THE AMERICAN CONSTITUTIONAL EXPERIENCE

Selected Readings & Supreme Court Opinions

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Preface

In the ten years since the first edition of *Constitutional Government: The American Experience,* the authors have received many helpful comments and suggestions from colleagues, adopters of the text, and students. Many of these suggestions have worked their way into the textbook. The decision to produce this reader and casebook to accompany *Constitutional Government* stems both from several useful suggestions and from our own years of experience in teaching courses on American constitutional development and constitutional law. We believe that students benefit from reading primary sources and Supreme Court opinions wherever possible. On the other hand, because the text is focused at the sophomore and junior level, it may be unrealistic to expect a beginning student to wade through entire opinions. As a result, this book provides selected readings and edited Supreme Court opinions to convey the richness of primary sources without subjecting students to excessively long reading assignments.

While this casebook is organized along the lines of our textbook, it certainly could be used in conjunction with other texts or serve as a supplement for introductory courses in American Government. The casebook begins with an introductory essay describing the work of the Supreme Court and its role in constitutional development. Students should find this chapter especially useful in introducing concepts and ideas which form the basis for America's judicial process. Subsequent chapters focus on the subject matter found in textbooks, including Judicial Review, Separation of Powers, Race and Equal Protection, New Equal Protection, Bill of Rights and Fundamental Rights, Due Process of Law, Freedom of Speech, Freedom of the Press, and the Religion Clauses. Each chapter begins with a reading which helps to place the topic in historical perspective, whether in the richness of the *Federalist Papers* or the thought of Frederick Douglass. Then, several Supreme Court opinions capture the development and transition of the Constitution through the words of the justices themselves.

As always, we thank our families for their continuing support and encouragement. Finally, we appreciate the assistance provided by Baylor University and Providence College in making this book a reality.

Contents

The Role of the Supreme Court in American Constitutional Development

Judge Learned Hand: *"Well, sir, goodbye. Do justice!"*

Justice Oliver Wendell Holmes: *"That is not my job. My job is to play the game according to the rules."*[1]

The conversation between Judge Learned Hand and Justice Oliver Wendell Holmes highlights a fundamental problem with our perception of the Supreme Court: does the Court "do justice," as Hand so admonished Holmes, or does the Court "play by the rules," as Holmes' reply indicates? "Doing justice" means that the Court is ultimately concerned with the final outcome in each case it reviews, and the outcome should reflect "justice." Yet, "playing by the rules" means the Court follows the rules and applies the rules (the law) to each case before it; the outcome of the case is subordinate to the higher value of following the rules. Figuring out whether the Court *ought* to "do justice" or "play by the rules" involves normative arguments concerning the role the Court *ought* to play in American politics. Recognizing that normative arguments about the Court's role are valuable, and even necessary in our democracy, what follows is a less ambitious discussion of some of the prominent aspects of the Supreme Court as a legal and political institution.

Understanding the Supreme Court's role in the American political system is not easy. At the outset, the Court is a court of law, and one of its primary roles is to serve as the nation's highest appellate court by resolving important legal disputes between two or more litigants. Yet, Americans often look upon the Court not only as a *legal* institution, but also as a *political* institution that resolves some of our most divisive disputes over the Constitution. Robert McCloskey submits that "the Court is an agency in the American governing process."[2] For McCloskey, then, understanding the Court involves not only perceiving it as an *agent* in the political system, but also understanding that the court has a "mind and a will and an influence of its own."

The Court as an agent in the political system means it serves several roles, and scholars have long noted that the Court's various roles extend beyond that of merely resolving legal disputes. The Court is referred to as:

- a "republican schoolmaster" that educates the citizenry in the basics of republican government;[3]
- an appellate court that unifies the country under one interpretation of federal and constitutional law;[4]
- a political institution comprised of nine justices, appointed for life, each of whom decides cases according to his/her own political ideology;[5]
- or the Court is an umpire that resolves disputes between the federal government and the states, or between national institutions.[6]

The Court's role is multi-faceted, and the above list is by no means exhaustive.

The following discussion highlights some, but obviously not all, roles that the Court plays in American politics. To better understand the Court, and the roles that it serves in the political system, several things are covered. The jurisdiction, or power, of the Court to decide certain issues is important, as is the Court's ability to set its own agenda and "decide what to decide." The decision-making process is also covered to provide background and insight into the various influences that affect outcomes at the Supreme Court. Finally, the relationship between the Court and public opinion is discussed, and questions concerning the impact of the Court on American society are also considered.

Two Approaches to Courts and the Law

Our understanding of the Supreme Court often revolves around two fundamental questions: how and why does the Court decide cases the way it does? As with other political institutions,

1. Judge Learned Hand, *The Spirit of Liberty*, 3rd ed., (Chicago: University of Chicago Press, 1960), 307.
2. Robert G. McCloskey, *The American Supreme Court*, (University of Chicago, 1960), ix.
3. Ralph Learner, *The Thinking Revolutionary: Principle and Practice in the New Republic*, (Ithaca: Cornell University Press, 1987), 91–139.
4. Martin Shapiro, *Courts: A Comparative and Political Analysis*, (Chicago: The University of Chicago Press, 1981), 49–56.
5. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model*, (Cambridge: Cambridge University Press, 1993), *passim*.
6. Louis Fisher, *Constitutional Dialogues*, (Princeton: Princeton University Press, 1988), 15–39.

the *outcomes* of the Court are informed by an understanding of the decisionmaking process, broadly defined. In this mode, American political scientists and legal scholars emphasize two main approaches to understanding the Court. A **legal** approach argues that what matters most to understanding the Court is how the Court interprets and applies *the law*, i.e., constitutional and statutory law. Thus, the decisions of the Court are "based on the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of social interests."[7] To understand the Court's role in the political system, and how the Court reaches decisions, all the necessary information is contained within the law, so to speak; that is, statutes and the Constitution are fairly clear, and their legal meanings can be deduced. As Lee Epstein puts it,

> legalism centers on a simple assumption about judicial decisionmaking: jurists derive rules from precedential cases, statutes, and the Constitution and then apply them to specific cases to reach decisions. . . . Some scholars label this "mechanical jurisprudence" because the process by which judges reach decisions is highly structured.[8]

However, Epstein observes that "the law does not explain all aspects of the judicial process," and a legalistic approach to the Court ignores several other factors. In contrast to a legal approach, a **behavioral,** or **attitudinal,** approach stipulates that Supreme Court decisions, to a large degree, are ultimately based on each individual Justice's political ideology. Thus, to understand the Court, legal factors from the law (Constitution, federal statutes), to legal procedure and jurisdiction, are important; but judicial ideology cannot be discounted, because the "Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."[9]

The debate between "legalists" and "behavioralists" highlights one fundamental problem with studying the Supreme Court. The types of cases that the Court hears are usually considered "hard" cases, in the sense that the law is not always determinative of a certain decision. That is, the law itself is vague, so that the Court often has to decide between contradictory, yet plausible, legal arguments. As Jeffrey Segal and Harold Spaeth put it, litigants at the Supreme Court generally have precedents supporting their arguments, and "both capably formulate arguments that the balance of societal interests rests in their . . . favor; and both sides typically allege that either the plain meaning of the Constitution and/or the intent of the framers supports its position."[10] Thus, the importance of studying the Court from a behavioralist perspective is obvious: "if various aspects of the legal model can support either side of any given dispute that comes before the Court, then the legal model hardly satisfies as an explanation of Supreme Court decisions."[11]

If the law itself is indeterminate, then the Court must choose between conflicting, yet plausible, interpretations of the Constitution or a statute. The legal model does not adequately explain that choice. The behavioralist, or attitudinal, model helps fill in the gaps, so to speak, in the sense that the Justices' political background are important to Supreme Court outcomes. However, to argue that the Court's decisions are simply the product of the Justices' ideology ignores the legal context of the disputes, and the legal context of the Court's decisions. Yet, to ignore the importance of political factors on the Court's decisions, such as ideology, overlooks a basic element of the decisionmaking process. Underlying the following discussion of the Court is this tension between the legal and behavioral approaches to what the Court does.

The American Supreme Court—the Institution

Constitutional historian Michael Kammen argues that American courthouses have historically been perceived as "temples of justice," although courts in the early Republic often met in taverns, barns, and other non-courthouse places.[12] Kammen's point is simply that courts were temples of justice in the abstract; where a court met, there also was the "temple." In fact, the description of a court as a type of temple devoted to justice indicates the reverence that Americans bestow upon their judicial process. The significance for the Supreme Court is that even though it was the highest court in the United States, and the head of the third branch of government, it did not have its own building until 1937. Understanding the Court's physical setting aids in more fully understanding the Court's role.

Indeed, the Court under Chief Justice John Marshall, which profoundly influenced the course of constitutional development with cases such as *Marbury v. Madison, McCullough v. Maryland,* and *Gibbons v. Ogden,* never had its own building. "John Marshall never had a temple of justice to call his own," as Kammen points out, thus "the Marshall Court labored in comparative obscurity; its quarters were truly inconspicuous."[13] John Marshall's experience points out one aspect of the Court's historical development: for its first one hundred years, the Court labored in relative obscurity. It did not play a high-profile role in the national political system, although it did occasionally decide monumental cases that impacted the system dramatically.

7. Segal and Spaeth, supra note 5, 32.
8. Lee Epstein and Jack Kobylka, *The Supreme Court and Legal Change,* (Chapel Hill: UNC Press, 1992), 11.
9. Ibid., 65.
10. Jeffrey Segal and Harold Spaeth, supra note 5, 65.
11. Ibid.
12. Michael Kammen, "The Iconography of Judgement and American Culture," in Maeva Marcus, ed., *Origins of the Federal Judiciary,* (Oxford: Oxford University Press, 1992), 251.
13. Ibid., 276.

The Court, as John Brigham puts it, "wandered about the republic . . . until 1937, when its present home was completed."[14] The Court moved several times prior to 1937, and held sessions in the merchants exchange building in New York City, Independence Hall in Philadelphia, and when the capital was finally located to Washington, D.C., the Court met in a congressional committee room, the basement of the congress, and finally the old Senate chamber. That the Court moved about indicates its relative lack of stature, in comparison to Congress and the Presidency. However, the new Supreme Court building reflected the changing status of the Court in American politics.

With the opening of the new Supreme Court building, the Court's role changed, almost dramatically so.

> The marble temple . . . is more than a symbol of the modern Court. The building further removed and insulated the justices from the political life in the Capitol. The building nonetheless reinforces basic institutional norms—in particular, along with the justices' psychological interdependence and independence from outside political accountability, the norms of secrecy, tradition, and collegiality.[15]

With its own building, the Court was now more than just symbolically separate from the rest of the Federal government. Indeed, institutional separation meant that the Court could develop its own institutional procedures to facilitate its decisionmaking. The Court's new building also symbolized the growing prominence it would take in the national political system.

"The new building at last presented the Court with a physical setting that matches the splendor of its constitutional role," as Bernard Schwartz notes in his history of the Court.[16] Schwartz observes the impressive nature of the building itself—longer and wider than a football field, made almost entirely of marble; the interior has six kinds of marble, thousands of feet of clear-grained white oak, and bronze firehose cupboards. It also has a basketball court. To quote Justice Harlan F. Stone, "the place is almost bombastically pretentious, and thus it seems to me wholly inappropriate for a quiet group of old boys such as the Supreme Court of the United States."[17]

At present, the Supreme Court is a well-developed and entrenched bureaucratic organization. Nine justices have several law clerks working for them (the Court is often referred to as "nine little law firms"), and the Court's budget has increased significantly. There is a vast wealth of resources, in terms of library volumes, journals, and computer databases, at the justices' disposal. Since it receives well over 8000 appeals per year, not only must the Court be a good processor of information coming into it, it must be able to efficiently process information going out.

Indeed, it would be difficult to see how the Court could effectively do its job as the nation's highest appellate court while still located in the Capital building. The Supreme Court building reflects the *institutionalized* Court; the Court that needs a surrounding bureaucracy to process the thousands of appeals its receives each year.

The Supreme Court's Power

The Court's power obviously is limited. Judicial power in general—the power of a court to decide certain issues—is called jurisdiction. Generally, jurisdiction necessarily limits the issues that come before courts, and therefore courts are constrained in what issues they have competence over. Only by understanding jurisdiction can we fully understand a court's power.[18] As Louis Fisher argues, "court jurisdiction may seem like a technical matter . . . but jurisdiction means political power."[19]

It is worth mentioning briefly the Court's original jurisdiction, which extends to disputes between states, those involving foreign ambassadors and other ministers, and disputes commenced by states against other citizens or foreign nationals. The most important type of original jurisdiction litigation concerns one state suing another state.[20] Original jurisdiction cases start, and end, in the Supreme Court, and do not come up to the Court as appeals. To decide an original jurisdiction case, the Court will generally appoint a "special master" to resolve the conflict, especially when the dispute is between two states. Special masters gather the facts in the dispute and proffer solutions to the Court; the Court can then accept and/or modify the special master's conclusion. Historically, the Court has rendered approximately 175 original jurisdiction opinions since 1793, indicating the rarity of such cases.[21] The Court is now predominantly an appellate court, since its original jurisdiction is rarely invoked.[22]

The Constitution allows Congress to regulate the Court's appellate jurisdiction. Historically, Congress has done so by controlling avenues to appeal. Congress regulates *procedural* aspects concerning how appeals get to the Court. Generally, though, Congress has been unable to regulate the *substance* of appeals heard by the Court.

14. John Brigham, *The Cult of the Court,* (Philadelphia: Temple University Press, 1992), 109.
15. David O'Brien, *Storm Center,* 4th ed., (New York: Norton, 1996), 145.
16. Bernard Schwartz, *The History of the Supreme Court.*
17. Quoted in Bernard Schwartz, *A History of the Supreme Court,* (Oxford: 1993), 225–227.
18. H. W. Perry, *Deciding to Decide,* (Cambridge: Harvard University Press, 1991), 22–41.
19. Louis Fisher, *Constitutional Dialogues,* (Princeton: Princeton University Press, 1988), 164.
20. See most recently *New Jersey v. New York,* decided May 26, 1998 (U.S. Reports citation not available), which concerned state ownership of Ellis Island.
21. Lawrence Baum, *The Supreme Court,* 6th ed., (Congressional Quarterly Press, 1998), 12.
22. See David M. O'Brien, supra note 15, 202–230.

For instance, Congress gave the Court a great deal of discretion over its docket under the 1925 Judiciary Act, while mandating that it still adjudicate certain appeals, including appeals from federal courts declaring state laws unconstitutional. In 1988, Congress abolished almost all of the Court's mandatory jurisdiction, granting it virtually complete discretion over what cases to hear each session.[23] However, even though the Court has complete control over its docket, as Robert Carp and Ronald Stidam point out, "the jurisdictional boundaries of the U.S. courts are a product of congressional judgements."[24] Although Congress consistently tries to limit appeals to the Court in high profile areas, such as school prayer and abortion, it is ultimately unsuccessful.[25] What this points out is that members of Congress use their power over the Court's appellate docket to great rhetorical effect. Some members consistently contend that Congress can withdraw jurisdiction from the Court over policy areas, such as school prayer. Yet, proposed statutes that seek to withdraw jurisdiction generally do not proceed far along the legislative process, and indeed there are serious constitutional questions concerning whether Congress can withdraw jurisdiction over constitutional issues.[26]

The Supreme Court's jurisdiction is considered *general*, in that it can accept any case "arising under the Constitution or the laws of the United States." Thus, any legal issue that implicates the Constitution, federal law, or a treaty, potentially falls within the Court's power. Yet, recalling that the Court is an appellate court means that it only reviews appeals concerning the Constitution, federal law, or treaties, that are first decided by lower courts. As an appellate court, its role is to decide appeals, and in the process provide uniform interpretations of federal and constitutional law that govern all of the United States.

The Court is a general court of appeal that oversees the federal and state judiciaries. Its modern role is pointedly described by Chief Justice Vinson, who noted in 1949 that:

> the Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions . . . the function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution [and] law . . . of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised . . . we could not fulfill the Constitutional and statutory responsibilities placed on the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.[27]

As Chief Justice Vinson pointed out, the Court cannot adjudicate every case appealed to it. Its role is not to correct errors made by lower trial courts, but to supervise the federal system to ensure the uniform interpretation of federal laws and the Constitution. Therefore, the Court will primarily limit its review to appeals that involve matters of public importance, such as constitutional issues, or appeals that include divergent interpretations of federal law in lower federal courts.

The Supreme Court's Jurisdiction—the Process

Although there are five ways cases come up to the Supreme Court,[28] only two are prominent: **appeals** and **certiorari petitions.** Under its *appeals* jurisdiction the Court hears cases that are mandatory, such as appeals from three-judge district courts in apportionment cases. Historically, Congress has mandated that the Court accept certain types of cases, such as appeals concerning lower federal court oversight of state apportionment, judicial review of state laws, and judicial review of federal statutes. However, in response to the Court's growing workload, Congress removed virtually all mandatory appeals in 1988. The Court develops limiting doctrines, such as standing, ripeness, mootness, the political question doctrine, or lack of a substantial federal question, to limit its acceptance of appeals cases.

The second major type of jurisdiction is the Court's *certiorari* jurisdiction. As Perry notes, *certiorari* is not a "well understood concept even though it is the principal way cases come before the Supreme Court."[29] "Granting cert." is the most common way cases come before the Court, and this aspect of jurisdiction is known as "statutory certiorari," as it is defined by the Judge's Act of 1923,[30] later codified in the United States Code under section 1254. Statutory certiorari is different than *certiorari* found under the Court's *writs* jurisdiction, but it is unnecessary to detail the differences here. It is by far the most important jurisdiction of the Court, in terms of the number of petitions it receives, and under this jurisdiction the Court has complete discretion to decide which cases it will adjudicate, and those cases in which it will deny a hearing. When a litigant files a cert. petition at the

23. Public Law 100–352.
24. Robert A. Carp and Ronald Stidham, *The Federal Courts*, 2nd ed., (Washington, D.C.: Congressional Quarterly Press, 1991), 45.
25. See Edward Keynes, with Randall K. Miller, *The Court vs. Congress*, (Durham: Duke University Press, 1989), 1–25; 145–173.
26. See generally Louis Fisher, *Constitutional Dialogues*, Princeton: Princeton University Press, 1988, 200–231.
27. Chief Justice Vinson, Address before the American Bar Association, September 7, 1949, quoted in H. W. Perry, supra note 18, 36.
28. The following discussion relies on Perry, supra note 18, 22–42; 293–309.
29. Ibid., 26.
30. 43 Stat. 935.

Appeal and Certiorari Jurisdictions

From Federal Courts	*From State Courts*
Appeal	**Appeal**
• Act of Congress held unconstitutional	• Treaty or statute of the U.S. held unconstitutional
• Court of Appeals invalidates statute	• State statute held valid when challenged as unconstitutional
• Decision by Three-Judge Federal Court[31]	
Certiorari	**Certiorari**
• Any civil or criminal case in Court of Appeals	• Decision from highest possible court, and state statute is challenged as unconstitutional
	• Violation of a federal right (constitutional or statutory) by a state, and the claim is asserted in state court

Source: H. W. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court,* (Cambridge, MA: Harvard University Press, 1991), 293–309.

Court, he or she is literally asking the Court to review a lower court decision.

Under Article III of the Constitution, the Court's **substantive** jurisdiction, i.e., the issues that are invoked in appeals, petitions for cert., or otherwise, are limited to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties." Congress has the power to limit or expand jurisdiction over other policy areas as long as it does not expand, or limit, the Court's jurisdiction beyond that defined by the Constitution. As long as a case invokes a question of federal and/or constitutional law, and Congress has not removed jurisdiction over the subject matter, then the Court may properly adjudicate the dispute. Simply put, the Court can only review cases that invoke federal law, constitutional law, or international law. Therefore, the Court cannot review state or local laws *unless* there is an alleged conflict with federal, constitutional, or international law.

Setting the Court's Agenda

Understanding the parameters of the Court's jurisdiction is important, because jurisdiction is power. Yet, jurisdiction is only part of the story, so to speak. the Court is simply unable to adjudicate all appeals brought to it. The Court can pick and choose which cases to decide; out of 8000 appeals per year, it can "decide what to decide." The ability to define its agenda—the cases that it will review—is a very important power that the Court exercises in relative obscurity.

The power to define its agenda means the Court is able to concentrate on certain substantive areas, such as federalism or civil rights. Since World War II, the Court has given a lot of attention, or agenda space, to civil rights and liberties, and has devoted less attention to areas such as foreign affairs, economic policy, and private law. Therefore, some scholars refer to the Court as a "specialist" court in the federal hierarchy, since "the bulk of its decisions are made in a few policy areas."[32] And, as David O'Brien notes, "the current . . . Court's power to pick the cases it wants from a very large docket enables it to assume the role of a super legislature."[33] That is, the Court can pick and choose which cases it will adjudicate with almost complete discretion. Therefore, simply because a case involves a question of federal or constitutional law does not mean the Court will hear it.

As Perry noted above, the vast majority of appeals come to the Court as cert. petitions, and from among the cert. petitions the Court carves out its agenda each year. Rule 10 of the Rules of the Supreme Court specifies some of the reasons the Court may grant review to a cert. petition.

In choosing cases for review, the Court follows several rules that, although non-binding, allow it to refuse a case for review. The Court will generally only review cases that are of public importance, raise important constitutional issues, affect federal statutory or administrative guidelines, or resolve conflicts between lower federal courts or between state and federal courts.[34] Basically, the Court sets its agenda to sift out and concentrate attention on those issues "which

31. Three judge federal courts were mandated by Congress in the early 20th century to oversee certain types of disputes. The first 3-judge courts were created to decide disputes concerning the constitutionality of state regulatory statutes. Congress has gradually expanded the subject matter of these courts to cover civil rights/liberties disputes. The purpose of the 3-judge courts was basically to prevent only one federal district judge from declaring a state law unconstitutional. Since 3-judge courts are to be comprised of 2 district judges and one circuit judge, the presumption was that three federal judges would have to reach a consensus before interfering with state legislation. In essence, the 3-judge court was a limit on federal judicial power when it conflicted with state legislative power.

32. Baum, supra note 21, 185.

33. David M. O'Brien, supra note 15, 260.

34. See Robert L. Stern, et.al., *Supreme Court Practice,* 6th ed., (Washington, D.C.: Bureau of National Affairs, 1986), 212–20.

Rules of the Supreme Court, Rule 10

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Source: *Rules of the Supreme Court of the United States*

it considers are worthy of review, while excluding those which reveal no basis for further consideration."[35] For O'Brien, when choosing cases to review the Court acts as a "roving commission, selecting and deciding only issues of national prominence for the governmental process."[36] Thus, not only do substantive factors of jurisdiction regulate the types of cases the Court hears, but the Court further narrows the cases it reviews to those that are of national prominence, and affect the nation as a whole, and not just the legal interests of two adverse litigants.

Compared to other supreme courts, the United States Supreme Court receives a phenomenally high number of appeals. For instance, the Canadian Supreme Court averages less than 500 appeals annually, of which it chooses to adjudicate around 100–150, and the German Constitutional Court averages even fewer (excluding individual petitions to the Court, which are decided by special procedures).[37] The result is that the United States Supreme Court is quite simply a much more engaged institution. It receives a high number of appeals each year, and "whittles" that number down to a manageable level. Of course, the Court's ability to limit the number of cases to which it devotes its full attention each year indicates that its ability to set its agenda is extremely important.

American political scientists pioneered the study of how courts determine which cases they will adjudicate, especially concerning the Supreme Court. With over 8000 cases filed a year, the Court's ability to determine its policy agenda becomes paramount. As Lawrence Baum points out, "agenda setting is of considerable importance, because the Court's role in making law and policy is based largely on the content of the cases that it hears."[38] Most, if not all, supreme courts in western democracies have a large degree of control in setting their own agendas, but the American Supreme Court probably has a higher degree than most.[39] It certainly entertains more appeals than any other high court. Of course, like any other court of law, the Supreme Court is unable to actively choose cases to adjudicate—it must wait for a dispute to come forward before it can "decide what to decide."

Richard Pacelle notes that "building an agenda through the selection of the cases on the docket and making decisions on the merits of cases define the role of the Supreme Court in the American government structure."[40] As Pacelle points out, in allocating agenda space to adjudicate appeals on its docket (and the Court's agenda space is *finite*), the Court switched over time from adjudicating primarily economic cases in the 1930s to adjudicating civil liberties cases

35. Ibid., 274. See *California v. Mitchell Brother's Santa Ana Theater,* 454 U.S. 90 (1981).
36. O'Brien, supra note 15, 260.
37. See Peter H. Russell, *The Judiciary in Canada,* (Toronto: McGraw-Hill Ryerson, 1987), 333–369; Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd ed., (Durham: Duke University Press, 1997), 10. For the German *Bundesverfassungsgericht,* see *Statiscticches Jahrbuch fur die Bundesrepublick of Deutschland,* for the years 1954–94.
38. Lawrence Baum, supra note 19, 75.
39. A survey of countries with prominent high courts, including Germany, France, Australia, New Zealand, Canada, and Italy confirms that the ability to set an agenda is found to a large degree. This survey of course is not exclusive, nor exhaustive. However, it does beg the question concerning why political scientists, especially those versed in agenda setting theory, do not expand their analyses outwards to include other national court systems.
40. Richard Pacelle, *The Transformation of the Supreme Court's Agenda,* (Boulder: Westview Press, 1991), 1.

in the 1980s. As a policy making institution, the Court changed as its agenda changed. For Pacelle, when the Court selects cases for review in order to reach decisions on the merits of appeals, it is concerned with the "authoritative allocation of values."[41] Thus, not only does the Court allocate values by serving as an appellate court concerned with creating and upholding a uniform system of federal and Constitutional law; it is also concerned with the allocation of values at the very initial stage of deciding which cases to review on the merits, and which cases to reject.

Agenda setting for the Supreme Court is its own unique process. As O'Brien notes, whenever any appeal or cert. petition arrives at the Court, it is screened by the Clerk's office to determine whether it satisfies the Court's rules concerning page length, form, fees, etc. Briefs against petitions must be filed by the respondent within thirty days. Once all the paperwork has been received by the Clerk, the case is put on a list of cases ready for review which is circulated to the Justices, along with a set of briefs for each case.[42] As the paper work involved with screening cases has grown, however, more and more work is delegated to the justices' law clerks.[43] All nine Supreme Court Justices meet on Friday afternoons in the Court's conference room prepared to discuss all new cert. petitions.

Starting with Chief Justice Hughes in the 1930s, some petitions were allocated to the "dead list"—a list of appeals considered unworthy of review. The dead list evolved into the "discuss list"—a list of cases worthy of review. The Chief Justice now decides the discuss list, which are those appeals that will be discussed in conference. Other justices are free to place appeals on the discuss list as well. Out of the discuss list, the Court narrows its review to certain cases that pass the so-called "Rule of Four." The rule of four is simply an internal Supreme Court rule stipulating that *at least* four justices must vote to accept a case for full review. The rule of four is a *strategic* process,[44] by which justices may be able to get certain types of cases accepted for review.[45] Yet, the drawback is that four justices may vote to accept a case for review, and may vote the same way in deciding the case; but, they may face a 5-justice opposition against them that decides the issue the opposite way, thereby creating a precedent. It is a risky process at times.

Once the discuss list is established, each petition or case is discussed in the Court's weekly conference. Only the nine justices are present in the conference room. Discussion proceeds based on the order of the case list, with the Chief Justice beginning discussion, then proceeding to the next senior justice, and so on. The justices give a brief comment on the petition, and usually announce whether they will vote to grant it a hearing. If four justices vote to hear a case, that petition is accepted for oral argument. The Court's conferences are conducted in secrecy, thus how each justice votes is not a matter of record. This means that justices do not have to give reasons as to why a petition is accepted or rejected. Thus, "to deny review enables the Court to dispose of its caseload, and to explain each denial would increase the justices' workload."[46]

The number of cases granted review, as a percentage of the total number of appeals, has steadily decreased on the Supreme Court. Chief Justice Rehnquist points out that with recent Congressional changes in the Court's jurisdiction, virtually eliminating mandatory appeals, the Court now has almost complete control over its docket. The implication is that with the court's increase discretion over its docket, so the court's decrease in the number of cases to which it devotes full review. And, as Rehnquist has also speculated, lower federal courts are now in sync with the Supreme Court, and most of the Justices are Reagan/Bush appointees; presumably Rehnquist means that federal judges and the justices are now more ideologically compatible.[47] Presumably, a lower federal judiciary that is more ideologically compatible with the Supreme Court will dampen conflict between lower federal judges and the justices. Chief Justice Rehnquist also points out that he, personally, no longer votes to accept cases for review because they are "interesting." He would like to see issues "percolate" in the lower courts prior to review by the Supreme Court.

Judicial Decision Making

Decision making is different from agenda setting. Agenda setting refers to "deciding what to decide"; that is, the Court makes an initial determination as to the cases it will accept for review each term. As the Court accepts cert. petitions, oral arguments in each specific case are scheduled, and briefs filed by petitioners, respondents, and other interested parties. Oral arguments and briefs submit information to the Court to facilitate its decisions. Once the Court's docket is set, in the sense that it has accepted petitions for hearing, the decision-making process to decide the merits of each case begins.

Basically, the decision-making process concerns how the Court processes information and arrives at a decision, or outcome, in the case.[48] How information is presented to the Court is controlled by specific rules and procedures. Key elements of the process involve the submission of briefs to the Court, oral arguments, the justices' conferences following oral arguments, and the opinion writing process itself. The main rules

41. Ibid., 136.
42. O'Brien, supra note 15, 231.
43. The role of law clerks is not discussed here, but for a good overview, see O'Brien, supra note 15, pages 155–170.
44. See Lee Epstein, *Hard Judicial Choices,* (Washington: Congressional Quarterly Press, 1998), and Walter Murphy, *Elements of Judicial Strategy,* (Chicago: University of Chicago Press, 1964).
45. See H. W. Perry, supra note 18, 41–91.
46. O'Brien, supra note 15, 242.
47. For much of the above discussion, see Joan Biskupic, "The Shrinking Docket," *Washington Post,* March 18, 1996; A15.
48. Note that the Court may decide the case with only one majority opinion. However, if one or more Justices dissent, dissenting opinions would probably be included.

Rule 24: What Briefs Must Contain

- A concise statement of the basis for jurisdiction in this Court . . .
- The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case . . .
- A concise statement of the case, setting out the facts material to the consideration of the questions presented
- A summary of the argument. . . . The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.
- The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.
- A conclusion specifying with particularity the relief the party seeks.

[The Supreme Court also mandates that a brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.]

Number of Copies and Time to File

- The petitioner or appellant shall file 40 copies of the brief on the merits . . .
- The respondent or appellee shall file 40 copies of the brief on the merits . . .
- After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.
- The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

Source: *Rules of the Supreme Court of the United States*

governing how briefs and other materials are presented to the Court are defined below, as defined by the Rules of the Supreme Court.

Briefs present the main legal arguments in each case from the standpoint of the petitioner, respondent, or interested parties such as interest groups or the federal government. Briefs and oral arguments present the Court with the information it needs to arrive at a decision. The Court's rules are very explicit about not only the presentation of briefs, but also their content. The rules are specific, and are geared towards helping the Court efficiently process the information it receives.

The Importance of Oral Arguments

Most of the information that the justices receive is contained in all the briefs filed in a case. The main legal arguments are defined, and policy arguments might also be included. Generally speaking, briefs are the main forms of communication to the Justices. However, oral argument should not be overlooked. As O'Brien points out, though, "for those outside the Court, the role of oral argument in deciding cases is vague, if not bewildering."[49] The influence of oral argument on the decisionmaking process is little understood.

Yet, oral argument is important. "The justices hold conference and take their initial, usually decisive votes on cases within a day or two after hearing oral arguments. Oral arguments come at a crucial time. They focus the minds of the justices and present the possibility for fresh perspectives on a case."[50] Oral arguments were more prominent in the 19th century, and indeed early oral arguments were basically unlimited. As the Court's workload increased, the time allotted for oral arguments was gradually reduced to the now 30 minute maximum for each litigant.[51]

Although most arguments last 1 hour, and counsel for each side is only allotted 30 minutes to present a case, oral arguments are still important. Chief Justice Rehnquist points out that in some instances, oral arguments may serve to make up a justice's mind on a case. After reading all of the briefs and other materials in a case, a Justice may still want to hear counsel address certain issues in Court; oral argument allows a justice to ask an attorney more specific questions about the case at hand. Rehnquist notes that:

Rule 28: Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

. . .

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. . . . Additional time is rarely accorded.

Source: *Rules of the Supreme Court of the United States*

49. David O'Brien, supra note 15, 275.
50. Ibid.
51. O'Brien also notes that reductions in oral argument time also reflect the Court's growing dissatisfaction with the quality of advocacy.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. Booklet Format:
(a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper . . . every document filed with the Court shall be prepared using typesetting (e. g., wordprocessing, electronic publishing, or image setting). . . . The process used must produce a clear, black image on white paper.
(b) The text of every document, including any appendix thereto, except a document permitted to be produced on 8½- by 11-inch paper, shall be typeset in standard 11-point or larger type with 2-point or more leading between lines. The type size and face shall be no smaller than that contained in the United States Reports beginning with Volume 453. Type size and face shall be consistent throughout. No attempt should be made to reduce, compress, or condense the typeface in a manner that would increase the content of a document. Quotations in excess of three lines shall be indented. Footnotes shall appear in print as standard 9-point or larger type with 2-point or more leading between lines. The text of the document must appear on both sides of the page.
(c) Every document, except one permitted to be produced on 8½- by 11-inch paper, shall be produced on paper that is opaque, unglazed, 6⅛ by 9¼ inches in size, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, should be approximately 4⅛ by 7⅛ inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, and string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix. . . .

(g) Page limits and cover colors for booklet-format documents are as follows:

	Type of Document	*Page Limits*	*Color of Cover*
(i)	Petition for a Writ of Certiorari	30	white
(ii)	Brief in Opposition	30	orange
(iii)	Reply to Brief in Opposition	10	tan
(iv)	Supplemental Brief	10	tan
(v)	Brief on the Merits for Petitioner or Appellant	50	light blue
(vi)	Brief on the Merits for Respondent or Appellee	50	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	20	yellow
. . .			
(x)	Brief for an Amicus Curiae at the Petition Stage	20	cream
(xi)	Brief for an Amicus Curiae in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage	30	light green
(xii)	Brief for an Amicus Curiae in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage	30	dark green

Source: *Rules of the Supreme Court of the United States*

> speaking for myself, [oral argument] does make a difference: I think that in a significant minority of the cases . . . I have left the bench feeling different about a case than I did when I came to the bench.[52]

Moreover, Rehnquist observes that oral arguments serve a real public function: "it forces the judges . . . and the lawyers . . . to look at one another for an hour, and talk back and forth about how a case should be decided."[53] Indeed, oral arguments are the most public function the Supreme Court undertakes, and are the most public part of the Court's decision-making process.

O'Brien discusses the nature of oral arguments at the Court:

> [C]entral to preparation and delivery is a bird's-eye view of the case, the issues, and the facts, and the reasoning behind legal developments. Crisp, concise, and conversational presentations are what the justices want. . . . Oral argument is definitely not a "brief with gestures."
>
> In 1993, the Court's Clerk began sending lawyers a booklet offering advice on preparing and presenting

52. Chief Justice Rehnquist, *The Supreme Court: How It Was, How It Is,* quoted in Susan Low Bloch, ed., *Supreme Court Politics,* (St. Paul: West Publishing, 1992), 514.
53. Ibid.

oral arguments. Among the recommendations: "Never under any circumstance interrupt a Justice when he or she is addressing you. Give the Justice your attention while being addressed . . . If a question seems hostile to you, do not answer with a short and abrupt response. It is far more effective to be polite and accurate. . . . Rebuttal can be very effective. But you can be even more effective if you thoughtfully waive it when your opponent has not been impressive . . . [Finally] attempts at humor usually fall flat. The same is true for attempts at familiarity. For example, do not say something like this: 'This is similar to a case argued when I clerked here . . .'[54]

After oral arguments, and on Fridays during the Court's term, the Justices gather for their regular conferences where they vote on the cases under review. Only the justices are allowed into the conference room. Chief Justice Rehnquist argues that the "conference is a relatively fragile instrument . . . probably every new justice, and very likely some justices who have been there for a while, wish that on occasion the floor could be opened up to a free-swinging exchange of views with much give-and-take rather than a structured statement of nine positions."[55] What the Chief Justice alludes to is that each justice, more often than not, forms a clear idea of how a case should be decided, presents that idea in conference, without much elaboration. Only when justices write majority, concurring, or dissenting opinions do they more formally spell out how they arrive at a decision. With over 100 cases each term under review, there simply is not time enough to debate the finer points and merits of each dispute. Thus, conferences proceed under tight schedules.

But Chief Justice Rehnquist points out still that the justices do not really engage in a scholarly, legal debate over how cases should be decided. Most often, a justice's mind is made up prior to the conference. This is problematic, for the simple reason that if the law is stable, and scientific, then there should be relatively little disagreement among the justices about outcomes in cases. Yet, in the same case different justices can reach profoundly different conclusions. Therefore, other things must inform the judicial decisionmaking process.

Some scholars argue that outcomes—what is actually decided in each case—are as much the product of a justice's own political ideology as much as the law itself. Jeffrey Segal and Harold Spaeth argue that:

> [the] justices make decisions by considering the facts of the case in light of their ideological attitudes and values . . . Because legal rules governing decisionmaking . . . in the type of cases that come to Court do not limit discretion; because the justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices . . . may freely implement their personal policy preferences.[56]

Although Segal and Spaeth's view that justices decide *primarily* based on their political ideology may be too strongly stated, they nonetheless provide sound and convincing evidence that ideology plays a role, and in some cases a large role in determining case outcomes.

There are, then, several factors key to understanding how the Court decides cases. The political ideology of the justices themselves is important. Of course, the law is important too, since the justices are engaged in interpreting and applying legal and constitutional principles. The internal dynamics of the Court itself are important, because some justices seek to influence others. That is, not only are justices interpreting the law and acting upon their own political ideologies, they are also engaged in strategic bargaining with other justices, and indeed seek to influence other justices' votes.[57] "Supreme Court bargaining is not about the trading of votes on bills, but accommodations over the content of legal opinions where the outcome of a case may not change but the explanation of the meaning of the law that will guide future actions certainly does."[58] Indeed, recent research argues that the justices are often strategic actors, in the sense that they "realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act."[59]

The outcome of this process—the Court's opinion—is itself an important step. The initial Court decision is reached at conference, and justices generally retain their vote from the conference, although some do change their vote from time to time. If the Chief Justice is in the Court majority, he assigns the majority opinion. If he is not in the majority, the most senior justice assigns the opinion. The justice who is assigned the opinion then writes and circulates a draft. Once the opinion is near completion, negotiation about its content becomes prominent. The justice writing the majority opinion must basically forge a consensus among the majority, meaning that the others in the majority are able to influence the wording of the opinion itself.

Of course, the justices who disagree with the court's conclusion are free to write dissenting opinions in which they express their differences as to why they disagree. If they agree with the *result* that the Court reached, but not with the majority's reasoning to that result, they may write a *concurring* opinion detailing why they concur in the final decision,

54. O'Brien, 280–281.
55. William H. Rehnquist, *The Supreme Court: How It Was, How It Is,* quoted in Susan Low Bloch, ed., supra note 52, 387.
56. Segal and Spaeth, *The Attitudinal Model,* 73.
57. See, e.g., Phillip Cooper, *Battles on the Bench: Conflict Inside the Supreme Court,* (Lawrence: University of Kansas Press, 1995).
58. Ibid., 2.
59. Lee Epstien and Jack Knight, *The Choices Justices Make,* (Washington: Congressional Quarterly Press, 1998), xiii.

but not the majority decision. The rate at which justices dissent or concur—write separate opinions from the majority—has increased, especially in the latter half of the twentieth century. Yet, Justice Scalia posits that dissents are good: "a system of separate opinions renders the profession of a judge . . . more enjoyable."[60]

The Sixth Circle: The Supreme Court and Public Opinion

"There is no doubt in my mind there is a special place in hell for a number of federal court judges."[61] That federal judges have their own zone in hell is probably surprising for most, but yet this hyperbole demonstrates one tension that constantly vexes federal judges, and is most pronounced at the Supreme Court level: the tension between the Court and public opinion. The old question as to whether the Supreme Court follows the election returns is prescient; no more so than the start of the third century of government under the 1787 Constitution.

There is no doubt that the Framers of the Constitution sought to insulate the federal judiciary from the day-to-day machinations of politicians, institutions, and the people. Yet, two hundred years on, the Supreme Court and public opinion are intricately linked. As Gregory Caldiera puts it, "the justices themselves seem to operate on the premise that the Court can shift the tides of opinion. Opinions often speak of the Court's moral suasion . . . for the most part, the justices have shared a robust view of the Court's persuasive capabilities."[62] The tenuous, and difficult to define, relationship between the Supreme Court and public opinion gets to the root of the Court's role as a "republican schoolmaster." That is, if the justices themselves perceive that they can educate and change public opinion, then certainly they perceive their role as more than just appellate judges who resolve legal disputes.

There are links between the Court's decisions and public opinion, and certainly there is no doubt that the Court had the ability—although difficult to actually define—to change the public's perceptions about certain issues. For instance, the Court's decision in *Brown v. Board of Education* is credited with fueling not only the desegregation movement, but also the civil rights movement to a degree. And, *Roe v. Wade* mobilized pro- and anti-abortion movements throughout the United States. *Brown* and *Roe* are but two examples of how the Court can affect public opinion. Yet, the Court consistently notes that it has no regard for public opinion polls, that its decisions are based on the law, not on the wishes of a transient majority. The Court should be believed here, and there is really no reason to doubt that the justices do not factor public opinions into their decisions. However, Justice Felix Frankfurter once noted that:

> the Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such a feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[63]

Justice Frankfurter's point highlights a dilemma for the Court: its authority ultimately rests on "sustained public confidence," since the Court does not have the power to spend money or enforce its own decisions. Thus, the Court must comfort the public that it serves a detached role, and does not actively set out to change society. This is a fundamental tension that the Court faces consistently, and this tension is exacerbated by constitutional disputes that may impact significant change, along the lines of *Brown* or *Roe*.

The Impact of the Supreme Court

Related to the Court's relationship to public opinion is the overall impact of the Court on American society. The basic question is simply this: can the Court bring about social change? Several "watershed" constitutional cases indicate that the Court can have a sweeping affect on American society. For instance, *Brown v. Board of Education* indicates that the Court's decision holding segregated schools unconstitutional set the stage for a desegregated (integrated) America. *Brown* is perhaps the most representative case concerning the Court and social change, yet cases in the fields of criminal justice, freedom of expression, right to privacy, and affirmative action should not be overlooked. Yet, the underlying question remains: *can* the Court bring about social change? The stakes are quite high. If the answer is no, then modern perceptions of the Court's role and ability to lead change in

Respondents Believing the Supreme Court Is Too Liberal or Too Conservative (%)

Year	*Too Liberal*	*Too Conservative*	*About Right*	*Unsure*
1973	35	26	17	22
1986	34	38	10	17
1987	38	38	8	18
1991	30	42	9	19

Source: *The Supreme Court Compendium,* edited by Lee Epstein, et. al., (Washington: Congressional Quarterly Press, 1992), 603.

60. Justice Scalia, quoted in O'Brien, supra note 15, 333.
61. Rep. Jack Kingston, R-Ga., May 4; quoted in *Congressional Quarterly Weekly,* June 20, 1998.
62. Gregory Caldiera, "Courts and Public Opinion," in John A. Gates and Charles H. Johnson, eds., *The American Courts: A Critical Assessment,* (Congressional Quarterly Press, 1991), 304.
63. *Baker v. Carr;* 369 U.S. 186, 268, (1962), Justice Felix Frankfurter, dissenting.