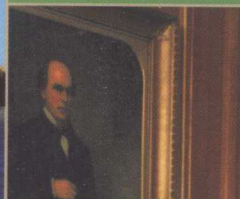
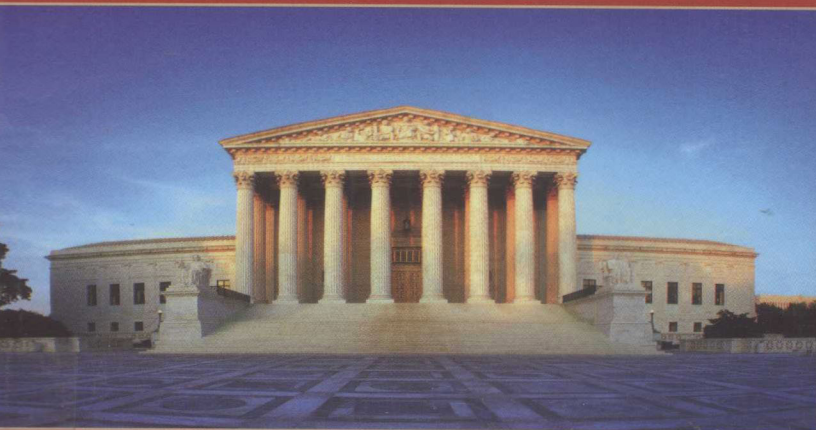
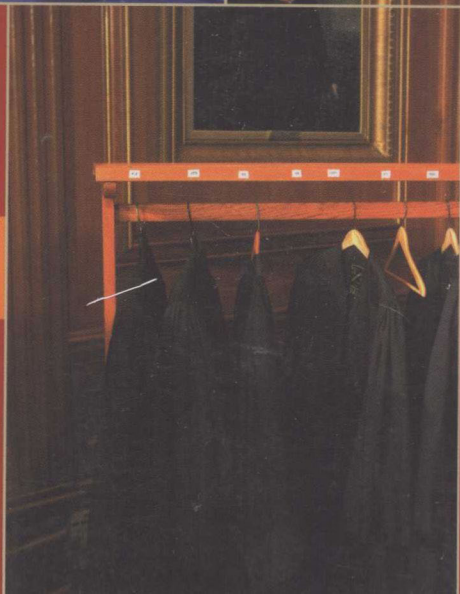


THE SUPREME COURT

Tenth Edition



LAWRENCE BAUM



The Supreme Court

Tenth Edition

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Ohio State University



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To my students

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Preface

In May 2009 Justice David Souter announced that he would retire from the Supreme Court at the end of the Court's term in June. His announcement triggered a wave of speculation about who his successor might be. A few weeks later President Barack Obama nominated Judge Sonia Sotomayor to succeed Souter. The nomination became a subject of intense scrutiny and debate that lasted until the Senate confirmed the nomination in midsummer.

While all this was going on, the Court completed its annual term in June. As it does every year, the Court issued many of its most important decisions in the last few weeks of the term. These decisions attracted considerable interest, and the Court's work over the term raised speculation about whether it was moving in a strongly conservative direction on such issues as racial discrimination and environmental protection.

The attention that the Supreme Court received in the spring and summer of 2009 underlines the importance of the Court for many people. But those who care a great deal about the Court do not always understand it well. The Supreme Court is a complicated institution, and on the whole it is more difficult to comprehend than the other branches of government. As a result, even some experts in American politics have substantial gaps in their knowledge of the Court.

I have written this book to provide a better understanding of the Supreme Court. The book is intended to serve as a short but comprehensive guide, both for readers who already know much about the Court and for those who have a more limited sense of it. I discuss how the Court functions, the work that it carries out, and the effects that its decisions have on the lives of people in the United States. And I provide some explanation of the decisions that the Court and its justices make, of actions by other people and groups that participate in cases, and of the Court's impact on government and society.

The book puts the Court in its historical context, but it focuses primarily on the current era. This edition incorporates recent developments in and around

the Court. Most evident are President Obama's 2009 appointment of Justice Sotomayor and the effects of President George W. Bush's two appointments to the Court in 2005 and 2006. I discuss decisions made in the past few years that illuminate what the Court does and why, such as its rulings on gun control and the rights of suspected terrorists. And I take advantage of recent work by scholars that provides new information and insights about the Court.

The first chapter introduces the Supreme Court. In it I discuss the Court's role in general terms, examine the Court's place in the judicial system, analyze the Court as an institution, and present a brief summary of its history.

Each of the other chapters deals with an important aspect of the Court. Chapter 2 focuses on the justices: their selection, their backgrounds and careers, and the circumstances under which they leave the Court. Chapter 3 contains a discussion of how cases reach the Court and how the Court selects the small portion of those cases that it will hear.

In Chapter 4 I look at decision making in the cases that the Court accepts for full consideration. After outlining the Court's decision-making procedures, I turn to the chapter's primary concern: the factors that influence the Court's choices among alternative decisions and policies. Chapter 5 deals with the kinds of issues on which the Court concentrates, the policies it supports, and the extent of its activism in the making of public policy. I give special attention to changes in the Court's role as a policymaker and the sources of those changes. The final chapter examines the ways in which other government policymakers respond to the Court's decisions as well as the Court's impact on American society as a whole. The chapter concludes with an assessment of the Court's significance as a force in American life.

This new edition of the book reflects the very considerable help that many people gave me with earlier editions. In writing this edition I benefited from the information provided by Melanie Oberlin, Thomas Walker, Alan Wiseman, Lawrence Wrightsman, the Office of the Solicitor General, and the Public Information Office of the Supreme Court. The book was strengthened by suggestions for revision from Chris Bonneau, University of Pittsburgh; Saul Brenner, University of North Carolina–Charlotte; Sheldon Goldman, University of Massachusetts; Mark Petracca, University of California–Irvine; and Kim Seckler, New Mexico State University.

As always, the professionals at CQ Press did a great deal to make my life easier and, more important, to make the book better. I appreciate the assistance of Joanne S. Ainsworth, Belinda Josey, and Allison McKay in the editing process; I benefited from their careful work and good judgment. I am grateful for everything that Charisse Kiino and Brenda Carter do to ensure that CQ Press books, including this one, are of the highest possible quality.

My faculty colleagues at Ohio State University are an abundant source of ideas, and the same is true of the students in my classes. This book reflects all the things I have learned from them.

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Chapter 1

The Court

Among the general public, Supreme Court justice Anthony Kennedy hardly qualifies as famous. But among people who follow government, Kennedy is widely regarded as very important. In 2007 a magazine ranked him as the fourth most powerful person in Washington. Four years earlier an interest group leader went further, calling him “the most dangerous man in America.”¹

What accounts for those characterizations of Kennedy? President Bush’s selection of two new justices in 2005 put Kennedy at the ideological center of the nine-member Court, a position he has maintained since then. As a result, he has cast the decisive fifth vote in major decisions on issues such as gun control and the death penalty. Most people who follow politics and government believe that Supreme Court decisions have considerable impact on life in the United States. From that perspective, it is easy to see why Justice Kennedy is considered powerful.

In reality the effect of the Supreme Court is probably more limited than most people think it is. But it is still quite substantial. For this reason, its members—and not only Justice Kennedy—are powerful. And for the same reason, it is impossible to understand American government and society without understanding the Supreme Court.

This book is an effort to provide that understanding. Who serves on the Court, and how do they get there? What determines which cases and issues the Court decides? In resolving the cases before it, how does the Court choose between alternative decisions? In what policy areas is it active, and what kinds of policies does it make? Finally, what happens to the Court’s decisions after they are handed down, and what impact do they actually have?

Each of these questions is the subject of a chapter in the book. As I focus on each question, I try to show not only what happens in and around the Court but also why things work the way they do. This first chapter is an introduction to the Court, providing background for the chapters that follow.

A Perspective on the Court

The Supreme Court's position in government is more ambiguous than the positions of the other branches, so a good place to begin is with the Court's attributes as an institution and its work as a policymaker.

The Court in Law and Politics

The Supreme Court is, first of all, a court—the highest court in the federal judicial system. Like other courts, it has jurisdiction to hear and decide certain kinds of cases. Like other courts, it can decide legal issues only in cases that are brought to it. And as a court, it makes decisions within a legal framework. Congress writes new law, but the Court interprets existing law. In this respect, the Court operates within a constraint from which legislators are free.

In another respect, however, the Supreme Court's identity as a court reduces the constraints on it. The widespread belief that courts should be insulated from the political process gives the Court a degree of actual insulation. The justices' lifetime appointments allow them some freedom from concerns about whether political leaders and voters approve of their decisions. Justices usually avoid open involvement in partisan activity, because such involvement is perceived as inappropriate. And because direct contact between lobbyists and justices is generally considered unacceptable, interest group activity in the Court is basically restricted to the formal channels of legal argument.

The Court's insulation from politics should not be exaggerated, however. People sometimes speak of courts as if they are, or at least ought to be, "nonpolitical." In a literal sense, this is impossible: as a part of government, courts are political institutions by definition. What people really mean when they refer to courts as nonpolitical is that courts are separate from the political process and that their decisions are affected only by legal considerations. This too is impossible for courts in general and certainly for the Supreme Court.

The Court is political chiefly because it makes important decisions on major issues. People care about those decisions and want to influence them. As a result, political battles regularly arise over appointments to the Court. Interest groups bring cases and present arguments to the Court in an effort to help shape its policies. Because members of Congress pay attention to the Court's decisions and hold powers over the Court, the justices may take Congress into account when they decide cases. Finally, the justices' political values affect the votes they cast and the opinions they write in the Court's decisions.

Thus, the Supreme Court should be viewed as both a legal institution and a political institution. The political process and the legal system each

influence what the Court does. This ambiguous position adds to the complexity of the Court. It also makes the Court an interesting case study in political behavior.

The Court as a Policymaker

This book examines the Supreme Court broadly, but it emphasizes the Court's role in making public policy—the authoritative rules by which people in government institutions seek to influence government itself and to shape society as a whole. Legislation to provide subsidies for wheat farmers, a trial judge's ruling in an auto accident case, and a Supreme Court decision on rules of police procedure are all examples of public policy. The Court can be viewed as part of a policymaking system that includes lower courts and the other branches of government.

As I have noted, the Supreme Court makes public policy by interpreting provisions of law. Issues of public policy come to the Court in the form of legal questions. In this respect the Court's work as a policymaker differs fundamentally in form from that of Congress.

The Court does not face legal questions in the abstract. Rather, it addresses these questions in the process of settling specific controversies between parties (sometimes called litigants) that bring cases to it. In a sense, then, every decision by the Court has three aspects: it is a judgment about the specific dispute brought to it, an interpretation of the legal issues in that dispute, and a position on the policy questions that are raised by the legal issues.

These three aspects of the Court's rulings are illustrated by a 2008 decision, *Riegel v. Medtronic, Inc.* Donna Riegel carried forward a lawsuit against the Medtronic company after her husband's death. Her husband had been injured by the rupture of a Medtronic catheter during heart surgery. The lawsuit was based on New York law. Medtronic argued that a federal law disallowed such lawsuits under the circumstances of this case. The lower federal courts ruled in favor of Medtronic, and the Supreme Court agreed.

In the first aspect of its decision, the Supreme Court affirmed the court of appeals decision against Riegel. As a result, Riegel lost her case and received nothing from Medtronic. If the Court had reversed the court of appeals decision and remanded the case to that court for further action, Riegel would have gained the chance to go to trial with her case.

The Court's decision was also a judgment about the meaning of the federal statute in question, the Medical Device Amendments of 1976 (MDA). The MDA has a clause that preempts certain state regulations of medical devices. Accepting Medtronic's argument, the Court ruled that this clause prohibits state "common law" suits relating to the safety or effectiveness of a medical device, if the marketing of that device was in a form that the federal Food and

4 The Supreme Court

Drug Administration had already approved. In any future case, lower courts would be obliged to follow that interpretation of the MDA.

Finally, the Supreme Court's decision cut off one use of state law to challenge practices that are also regulated by federal law. In recent years the Court has decided a series of cases involving federal preemption of state laws that provide protections for consumers, employees, and people who have been injured. The decision in *Riegel* is consistent with the dominant theme of those decisions, a theme that limits the power of states to regulate business practices on issues that federal laws address. In adopting that theme, the Court has helped to shape government policy on business regulation.

The Supreme Court's role in business regulation policy is not unusual. Through its individual decisions and lines of decisions, the Court contributes to the content of government policy on a variety of issues. The Court's assumption of this role reflects several circumstances. For one thing, as the French observer Alexis de Tocqueville noted more than a century ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."² In part, this is because the United States has a written Constitution that can be used to challenge the legality of government actions. Because so many policy questions come to the courts and ultimately to the Supreme Court, the Court has the opportunity to shape a wide range of policies. And the justices often accept and even welcome that opportunity, ruling on major issues and shaping public policy on those issues.

At the same time, the Court's role in policymaking is limited by several conditions, of which two are especially important. First, the Court can do only so much with the relatively few decisions it makes in a year. The Court currently issues decisions with full opinions in an average of about eighty cases each year. In deciding such a small number of cases, the Court addresses only a select group of policy issues. Inevitably, there are whole fields of policy that it barely touches. Even in the areas in which the Court does act, it deals with only a limited number of the issues that exist at a given time.

Second, the actions of other policymakers narrow the impact of the Court's decisions. The Court is seldom the final government institution to deal with the policy issues it addresses. Its decisions are implemented by lower-court judges and administrators, who often have considerable discretion over how they put a ruling into effect. The impact of a decision concerning police searches for evidence depends largely on how police officers react to it. Congress and the president influence how the Court's decisions are carried out, and they can overcome its interpretations of federal statutes simply by amending those statutes. As a result, there may be a great deal of difference between what the Court rules on an issue and the public policy that ultimately results from government actions on that issue.

For these reasons, those who see the Supreme Court as the dominant force in the U.S. government almost surely are wrong. But the Court does contribute a good deal to the making of public policy.

The Court in the Judicial System

The Supreme Court is part of a court system, and its place in that system structures its role by determining what cases it can hear and the routes those cases take.

State and Federal Court Systems

The United States has a federal court system and a separate court system for each state. Federal courts can hear only those cases that Congress has put under their jurisdiction. Nearly all of this jurisdiction falls into three categories.

First are the criminal and civil cases that arise under federal laws, including the Constitution. A prosecution for bank robbery, which violates federal law, is brought to federal court. So are civil cases based on federal patent and copyright laws.

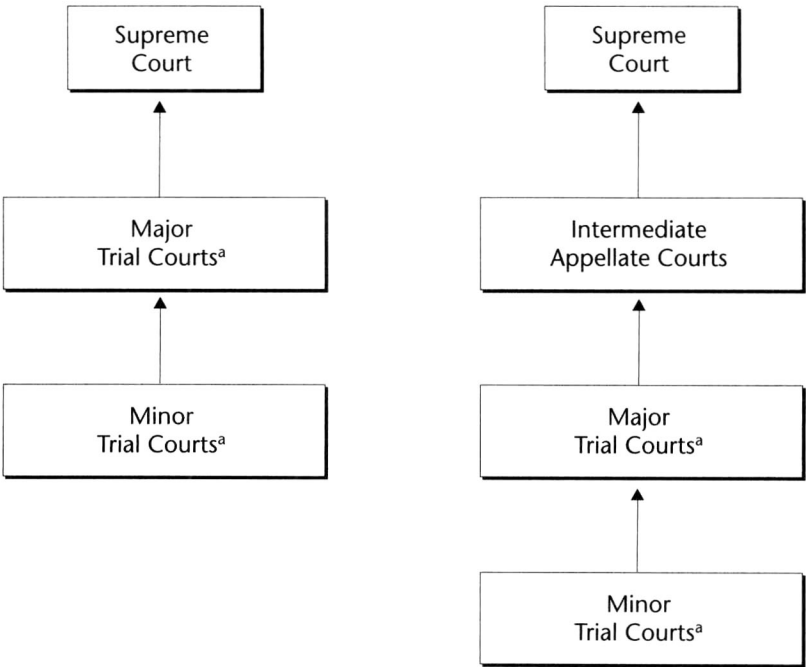
Second are cases to which the U.S. government is a party. When the federal government sues an individual to recover what it claims to be owed from a student loan, or when an individual sues the federal government over disputed Social Security benefits, the case almost always goes to federal court.

Third are civil cases involving citizens of different states in which the amount in question is more than \$75,000. If this condition is met, either party may bring the case to federal court. If a citizen of New Jersey sues a citizen of Texas for \$100,000 as compensation for injuries from an auto accident, the plaintiff (the New Jersey resident) might bring the case to federal court, or the defendant (the Texan) might have the case “removed” from state court to federal court. If neither does so, the case will be heard in state court—generally, in the state where the accident occurred or the defendant lives.

These categories encompass only a small proportion of all court cases. The most common kinds of cases—criminal prosecutions, personal injury suits, divorces, actions to collect debts—typically are heard in state court. The trial courts of a single populous state such as Illinois or Florida hear far more cases than do the federal trial courts. However, federal cases are more likely than state cases to raise major issues of public policy.

State court systems vary considerably in their structure, but some general patterns exist (see Figure 1-1). Each state system has courts that are primarily

FIGURE 1-1
Most Common State Court Structures



Note: Arrows indicate most common routes of appeals.

a. In many states, major trial courts or minor trial courts (or both) are composed of two or more different sets of courts. For instance, New York has several types of minor trial courts.

trial courts, which hear cases initially as they enter the court system, and courts that are primarily appellate courts, which review lower-court decisions that are appealed to them. Most states have two sets of trial courts, one to handle major cases and the other to deal with minor cases. Major criminal cases usually concern what the law defines as felonies. Major civil cases are those involving large sums of money. Most often, appeals from decisions of minor trial courts are heard by major trial courts.

Appellate courts are structured in two ways. Eleven states, generally those with small populations, have a single appellate court—usually called the state supreme court. All appeals from major trial courts go to this supreme court. The other thirty-nine states have a set of intermediate

appellate courts below the supreme court. These intermediate courts initially hear most appeals from major trial courts. In those states supreme courts have discretionary jurisdiction over most challenges to the decisions of intermediate courts. Discretionary jurisdiction means simply that a court can choose which cases to hear; cases that a court is required to hear fall under its mandatory jurisdiction.

The structure of federal courts is shown in Figure 1-2. At the base of the federal court system are the federal district courts. The United States has ninety-four district courts. Each state has between one and four district courts, and there is a district court in the District of Columbia and in some of the territories, such as Guam. District courts hear all federal cases at the trial level, with the exception of a few types of cases that are heard in specialized courts.

Above the district courts are the twelve courts of appeals, each of which hears appeals in one of the federal judicial circuits. The District of Columbia constitutes one circuit; each of the other eleven circuits covers three or more states. The Second Circuit, for example, includes Connecticut, New York, and Vermont. Appeals from the district courts in one circuit generally go to the court of appeals for that circuit, along with appeals from the Tax Court and from some administrative agencies. Patent cases and some claims against the federal government go from the district courts to the specialized Court of Appeals for the Federal Circuit, as do appeals from three specialized trial courts. The Court of Appeals for the Armed Forces hears cases from lower courts in the military system.

The Supreme Court's Jurisdiction

The Supreme Court stands at the top of the federal judicial system. Its jurisdiction, summarized in Table 1-1, is of two types. First is the Court's original jurisdiction: the Constitution gives the Court jurisdiction over a few categories of cases as a trial court, so these cases may be brought directly to the Court without going through lower courts. The Court's original jurisdiction includes some cases to which a state is a party and cases involving foreign diplomatic personnel.

Most cases within the Court's original jurisdiction can be heard alternatively by a district court. Lawsuits between two states can be heard only by the Supreme Court, and these lawsuits account for most of the decisions based on the Court's original jurisdiction. These cases often involve disputed state borders, but increasingly they are battles over water rights.³ The Court frequently refuses to hear cases under its original jurisdiction, even some lawsuits by one state against another. In part for this reason, full decisions in these cases are not plentiful—fewer than two hundred in the Court's history.⁴ When the Court does accept a case under its original jurisdiction, it ordinarily appoints a “special master” to gather facts and