making it harder to bring class-action suits. As you learned above, the Roberts Court further limited the ability of similarly situated people to bring such suits.

Interest groups often get involved in suits brought by others by filing *amicus curiae* briefs.⁵⁶ Pro-abortion and anti-abortion groups submitted seventy-eight such briefs in *Webster v. Reproductive Health Services* (1989), a decision that allowed states to regulate and limit abortion availability.⁵⁷ These briefs set out the group's position on the constitutional issues or talk about some of the most important consequences of deciding the case one way or the other. In a sense, this activity is a form of lobbying. Some scholars believe that the Court finds such briefs to be a way to keep track of public and group opinion on the issues before it, which is helpful to its work.⁵⁸

Leaders The Supreme Court does not usually stray very far from the opinions of public- and private-sector leaders when a consensus exists among them.⁵⁹ Social and economic leaders use their influence in a number of ways. As we learned in ear-

test case

A case brought by advocacy or interest groups to try to force a ruling on the constitutionality of some law or executive action.

class-action suit

A suit brought on behalf of a group of people who are in a situation similar to that of the plaintiffs.



CIVIL RIGHTS CHAMPION

Social movements often use test cases to challenge the constitutionality of laws and government actions. After a long search, NAACP attorney Thurgood Marshall—shown here in front of the Supreme Court, where he would later sit as a justice—selected Linda Brown, a fifth grader from Topeka, Kansas, who was not permitted to attend the school closest to her house because it was reserved for whites, as the principal plaintiff in *Brown v. Board of Education of Topeka*, the historic case that successfully challenged school segregation. How else has the Court been a vehicle for social change?

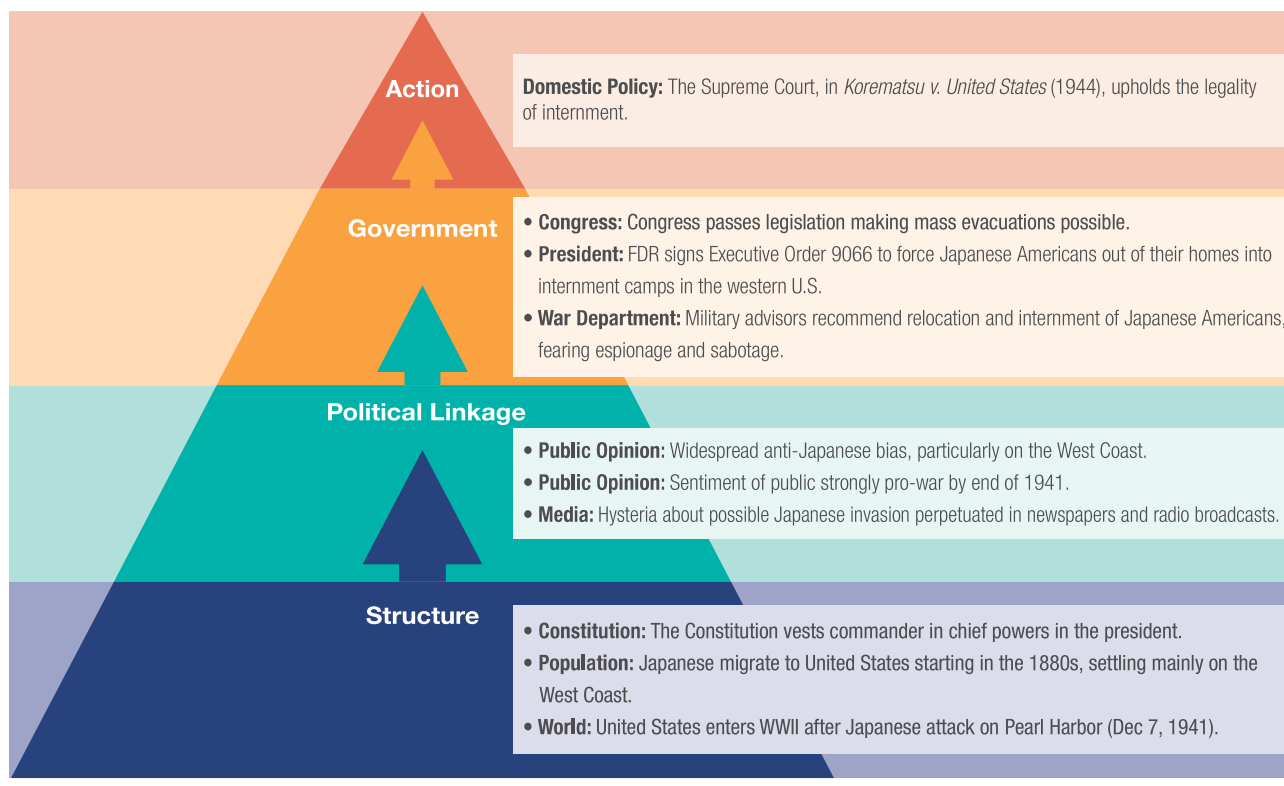
lier chapters, their influence is substantial in the media, the interest group system, party politics, and elections at all levels. It follows, then, that elites play a substantial role in the thinking of presidents and the members of Congress as they, in turn, deal with the Court.

On the other hand, when there is no elite consensus but rather deep divisions among them, as in our current period, the Court has more freedom to operate and is likely to swing back-and-forth between liberal and conservative rulings decided by 5–4 votes where a single justice often decide the outcome. Today, as we have learned, party, business, media, and advocacy group leaders are split along partisan and ideological lines. During the 1950s, to take a counter-example, elites were generally agreed that the United States, for both domestic and foreign policy reasons, had to end the legal segregation of the races in education. One result was the unanimous decision of the Court in *Brown v. Board of Education* (1954) that de jure segregation of schools was unconstitutional.⁶⁰

In addition to this powerful but indirect influence, the Court is also shaped by developments on issues and doctrine within the legal profession as these are expressed by bar associations, law journals, and law schools. For example, Justice O'Connor, in her opinion in the 2004 Michigan Law School affirmative action case, justified her vote by pointing out that the use of race as one criterion among many in law school admission decisions was now widely accepted in the university and legal communities, as was the legitimacy of the goal of “diversity” in higher education.

Public Opinion We might think that the Supreme Court is immune from public opinion because the justices are appointed for life and do not face the electorate. There is reason to believe, however, that what the Court does and what the public wants—at least as expressed in public opinion polls—are in fact highly correlated. A substantial body of research shows that Court rulings and public opinion are consistent with one another about two-thirds of the time, about the same level of consistency with the public as the president and Congress.⁶¹ There does not seem to be a yawning gap, then, between the public and the Supreme Court. We cannot say for sure, however, that public opinion causes the Court to act in particular ways when making decisions.⁶² Indeed, it is just as likely that third factors—such as major events, political developments, and cultural changes conveyed in the media—shape the perceptions of judges and citizens alike. Nevertheless, the close association between Court decisions and public opinion is good news in a society that aspires to be democratic.

However, it also is important to point out that there have been times during our history when the Court was so influenced by other political actors that it set aside, if only for a short while, its responsibility to protect the rights and liberties of all citizens. Although the Court has played an important role in advancing rights and liberties in the United States, it has not been entirely immune from pressure brought to bear by the public, other government officials, and private-sector leaders to punish suspect groups. For example, the Court went along with local, state, and federal actions to punish dissident voices during the McCarthy era’s anticommunist hysteria of the 1950s. It also approved in *Korematsu v. United States* (1944) the forced relocation and internment of 112,000 Japanese Americans during World War II, when Franklin Roosevelt, on the advice of his top military command, issued orders as commander in chief to relocate them into camps in the interior West, away from the Pacific coast. To gain a holistic account of how this was possible, examine the analytical framework shown in Figure 14.5. A broad overview of the decision in *Korematsu*, taking into account the influence of *structural, political linkage, and governmental factors*, helps explain why the Supreme Court upheld the legality of internment.

FIGURE 14.5 APPLYING THE FRAMEWORK: UPHOLDING THE LEGALITY OF INTERNMENT

THE SUPREME COURT AS A NATIONAL POLICY MAKER

14.5 Evaluate the role of the Supreme Court in national policy making.

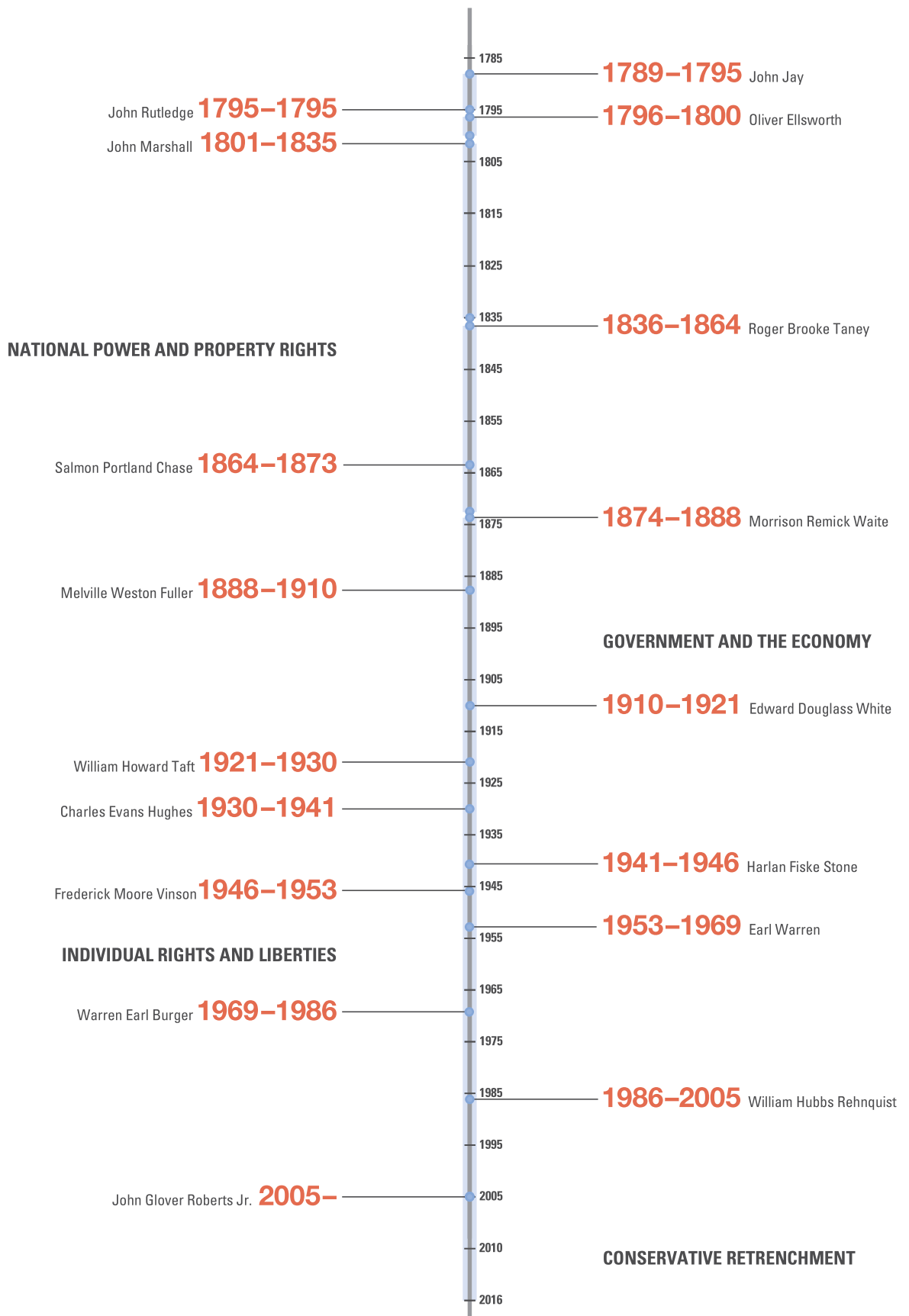
People often say the Court should settle disputes and not make policy. But because the disputes it settles involve contentious public issues (such as abortion rights and affirmative action) and fundamental questions about the meaning of our constitutional rules (such as the extent of presidential powers in wartime), the Court cannot help but make public policy.

It seems likely that the Court recognizes and cultivates its policy-making role. In the main, the Court does not see itself as a court of last resort, simply righting routine errors in the lower courts or settling minor private disputes. It sees itself instead as the “highest judicial tribunal for settling policy conflicts” and constitutional issues and chooses its cases accordingly.⁶³ The fact that decisions are not simply handed down but come with an opinion attached for the purpose of guiding the actions of other courts, litigants, and public officials is another demonstration that the Court recognizes its policy-making role. Let’s look at judicial policy making—which takes the form of the Court’s constitutional interpretations as revealed in its decisions—and see how it has evolved over time.

Structural Change and Constitutional Interpretation

Scholars generally identify three periods in the history of constitutional interpretation by the Supreme Court in the United States, one stretching from the early 1800s to the Civil War, the next from the end of the Civil War to the Great Depression, and the last from World War II to the mid-1980s.⁶⁴ We would add a fourth, covering the years from 1991 to the present (see Figure 14.6). We will see how changes in constitutional law have been influenced by structural factors, particularly economic change.

FIGURE 14.6 TIMELINE: CHIEF JUSTICES OF THE SUPREME COURT AND ERAS OF CONSTITUTIONAL INTERPRETATION, 1789–2016



SOURCE: United States Supreme Court.

PERIOD 1: NATIONAL POWER AND PROPERTY RIGHTS The United States experienced significant growth and change during the first seventy-five years of its existence. This growth was accompanied by changes in constitutional law. Chief Justice John Marshall, who presided over the Supreme Court from 1801 to 1835, was the key judicial figure during this important period in our history.⁶⁵ Marshall was a follower of the doctrines of Alexander Hamilton, who believed that American greatness depended on a strong national government, a partnership between government and business in which industry and commerce were encouraged, and a national market economy free of the regulatory restraints of state and local governments. In a string of opinions that have shaped the fundamentals of American constitutional law—especially important are *Fletcher v. Peck* (1810) and *McCulloch v. Maryland* (1819) discussed elsewhere in this text—Marshall interpreted the Constitution to mean “maximum protection to property rights and maximum support for the idea of nationalism over states’ rights.”⁶⁶

PERIOD 2: GOVERNMENT AND THE ECONOMY The Industrial Revolution and the Civil War triggered the development of a mass-production industrial economy dominated by the business corporation. Determining the role to be played by government in such an economy was a central theme of American political life in the late nineteenth and early twentieth centuries. The courts were involved deeply in this rethinking. At the beginning of this period, the Supreme Court took the position that the corporation was to be protected against regulation by both the state and federal governments; by the end, it was more sympathetic to the desire of the people and the political branches for the expansion of government regulation and management of the economy during the crisis of the Great Depression.

The main protection for the corporation against regulation came from the Fourteenth Amendment. This amendment was passed in the wake of the Civil War to guarantee the citizenship rights of freed slaves. The operative phrase was from Section 1: “Nor shall any state deprive any person of life, liberty, or property without due process of law”—on its face, hardly relevant to the world of the corporation. But in one of the great ironies of American history, the Court took up this expanded federal power over the states to protect rights and translated it to mean that corporations (considered “persons” under the law) and other forms of business should have increased protection from state regulation.

This reading of *laissez-faire* economic theory into constitutional law made the Supreme Court the principal ally of business in the late nineteenth and early twentieth centuries.⁶⁷ Keeping the government out of the economy in general, the Court overturned efforts by both the state and federal governments to provide welfare for the poor; to regulate manufacturing monopolies; to initiate an income tax; to regulate interstate railroad rates; to provide scholarships to students; to regulate wages, hours, and working conditions; and to protect consumers against unsafe or unhealthy products. The Court also supported the use of judicial injunctions to halt strikes by labor unions.

The business–Supreme Court alliance lasted until the Great Depression. Roosevelt’s New Deal reflected a new national consensus on the need for a greatly expanded federal government with a new set of responsibilities: to manage the economy; to provide a safety net for the poor, the unemployed, and the elderly; to protect workers’ rights to form labor unions; and to regulate business in the public interest. The Supreme Court, however, filled with justices born in the nineteenth century and committed to the unshakable link between the Constitution and *laissez-faire* economic doctrine, was opposed to the national consensus and in 1935 and 1936 declared unconstitutional several laws that were part of the foundation of the New Deal. In an extraordinary turn of events, however, the Supreme Court reversed itself in 1937, finding the Social Security Act, the Labor Relations Act, and state minimum wage laws acceptable. It is not entirely clear why the so-called switch-in-time-that-saved-nine occurred, but surely Roosevelt’s landslide reelection in 1936, the heightening of public hostility toward the Court, and

laissez-faire

The political-economic doctrine that holds that government ought not interfere with the operations of the free market.

Roosevelt's threat to expand and "pack the Court" all played a role. Whatever the reason, the Court abandoned its effort to prevent the government from playing a central role in the management of the economy and the regulation of business, and it came to defer to the political linkage branches of government on such issues by the end of the 1930s. In doing so, it brought another constitutional era to a close.

PERIOD 3: INDIVIDUAL RIGHTS AND LIBERTIES Three fundamental issues of American constitutional law—the relationship of the states to the nation, the nature and extent of private property rights, and the role of government in the management of the economy—were essentially settled by the time World War II broke out. From then until the mid- to late 1980s, the Court turned its main attention to the relationship between the individual and government.⁶⁸

Later chapters tell the story on civil liberties and civil rights. For now, it is sufficient to point out that the Court—especially during the tenure of Chief Justice Earl Warren—decided cases that expanded protections for free expression and association, religious expression, fair trials, and civil rights for minorities. In another series of cases dealing with the apportionment of electoral districts, the Court declared for political equality, based on the principle of "one person, one vote." In many of its landmark decisions, the Court applied the Bill of Rights to the states. Although the Court's record was not without blemishes during and after World War II (see Figure 14.4), it made significant strides in expanding the realm of individual freedom.

PERIOD 4: CONSERVATIVE RETRENCHMENT A new conservative majority emerged on the Supreme Court in the early 1990s, fashioned by the judicial nominations of Presidents Ronald Reagan and George H. W. Bush, and the patient efforts of conservative Chief Justice William Rehnquist. This new majority—with O'Connor and Kennedy usually, but not always, joining the three most consistently conservative justices, Scalia, Thomas, and Rehnquist—moved the Court to reconsider many of its long-established doctrines in the areas of rights and liberties and the relationship between the national and state governments. Its steady restriction of Congress's use of the commerce clause to underpin national laws in favor of "states' rights" was particularly noteworthy. In a string of landmark cases, the Court said Congress had gone too far in its efforts to ban guns from the area immediately around public schools, requiring background checks for gun buyers, and barring age discrimination in employment.

After moderate justice Sandra Day O'Connor retired in 2006 and Samuel Alito joined the Court, and with the strong leadership of Chief Justice John Roberts, the 5–4 conservative majority became even more cohesive, lasting until the death of Justice Scalia in early 2016.⁶⁹ Here are some representative rulings: In 2007, the Court ruled that school districts could not use racial criteria to promote school integration, and it upheld federal restrictions on very late-term abortions (called "partial birth abortions" by abortion opponents). In 2008, in *District of Columbia v. Heller*, the Court for the first time ruled that Americans have a constitutional right to own guns for their personal use under terms of the Second Amendment; the Court later ruled in 2010 that state and local regulations that effectively banned guns were unconstitutional. In 2009, it ruled in favor of a group of New Haven firefighters (nineteen white and one Hispanic) in a reverse discrimination case that bodes ill for the constitutional acceptability of local, state, and national affirmative action programs. In 2013, in *Shelby County v. Heller*, the Court's 5–4 conservative majority struck down a key provision of the 1965 Voting Rights Act, which had been instrumental in protecting the equal citizenship of African Americans.

The Roberts Court has been especially friendly to business interests and large corporations. In a stunningly broad ruling in 2010, the Court said that Congress could not restrict the campaign activities of corporations as specified by the McCain–Feingold reforms of 2002—*Citizens United v. FEC*—in the process overturning three of its own past rulings (precedents) on the same issue in which it had upheld restrictions on corporation campaign activity in the statutes of twenty-one states. In a 2011 case

involving Walmart, the Court issued a ruling making it more difficult for consumers and employees to bring class-action lawsuits against businesses. In 2012, it made a ruling making it more difficult for public-sector unions to raise money to use in political campaigns. In a series of cases in 2013, the Court made it more difficult to bring class-action suits against large corporations. In 2016, it placed a stay on the EPA's rules to limit emissions from coal-fired power plants. Perhaps the best indicator of the ideological leaning of the Roberts Court is the mounting success of the U.S. Chamber of Commerce before the Court. As we pointed out in Chapter 7, in the many cases supported by it, the Chamber was on the winning side 43 percent of the time before the Burger Court (1981–1993), 56 percent of the time during the Rehnquist years (1994–2004), and 69 percent of the time during the Roberts years (2006–2016).

There seem to be two exceptions to the ever-more conservative drift of the Court. First, the Court has proved to be a strong defender of gay and lesbian rights, even ruling that state and federal laws against same-sex marriage are unconstitutional. For whatever reason, Justice Kennedy, normally part of the five-member majority conservative coalition during these years, swung to the liberal side on this issue and has been consistent. Second, and, for reasons that have stumped liberals and conservatives, Democrats and Republicans, Chief Justice John Roberts provided the winning vote on the ruling that upheld the Affordable Care Act in 2012. It may be that the Chief Justice was worried about the standing of the Court were it to rule against such a massive program, with its millions of enrollees and scores of health insurance companies involved in its implementation and which had changed much of the landscape of the health care sector of the American economy. Of course, there is no way to know with any certainty. And, recall that he rejected Congress's use of the commerce clause to justify the Act and that this part of his opinion may represent a booby-trap for liberal legislation in the future.

The Debate over Judicial Activism

Has the Court become too involved in national policy making? Many people think so; others think not. Let us examine several of the ways in which **judicial activism** is expressed.⁷⁰

judicial activism

Actions by the courts that purportedly go beyond the role of the judiciary as interpreter of the law and adjudicator of disputes.

REDUCED DAMAGES

The *Exxon Valdez* oil spill in Prince William Sound in Alaska in 1989 caused substantial environmental damage and hurt the area's fishing- and tourist-based economy. After a long legal battle, the Roberts Court in 2008 dramatically reduced the money the big energy company owed in punitive damages for its negligence, overturning the actions of lower federal courts.

With Congress and the president often gridlocked, does it make sense for both liberal and conservative groups to turn to the federal courts to fashion the sorts of public policies they support?



JUDICIAL REVIEW We have already seen how, under John Marshall's leadership, the Court claimed the right of judicial review in the case of *Marbury v. Madison* (1803). Still, the Court did not exercise that power to any great extent until the late nineteenth century. The use of judicial review increased during the twentieth century, however, with most of the Court's adverse attention being paid to the states. As described earlier, the Rehnquist Court was fairly aggressive in overturning federal statutes, averaging almost six per term from 1994 to 2005, compared with one every two years from the end of the Civil War to the early 1990s.⁷¹ Oddly, given the tendency of conservative activists and organizations to be the most vociferously concerned about an overly activist judiciary, it was the most conservative members of the Court who most frequently voted to overturn congressional statutes during these years.⁷² The Roberts Court seems to be even more aggressively moving in this direction with the conservative majority most often ruling against the actions of the political bodies, Congress and the president.⁷³ These trends in the use of judicial review suggest that over time the Court has become more willing to monitor the activities of other governmental entities.

REVERSING THE DECISIONS OF PAST SUPREME COURTS Despite the norm of precedent (*stare decisis*) that guides judicial decision making, the Warren, Burger, Rehnquist, and Roberts Courts all overturned previous Court decisions. The most dramatic instance was the Warren Court's reversal of *Plessy v. Ferguson* (1896), which had endorsed legal segregation in the South, with *Brown v. Board of Education* (1954), which removed segregation's legal underpinnings. The Rehnquist Court overturned a number of previous Court decisions that had expanded the rights of criminal defendants and that had supported the extension of federal government power, reviewed earlier. When the Roberts Court upheld the federal Partial-Birth Abortion Ban Act, it reversed its own position on an identical Nebraska law it had declared unconstitutional in 2000. In *Citizens United v. Federal Election Commission* (2010), the Court overturned three of its own precedents, including cases from 1990, 2003, and 2007. In his dissent in this case, read from the bench as a sign of his deep displeasure with the majority, Justice John Paul Stevens lamented what he took to be the overly broad and ambitious reach of the majority, saying "essentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."

In 2015 and 2016, the Court said it would take up a number of cases that challenge long-settled law. The Court, for example, heard arguments on a case that reopened the meaning of "one person, one vote," and seemed poised before Scalia's death to radically change its meaning in the drawing of congressional district lines, but with a 4–4 deadlock on the Court in 2016, compromise prevailed and it ruled 8–0 in favor of the state of Texas' right to choose its own method of counting (the number of people living in a district, the traditional method) and leaving for a later day the decision on whether to allow states to count only the number of eligible voters, a position advocated by some conservatives).

DECIDING "POLITICAL" ISSUES Critics claim that the Court is taking on too many matters best left to the elected branches of government. An oft-cited example is the Court's willingness to become increasingly involved in the process of drawing congressional electoral district boundaries in the states. Defenders of the Court argue that when such basic constitutional rights as equality of citizenship are at peril, the Court is obligated to protect these rights, no matter what other government bodies may choose to do. The Court's intervention in the 2000 presidential election generated widespread criticism for its meddling in politics, although its many defenders insist that the Court's decision in *Bush v. Gore* saved the nation from a constitutional crisis.



DECIDING THE 2000 PRESIDENTIAL ELECTION

The outcome of the closely fought 2000 presidential election was not finally decided until the Supreme Court stopped the recount in Florida, giving the state's electoral votes to George W. Bush. Here, passionate supporters of Bush and Al Gore demonstrate in front of the Supreme Court building while awaiting its decision.

Do you think the Court's intervention was in the nation's best interest?

REMEDIES The most criticized aspect of judicial activism is the tendency for federal judges to impose broad remedies on states and localities. A **remedy** is what a court determines must be done to rectify a wrong. Since the 1960s, the Court has been more willing than in the past to impose remedies that require other governmental bodies to take action. Some of the most controversial of these remedies include court orders requiring states to build more prison space and mandating that school districts bus students to achieve racial balance. Such remedies often require that governments spend public funds for things they do not necessarily want to do. Critics claim that the federal judiciary's legitimate role is to prevent government actions that threaten rights and liberties, not to compel government to take action to meet some policy goal.

STRICT CONSTRUCTION Many conservative legal scholars and judges believe that the Constitution is not, as we suggested in Chapter 2, a "living" document whose meaning does and should change as the United States evolves, but one that must be true to its beginnings. This takes two forms: Advocates of **original intention** believe the Court must be guided by the original intentions of the framers when they wrote the document in Philadelphia in 1787 and ratified it in 1788; advocates of **originalism** like the late Antonin Scalia, believe judges should interpret the Constitution in light of the original meaning of the text (words and phrases) as understood by the people who wrote and ratified it.⁷⁴ Strict constructionists believe the expansion of rights that has occurred since the mid-1960s—such as the new right to privacy that formed the basis of the *Roe v. Wade* decision and rights for criminal defendants—is illegitimate, having no foundation in the framers' intentions or the text of the Constitution.

Critics of **strict construction** believe that the intentions of the framers and the meaning of the text at the time of the founding are not only impossible to determine but also unduly constricting. They point out that original intent cannot be known, mostly because the only record of the debates at the constitutional convention are Madison's⁷⁵ notes, which incorporated only about 10 percent of what was said, according to scholars. Moreover, it is not entirely clear how to define the framers.

remedy

An action that a court determines must be taken to rectify a wrong done by government.

original intent

The doctrine that the courts must interpret the Constitution in ways consistent with the intentions of the framers rather than in light of contemporary conditions and needs.

originalism

The doctrine that judges must interpret the Constitution based on the exact meaning of the words and phrases in the document as understood by the Framers.

strict construction

The doctrine that the provisions of the Constitution have a clear meaning and that judges must stick closely to this meaning when rendering decisions.

Is it all who attended the convention? All who signed the document? And what about the ratification conventions in the states? Do we include them among what we might call the Founders, knowing that there were several states that voted against the Constitution and many who dissented from the majority in those state conventions that voted to ratify? Other critics wonder why we ought to be bound by late-eighteenth-century interpretations of the meaning of words, even if it were possible to uncover what the words meant to people at the time.⁷⁶ Most importantly, strict construction, according to its many critics, is unduly constricting in light of the great transformations that have occurred in American society in the years since ratification. What seems more reasonable in this view is to have jurists try to reconcile the fundamental principles of the Constitution with changing conditions in the United States and the democratic aspirations of the American people.⁷⁷

Clearly, the modern Supreme Court is more activist than it was in the past; most justices today hold a more expansive view of the role of the Court in forging national policy than their predecessors. And because the Court is likely to remain activist under Chief Justice John Roberts or any future chief justice, the debate about judicial activism is likely to remain important in American politics.

THE COURTS: DOES THE SUPREME COURT ENHANCE AMERICAN DEMOCRACY?

The framers designed the Supreme Court as an institution that would serve as a check on the other branches, most especially on Congress, the only semi-democratic institution of the lot in their original design. They also structured the Court to be the least democratic of the branches in the new federal government, with justices appointed rather than elected and serving for life rather than for a fixed term of office. The framers wanted the judiciary to function as a referee who stands above the fray, preserving the rules, overseeing the orderly changing of some rules when the situation demands it, protecting minorities against the potentially tyrannical behavior of the majority, and protecting individuals in the exercise of their constitutionally guaranteed rights. From the perspective of democratic theory, however, it is unacceptable that one of the three main branches of the federal government in the United States—with the power to override the decisions of presidents, Congress, and state legislatures and to make binding decisions for the nation as a whole—is staffed with members who never face the judgment of the voters. It also is troubling how the Court has often sided with the business community against other sectors of American society, over-ruling laws and regulations passed by the popular branches of government.

Although designed as an antimajoritarian institution, the Supreme Court is much more responsive to majoritarian political actors and to the public than the framers ever imagined would be the case. For example, we have seen that the Supreme Court does not often stray very far from what is acceptable to the president and Congress or to private elites; we have seen, also, that the Court acts consistently with public opinion about as often as Congress and the president do. In addition, as the chapters on civil rights and civil liberties will show, the Court has sometimes played an important and positive role in the protection of minority rights and liberties in the United States, although it has been inconsistent and slow in doing so.

The overall view suggests that, whatever the intention of the framers or the original meaning of the Constitution, the Court has not acted consistently as an antimajoritarian institution, though it has sometimes done so. It is a mixed picture. The Court has sometimes been the protector of democracy and individual rights and liberties, and sometimes not. The Court, being a creature of the Constitution, the political process, social and cultural trends, and the proclivities of individual justices, is hard to unambiguously categorize in terms of its democratic character.

REVIEW THE CHAPTER

THE FOUNDATIONS OF JUDICIAL POWER

- 14.1** Describe the constitutional and political foundations of federal judicial power in the United States.

Despite the fact that Article III of the Constitution is quite vague about the powers and responsibilities of the U.S. Supreme Court, the Court has fashioned a powerful position for itself in American politics, coequal with the executive and legislative branches.

Under Justice John Marshall in the early nineteenth century, the Court first claimed its right to rule on the constitutionality of state and federal legislation. The Court exercised its power of judicial review in the nineteenth century primarily over state actions, with particular regard to preventing regulation of business.

The Rehnquist and Roberts Courts regularly overruled Congress and, beginning in the 2000s, the president as well.

THE FEDERAL COURT SYSTEM: JURISDICTION AND ORGANIZATION

- 14.2** Describe the structure of the federal judiciary.

The federal court system is made up of three parts. At the bottom are ninety-four federal district courts, in which most cases originate. In the middle are thirteen appeals courts. At the top is the Supreme Court, with both original and appellate jurisdiction. Only a relative handful of the thousands of cases filed in the federal district courts make it to the Supreme Court.

APPOINTMENT TO THE FEDERAL BENCH

- 14.3** Describe the background of appointees to the federal bench and the process by which they are appointed.

Until quite recently, the federal judiciary was dominated by white Protestant men from top law firms and law schools or from government service.

Today, many more women and racial and ethnic minorities serve in the federal judiciary, with one African American man and three women, one of whom is Hispanic, on the Supreme Court. A majority of the justices on the current Court are Catholic.

The appointment process is highly political and increasingly contentious, with presidents trying to leave

their mark on the Court, the political parties bringing ideological views to the process, and interest and advocacy groups fully engaged.

THE SUPREME COURT IN ACTION

- 14.4** Outline the process by which the Supreme Court makes decisions and the factors that influence judicial decision making.

The Supreme Court operates on the basis of several widely shared norms: secrecy, seniority, and adherence to precedent. The Court controls its agenda by granting or not granting a writ of certiorari to cases filed.

Cases before the Court wend their way through the process in the following way: submission of briefs, oral argument, initial consideration in conference, opinion writing, and final conference consideration by the justices.

Published opinions serve as precedents for other federal courts and future Supreme Court decisions.

The decisions of the Court are influenced not only by the judicial philosophies of the justices, but also by the actions and preferences of other political actors such as the president and Congress as well as by interest groups and public and elite opinion.

Increasingly, the ideological predispositions and partisan identifications of the justices determine how they vote on cases. The Supreme Court was dominated by a conservative majority appointed by Republican presidents until the death of Justice Scalia in early 2016.

THE SUPREME COURT AS A NATIONAL POLICY MAKER

- 14.5** Evaluate the role of the Supreme Court in national policy making.

The Supreme Court is a national policy maker of considerable importance. Its rulings not only settle disputes between political actors on critical matters and help define the meaning of the Constitution for others in the political system, but it also is quite active in pushing its own policy agenda.

The Court often serves as the referee of the democratic process and the rights of minorities, although it has sometimes failed to do this.

LEARN THE TERMS

amicus curiae Latin for “friend of the court”; a legal brief in which individuals not party to a suit may have their views heard in court.

appellate courts Courts that hear cases on appeal from other courts.

briefs Documents setting out the arguments in legal cases, prepared by attorneys and presented to courts.

circuit courts The 12 geographical jurisdictions and one special court that hear appeals from the federal district courts.

class-action suit A suit brought on behalf of a group of people who are in a situation similar to that of the plaintiffs.

concurring opinion The opinion of one or more judges who vote with the majority on a case but wish to set out different reasons for their decision.

constitutional courts Federal courts created by Congress under the authority of Article III of the Constitution.

dissenting opinion The opinion of the judge or judges who are in the minority on a particular case before the Supreme Court.

grand juries Groups of citizens who decide whether there is sufficient evidence to bring an indictment against accused persons.

in forma pauperis Describing a process by which indigents may file a suit with the Supreme Court free of charge.

judicial activism Actions by the courts that purportedly go beyond the role of the judiciary as interpreter of the law and adjudicator of disputes.

judicial review The power of the Supreme Court to declare actions of the other branches and levels of government unconstitutional.

laissez-faire The political-economic doctrine that holds that government ought not interfere with the operations of the free market.

legislative courts Highly specialized federal courts created by Congress under the authority of Article I of the Constitution.

opinion The explanation of the majority’s and the minority’s reasoning that accompanies a court decision.

opinion of the Court The majority opinion that accompanies a Supreme Court decision; also called the majority opinion.

original intent The doctrine that the courts must interpret the Constitution in ways consistent with the intentions of the

framers rather than in light of contemporary conditions and needs.

original jurisdiction The authority of a court to be the first to hear a particular kind of case.

originalism The doctrine that judges must interpret the Constitution based on the exact meaning of the words and phrases in the document as understood by the Framers.

petit (trial) juries Juries that hear evidence and sit in judgment on charges brought in civil or criminal cases.

plaintiff One who brings suit in a court.

precedents Past rulings by courts that guide judicial reasoning in subsequent cases.

remedy An action that a court determines must be taken to rectify a wrong done by government.

rule of four An *unwritten* practice that requires at least four justices of the Supreme Court to agree that a case warrants review by the Court before it will hear the case.

senatorial courtesy The tradition that a judicial nomination for a federal district court seat be approved by the senior senator of the president’s party from the state where a district court is located before the nominee is considered by the Senate Judiciary Committee.

separate but equal doctrine The principle articulated in *Plessy v. Ferguson* (1896) that laws prescribing separate public facilities and services for nonwhite Americans are permissible if the facilities and services are equal to those provided for whites.

standing Authority to bring legal action because one is directly affected by the issues at hand.

stare decisis The legal doctrine that says precedent should guide judicial decision making.

strict construction The doctrine that the provisions of the Constitution have a clear meaning and that judges must stick closely to this meaning when rendering decisions.

test case A case brought by advocacy or interest groups to try to force a ruling on the constitutionality of some law or executive action.

writ of certiorari An announcement that the Supreme Court will hear a case on appeal from a lower court; its issuance requires the vote of four of the nine justices.