Chapter 1

The Court

In 2010, after a heated battle in Congress, President Obama signed the law that made major changes to the country’s health care system. Two years later the Supreme Court addressed arguments that two key provisions of the law went beyond the constitutional powers of Congress. The Court narrowly upheld the law’s mandate that most individuals have health insurance, but it struck down a provision that effectively forced states to expand their Medicaid coverage for low-income residents.

In 2015 the Court returned to the law. In thirty-four states, the state government had decided not to set up the “exchanges” under which the health program operated, and the federal government stepped in to set up the exchanges itself under the law. The Treasury Department acted to provide tax credits to people who signed up for insurance in those states, as it did in the other sixteen states. Opponents of the program argued that the law’s wording did not allow tax credits in the states with federally created exchanges, but the Court ruled that those tax credits were allowed. In doing so, the Court made it possible for the health care law to function in those thirty-four states.¹

In ruling on three major issues involving President Obama’s most important legislative accomplishment, the Court made itself a major participant in health care politics and policy. By doing so, it maintained a role that it has played through most of its history. In the past half-century the Court has issued highly significant rulings on issues such as abortion, capital punishment, gun rights, and funding of political campaigns. One of its decisions ensured that President Richard Nixon would leave office in 1974, and another ensured that George W. Bush would become president in 2001.²

Because the Supreme Court plays a key role in American life, it is impossible to understand American government and society without understanding the Court. In this book, I seek to contribute to 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 does the Court play an active role, 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 those decisions 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 place in government is complicated, so it is useful to begin by considering 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. And like other courts, it can decide legal issues only in cases that are brought to it.

As a court, the Supreme Court 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 justices have more autonomy than most other policymakers: the widespread belief that courts should be insulated from the political process gives the Court a degree of actual insulation. In particular, the justices’ appointments for life allow them some freedom from concerns about whether political leaders and voters approve of their decisions.

The Court’s insulation from politics is far from total, 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 in this sense primarily 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. Members of Congress pay attention to the Court’s decisions and hold powers over the
Court, and for that reason 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 is 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 Court’s complexity. 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 fund schools, a trial court’s ruling in an auto accident case, and a Supreme Court decision on labor law are all examples of public policy. The Court is 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.

The Court does not rule on 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 2014 decision, *Sandifer v. United States Steel Corp.* Some current and former employees of U.S. Steel brought a lawsuit against the company under the federal Fair Labor Standards Act (FLSA), arguing that they should be paid for the time they spent putting on, and taking off, protective gear required for their jobs. However, U.S. Steel and the United Steelworkers, the employees’ union, had agreed that workers should not be paid for that time, and a provision of the FLSA held that such agreements overrode workers’ pay rights if they involved “changing clothes” at the beginning and end of the workday. The Supreme Court ruled that most of the protective gear qualified as “clothes” under that provision and that the time workers spent on the other gear was minimal, so it ruled against the employees.

In the first aspect of its decision, the Supreme Court affirmed the court of appeals decision against the employees who had brought the lawsuit. As a result, the employees lost the case. If the Supreme Court had reversed the court of appeals decision, the case would have gone back to the lower courts to consider the employees’ claim for back pay.
The Court’s decision was also a judgment about the meaning of the provision of the FLSA that was in question, section 203(o) of Title 29 of the United States Code. Its interpretation of “changing clothes” as applied to protective gear became the authoritative standard, one that lower courts were obliged to follow in any future case involving that language.

Finally, the Supreme Court’s decision shaped federal policy on requirements for payment of employees. The decision meant that the employees covered by the FLSA—most of the nation’s workforce—generally had no legal right to be paid for the time spent putting on protective gear and taking it off if their union had agreed to give up that right in negotiations with a company. Thus, by making its decision the Court acted as a policy-maker on labor law.

Like most of the Court’s decisions, the ruling in Sandifer was undramatic and received little coverage from the news media. In contrast, some decisions receive widespread attention and become the subjects of heated debate. But through both types of decisions, singly and in combination with each other, the Court contributes to the content of government policy.

This role for the Court reflects several circumstances. For one thing, as the French observer Alexis de Tocqueville noted early in the nation’s history, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” 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 shapes a wide range of policies.

Yet the Court’s role in policymaking is limited by several conditions, two of which 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 fewer than 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. Congress and the president influence how the Court’s decisions are carried out. They can also over- come its interpretations of federal statutes, laws enacted by Congress, 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 surely are wrong. But the Court does contribute a good deal to the making of public policy through its decisions.

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 the federal courts’ jurisdiction falls into three categories.

First are the criminal and civil cases that arise under federal laws, including the Constitution. All prosecutions for federal crimes are brought to federal court. Some types of civil cases based on federal law, such as those involving antitrust and bankruptcy, must go to federal court. Other types can go to either federal or state court, but most are brought to federal court.

Second are cases to which the U.S. government is a party. When the federal government brings a lawsuit, it nearly always does so in federal court. When someone sues the federal government, the case must go 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 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.

Only a small proportion of all court cases fit in any of those categories. 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 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

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**FIGURE 1-1**

_The Most Common State Court Structures_

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**Note:** Arrows indicate the 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.
primarily 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 generally 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. Ten 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 forty states have 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 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 Puerto Rico. 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.
FIGURE 1-2
Basic Structure of the Federal Court System

Note: Arrows indicate the most common routes of appeals. Some specialized courts of minor importance are excluded.

a. These courts also hear appeals from administrative agencies.
### TABLE 1-1

**Summary of Supreme Court Jurisdiction**

<table>
<thead>
<tr>
<th>Types of jurisdiction</th>
<th>Categories of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Original</strong></td>
<td></td>
</tr>
<tr>
<td>Disputes between states&lt;sup&gt;a&lt;/sup&gt;</td>
<td></td>
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<tr>
<td>Some types of cases brought by a state</td>
<td></td>
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<tr>
<td>Disputes between a state and the federal government</td>
<td></td>
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<tr>
<td>Cases involving foreign diplomatic personnel</td>
<td></td>
</tr>
<tr>
<td><strong>Appellate</strong>&lt;sup&gt;b&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>All decisions of federal courts of appeals and specialized federal appellate courts</td>
<td></td>
</tr>
<tr>
<td>All decisions of the highest state court with jurisdiction over a case, concerning issues of federal law</td>
<td></td>
</tr>
<tr>
<td>Decisions of special three-judge federal district courts (mandatory)</td>
<td></td>
</tr>
</tbody>
</table>

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<sup>a</sup> It is unclear whether these cases are mandatory, and the Court treats them as discretionary.

<sup>b</sup> Some minor categories are not listed.

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 disputes over state borders, though water rights have been the most common issue in recent years. 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 200 in the Court’s history. When the Court does accept a case under its original jurisdiction, it ordinarily appoints a “special master” to gather facts and propose a decision to the Court. These cases can take a long time to resolve. A dispute over water rights involving Kansas, Nebraska, and Colorado that came to the Court in 1999 was back in the Court fifteen years later because of a continuing dispute over compliance with a 2002 settlement agreement in the case.<sup>4</sup>

All the other cases that come to the Court are under the second type of jurisdiction: appellate jurisdiction. Under its appellate jurisdiction the Court hears cases brought by parties that are dissatisfied with the lower-court decisions in their cases. Within the federal court system such cases can come from the federal courts of appeals and from the two specialized appellate courts. Cases may also come directly from special three-judge district courts; most of these cases involve voting and election issues.

State cases can come to the Supreme Court after decisions by state supreme courts if they involve claims based on federal law, including the Constitution. If a state supreme court chooses not to hear a case, the losing party can then go to the Supreme Court. Table 1-2 shows that a substantial majority of the cases that come to the Court—and an even
larger majority of the cases that it hears—originated in federal court rather than in state court.

The rule under which state cases come to the Supreme Court may be confusing, because cases based on federal law ordinarily start in federal court. But cases brought to state courts on the basis of state law sometimes contain issues of federal law as well. This situation is common in criminal cases. A person accused of burglary under state law will be tried in a state court. During the state court proceedings, the defendant may argue that the police violated rights protected by the U.S. Constitution during a search. The case eventually can be brought to the Supreme Court on that issue. If it is, the Court will have the power to rule only on the federal issue, not on the issues of state law involved in the case. Thus, the Court cannot rule on whether the defendant actually committed the burglary.

Nearly all cases brought to the Court under its appellate jurisdiction also are under its discretionary jurisdiction, so it can choose whether or not to hear them. With occasional exceptions discretionary cases come to the Court in the form of petitions for a writ of certiorari, a writ through which the Court calls up a case for decision from a lower court. The cases that the Court is required to hear are called appeals. In a series of steps culminating in 1988, Congress converted the Court’s jurisdiction from mostly mandatory to almost entirely discretionary. Today, appeals can be brought in only the few cases that come directly from three-judge district courts.

The Supreme Court hears only a fraction of 1 percent of the cases brought to federal and state courts. As this figure suggests, courts other

<table>
<thead>
<tr>
<th>TABLE 1-2</th>
<th>Sources of Supreme Court Cases in Recent Periods (in Percentages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal courts</td>
<td>Courts of appeals</td>
</tr>
<tr>
<td>Cases brought to the Court</td>
<td>74</td>
</tr>
<tr>
<td>Cases decided on the merits</td>
<td>79</td>
</tr>
</tbody>
</table>


Note: Original jurisdiction cases are not included. Nonfederal courts of the District of Columbia and of U.S. territories are treated as state courts. For cases heard by the Court, each oral argument is counted once unless it involves consolidated cases from two different categories of courts.

a. Cases in which the Court ruled on petitions for hearings, October 6, 2014 (1,657 cases).
b. Cases that the Court decided on the merits, including summary reversals, 2012 and 2013 terms (151 cases).
than the Supreme Court have ample opportunities to make policy on their own. Moreover, their decisions help determine the ultimate impact of the Court’s policies. Important though it is, the Supreme Court certainly is not the only court that matters.

An Overview of the Court

Several attributes of the Court should be examined to provide an understanding of the Court as an institution. Especially important are the activities of justices and the people who help them do their work.

The Court’s Building

The Supreme Court did not move into its own building until 1935. In its first decade the Court met first in New York and then in Philadelphia. The Court moved to Washington, D.C., with the rest of the federal government at the beginning of the nineteenth century. For the next 130 years, it sat in the Capitol, a tenant of Congress.

The Court’s accommodations in the Capitol were not entirely adequate. Among other things, the lack of office space meant that justices did most of their work at home. After an intensive lobbying effort by Chief Justice William Howard Taft, Congress appropriated money for the Supreme Court building in 1929. The five-story structure occupies a full square block across the street from the Capitol. Because the primary material in the impressive building is marble, it has been called a “marble palace.” The aging of the Court’s building and the need to house a staff that had grown considerably led to a major renovation project that was completed in 2011.

The building houses all the Court’s facilities. Formal sessions are held in the courtroom on the first floor. Behind the courtroom is the conference room, where the justices meet to decide cases. Also near the courtroom are the chambers that contain offices for the associate justices and their staffs. The chief justice’s chambers are attached to the conference room.

In 2010 the Court closed its main public entrance at the top of the stairs in the front of the building, citing security concerns. The symbolism of that closure led to considerable criticism, including an unusual statement by Justice Stephen Breyer opposing the closure, which Ruth Bader Ginsburg joined. A federal statute that broadly prohibits political demonstrations and protests on the Court’s grounds was held to violate the First Amendment by a federal district judge in 2013. The Court quickly adopted a regulation that limits demonstrations on its grounds, a regulation that has not yet been tested in court.
Personnel: The Justices

Under the Constitution, Supreme Court justices are nominated by the president and confirmed by the Senate. By long-established Senate practice, a simple majority is required for confirmation. The Constitution says that justices will hold office “during good behavior”—that is, for life unless they relinquish their posts voluntarily or they are removed through impeachment proceedings. Beyond these basic rules, questions such as the number of justices, their qualifications, and their duties have been settled by federal statutes and by tradition.

The Constitution says nothing about the number of justices. The Judiciary Act of 1789 provided for six justices. Subsequent statutes changed the number successively to five, six, seven, nine, ten, seven, and nine. The changes were made in part to accommodate the justices’ duties in the lower federal courts, in part to serve partisan and policy goals of the president and Congress. The most recent change to nine members was made in 1869, and any further changes in size seem quite unlikely.

As of 2015, each associate justice receives an annual salary of $246,800, and the chief justice receives $258,100. The justices gained raises of more than $30,000 in 2014 after a lower court ruled in favor of six federal judges who challenged congressional action that blocked cost-of-living adjustments to judicial salaries. Justices are limited to about $27,000 in outside income from activities such as teaching, but there are no limits on income from books. Clarence Thomas earned about $1.5 million for his memoirs, and as of 2014 Sonia Sotomayor had earned about $3 million. Antonin Scalia earned several hundred thousand dollars for two books about interpretation of the law between 2007 and 2014. Some of the current justices, including John Roberts and Stephen Breyer, were wealthy when they came to the Court. Thomas and Sotomayor were far from wealthy, and their book earnings improved their financial status enormously.

The primary duty of the justices is to participate in the collective decisions of the Court: determining which cases to hear, deciding cases, and writing and contributing to opinions. Ordinarily, the Court’s decisions are made by all nine members, but exceptions occur. At times the Court has only eight members because a justice has left the Court and a replacement has not been appointed. A justice’s illness may leave the Court temporarily shorthanded, or a justice may decide not to participate in a case because of a perceived conflict of interest. Under federal law, judges should withdraw from cases—recuse themselves—when a decision would affect their self-interest substantially or their impartiality “might reasonably be questioned.” The Court leaves this decision entirely to the individual justice.

Justices seldom explain the reasons for their recusals, but those reasons often can be discerned. The most common reason is a financial interest in a case—usually a result of a justice’s investments. Some justices have sold stocks to enable them to participate in cases from which they would otherwise have
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had to recuse. Other recusals result when a justice was involved in a case in a prior position, such as a lower-court judgeship. Elena Kagan recused from about one-third of the cases during her first term on the Court because her office had worked on those cases when she was U.S. solicitor general.

Controversies about justices’ recusal decisions have arisen in recent years, spurred primarily by public statements by justices about matters related to pending or future cases and by interactions between justices and people who have an interest in the outcome of a case. Litigants and others who care about particular cases have sought recusals on those grounds. Justice Scalia agreed to recuse in one case in which he had criticized the lower court’s decision in a speech, but he has resisted other efforts to secure his recusal. When oral argument was about to begin in one case in which his recusal had been requested, Scalia stood up as if he were about to absent himself from the argument, but then he smiled and sat back down. Outside groups pressured two justices to recuse from National Federation of Independent Business v. Sebelius (2012), in which the health care law enacted by Congress in 2010 was challenged on constitutional grounds. Conservative groups argued that Justice Kagan had dealt with the issue as solicitor general, and liberal groups argued that Justice Thomas’s wife had been heavily involved in opposition to the law. Both justices resisted this pressure and participated in the case.

The Court may have a tie vote when only eight justices participate in a decision. A tie vote affirms the lower-court decision. If the tie applies to the whole decision, the votes of individual justices are not announced and no opinions are written. Similarly, the lower-court decision in a case is affirmed if the Court cannot reach a quorum of six members. This situation has occurred a few times in recent years, most often because litigants named most of the justices as defendants in their lawsuits.

In addition to their participation in collective decisions, the justices make some decisions individually as circuit justices. The United States has always been divided into federal judicial circuits. Originally, most appeals within a circuit were heard by ad hoc courts composed of a federal trial judge and two members of the Supreme Court who were assigned to that area as circuit justices. The circuit duties were arduous, especially at a time when travel was difficult. Some justices even suffered ill health from what was called circuit riding. Actions by Congress and by the justices themselves gradually reduced the extent of their circuit riding, and this duty ended altogether when Congress created the courts of appeals in 1891.

The justices today retain some duties as circuit justices, with each justice assigned to one or more circuits. As circuit justices they deal with applications for special action, such as a request to stay a lower-court decision (prevent it from taking effect) until the Court decides whether to hear the case. Such an application generally must go first to the circuit justice. That justice may rule on the application as an individual or refer the case to the whole
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Court. If the circuit justice rejects an application, it can then be made to a second justice. That justice ordinarily refers it to the whole Court.

Probably the most common subject of stay requests is the death penalty. The Court is confronted with numerous requests to stay executions or vacate (remove) stays of execution, many of which come near the scheduled execution time. The Court grants only a small proportion of requests for stays of execution. Because five votes are required for a stay but only four votes to hear a case, it is possible that a prisoner will be executed even though the Court would have heard his case. Indeed, that happened in 2015 to a man who was one of four prisoners challenging the mix of drugs used for executions in Oklahoma. His application for a stay of execution was denied by a 5–4 vote, he was executed later that day, and eight days later the Court agreed to hear the case with the three remaining prisoners.¹³

Stays in other kinds of cases sometimes involve significant policy issues. In 2014 the Court acted on stay requests involving abortion, immigration, same-sex marriage, and administration of elections. The Court’s action in several of these cases drew dissenting opinions.

All but one of the nine justices are equal in formal power. The exception is the chief justice, who is the formal leader of the Court. The chief justice presides over the Court’s public sessions and conferences and assigns the Court’s opinion whenever the chief voted with the majority. The chief also supervises administration of the Court with the assistance of committees.

By tradition, the junior justice, the one with the least seniority, sits on the Court’s cafeteria committee. A 2010 review in the Washington Post gave the cafeteria a grade of F and concluded that “this food should be unconstitutional.”¹⁴ Joining the Court and the committee later that year, Justice Kagan got a frozen yogurt machine installed in the cafeteria. Chief Justice Roberts said that “no one can remember” such a significant achievement for the justice on the committee.¹⁵ In 2013 the Court reportedly changed the management of its cafeteria, perhaps in an effort to improve its grade; Kagan’s role in that decision is not known.

The chief justice appoints judges to administrative committees and some specialized courts. In 2013 one of those courts, the Foreign Intelligence Surveillance Court, garnered attention because of revelations about its formerly secret decisions expanding the federal government’s power to engage in electronic surveillance for national security purposes. Roberts’s appointment role was discussed during that episode because the great majority of the district judges whom he had assigned to the Surveillance Court for part-time duty were Republican appointees like Roberts himself, and some members of Congress proposed to limit or eliminate the chief justice’s assignment power for that court.¹⁶

The job of Supreme Court justice brings with it both satisfactions and burdens. The extent of the burdens is a matter of disagreement. Some observers see the justices’ workload as relatively light. They point to the...
relatively small number of cases that the Court now hears, the excellent support
that the justices get from their law clerks, and the time that the justices
are able to spend in activities outside the Court. One law professor, exaggerat-
ing for emphasis, said that in many ways “it’s the cushiest job in the world.”17

In contrast, justices often refer to the time their work requires, espe-
cially the volume of material they must read in the cases that come to the
Court. At least some justices spend very long hours on the job. But in the
current era, because justices typically stay on the Court until they reach an
advanced age, the satisfactions of serving as a justice appear to outweigh
the burdens of the job by a substantial margin.

Personnel: Law Clerks and Other Support Staff
A staff of about 460 people, serving in several units, supports the justices.
Most of the staff members carry out custodial and police functions under
the supervision of the marshal of the Court. The clerk of the Court han-
dles the clerical processing of all the cases that come to the Court. The
reporter of decisions supervises preparation of the official record of the
Court’s decisions, the United States Reports. The librarian is in charge of
the libraries in the Supreme Court building. The Court’s public information
office responds to inquiries and distributes information about the Court.

Of all the members of the support staff, the law clerks have the most
direct effect on the Court’s decisions.18 Associate justices may employ four

Justice Stephen Breyer with two of his law clerks. The Court’s law clerks work directly
with their justice in the process of reaching decisions.
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clerks each, the chief justice five (though the chief generally hires only four). Clerks usually work with a justice for only one year. The typical clerk is a recent, high-ranked graduate of a prestigious law school. The clerks who served in the 2010–2014 terms came from two dozen law schools, but nearly half had gone to Harvard or Yale. The great majority had clerked in a federal court of appeals before coming to the Supreme Court, and some had spent a short time in legal practice after their service in a court of appeals.

Justices, especially those who are most conservative, tend to draw clerks from court of appeals judges who share the justices’ ideological positions. Clerks typically spend much of their time on the petitions for hearings by the Court, reading the petitions and the lower-court records and summarizing them for the justices. Clerks also work on cases that have been accepted for decision. This work includes analysis of case materials and issues, discussions of cases with their justices, and drafting opinions.

Justice Alito reported that his clerks “always do a draft for me,” Justice Scalia said that “I almost never do the first draft,” and all the other current justices have similar practices. Justice Kagan said that clerks also “wander around the building and find out a lot about what other people are thinking,” and one reason is to help justices develop positions in cases that will win support from their colleagues.

The extent of law clerks’ influence over the Court’s decisions is a matter of considerable interest and wide disagreement. Observers who depict the clerks as quite powerful probably underestimate the justices’ ability to maintain control over their decisions. Still, the jobs that justices give to their clerks ensure significant influence. Drafting opinions, for instance, allows clerks to shape the content of those opinions, whether or not they seek to do so. The same is true of the other work that clerks do.

After leaving the Court, law clerks take a variety of career paths, with private practice the most common. Clerks completing their term at the Court are prized by large law firms, especially those that handle Supreme Court cases, and firms offer them “signing bonuses” of as much as $300,000 in addition to high salaries. Many former clerks go on to distinguished careers. Some justices were once law clerks, including John Roberts, Stephen Breyer, and Elena Kagan on the current Court.

The Court and the Outside World

Among people who care about politics or the law, the Supreme Court is the object of considerable fascination. There are often long lines of people who seek the limited numbers of seats available in the courtroom for oral argument sessions, and some people make money holding places in line for others. At the end of the Court’s annual term, when announcements of major decisions are expected, thousands of people watch the feed of information on SCOTUSBlog to learn of the Court’s rulings as quickly as
possible. The lawyers and other people who subscribe to a journal called *The Green Bag* prize the bobbleheads of justices that the journal issues to its readers.

Responding to this interest, the news media devote considerable attention to the Court. Some of its decisions receive extensive coverage in newspapers, television broadcasts, and blogs. The justices are satirized in stories and cartoons, and their activities are extensively chronicled. To take one example, the parking tickets issued to two cars that had delivered and accompanied Justice Scalia to a Philadelphia speaking engagement were reported in the news. Beyond the news media, individual justices and the Court as a whole have been the subjects of a series of books for a general audience over the years, and in recent years there has been a theatrical play about one of the Court’s decisions, a play about Scalia, and an opera about Scalia and Justice Ginsburg (both serious opera fans themselves). In 2015 it was announced that Natalie Portman would play Ginsburg in a movie about her years as a lawyer litigating against sex discrimination.

Despite the high level of interest in the Court, both the Court as an institution and individual justices traditionally kept out of the public eye. For instance, justices seldom gave public interviews, and the Court’s oral arguments and other formal proceedings were accessible only to those who attended them in person. This paucity of information may have been part of an effort to win favorable public attitudes toward the Court by fostering the impression that the Court stands apart from ordinary politics.

The Court and the justices were never completely isolated from the world outside the Court, and they have become more open to that world in recent years. The Court now provides a good deal of information about its work through its website. Transcripts of oral arguments are available on the same day as the arguments. Audio recordings are released a few days later and occasionally on the same day.

However, the Court has refused so far to allow oral arguments to be televised, despite pressure from Congress and widespread public support for televised arguments. At least some of the justices may want to avoid becoming too recognizable. They may also fear that lawyers (or their own colleagues) will grandstand for the cameras. One commentator, asked for
his explanation, said that “they don’t want to be made fun of on The Daily Show.” In 2014 John Oliver of HBO’s Last Week Tonight got around the lack of televised arguments by staging part of the argument in one case with dogs representing the justices and lawyers while the audio of the argument played. Justice Ginsburg reported that “I thought it was hilarious.”

Justices have long been active within the legal community, participating in programs at law schools and speaking before groups of lawyers and judges. This continues to be true today, and justices travel a good deal to make these appearances. One common activity is teaching at summer law school programs outside the United States.

What has changed in the recent past is the justices’ willingness to interact with people outside the legal system. Interviews with the news media are now common, and justices often speak before nonlegal groups. The justices who are book authors have made appearances to publicize their books, and Antonin Scalia and Sonia Sotomayor have been quite active in book promotion. Some justices take advantage of their celebrity to participate in activities they enjoy, such as throwing out the first pitch at Major League Baseball games, as Sotomayor, Samuel Alito, and John Paul Stevens have done. The high level of outside activity for some justices is symbolized by their occasional absences from public Court sessions on days when the Court does not hold oral argument but announces decisions.

In their appearances before legal and public groups, the justices sometimes express their views about issues of legal and public policy. Scalia does so most frequently, and Ginsburg has become increasingly willing to do so in recent years. These commentaries sometimes include defenses or criticisms of recent decisions by the Court, and occasionally justices express opinions that are relevant to potential future cases. One example was Ginsburg’s negative comment on a Texas abortion law in a 2014 interview. As noted earlier, some of those expressions have led to calls for justices to recuse themselves from the relevant cases. Justices sometimes have public and private interactions with groups that have policy agendas, such as their appearances at events sponsored by the conservative Federalist Society and the liberal American Constitution Society.

Justices differ in the extent to which they act as public figures. Among the current justices, Scalia and Sotomayor have been the most willing to take on that role. Sotomayor received attention as the first justice from the Latino community, and she has attracted additional attention with her best-selling memoir and her frequent appearances at public events and in the mass media. In 2013 she appeared on 60 Minutes, The View, Today, The Daily Show, and The Colbert Report. A year after she joined the Court, she estimated that what a friend called “her celebrity” took up about 40 percent of her time. In contrast, some other justices are more reticent about taking on public roles. At the extreme was David Souter, who retired from
the Court in 2009. Souter seemed to seek complete anonymity. He kept his distance from the news media and made few appearances at events outside the Court.

Among the public as a whole, knowledge of the Court and the justices is relatively limited. Still, most people who respond to public opinion surveys express positive or negative judgments about the Court. By most measures, the public’s attitudes toward the Court today are considerably less positive than they were in the 1980s and 1990s. This trend concerns people who are sympathetic to the Court, largely because of the widespread belief that public support is important to the Court’s success in getting its decisions carried out. The sources of this trend are uncertain, but the main driving force is probably a broader negativity in attitudes toward government. Chief Justice Roberts said of the Court’s approval ratings in 2012 that “I think we’re low because people’s view of government is low.”34 As Roberts pointed out, the Court still does well in comparison with other institutions, and the gap between the Court and Congress in public approval is quite substantial.

The Court’s Schedule

The Court has a regular annual schedule.35 It holds one term each year, lasting from the first Monday in October until the beginning of the succeeding term a year later. The term is designated by the year in which it begins: The 2015 term began in October 2015. (However, the clerk’s office treats a term as ending when the Court finishes its work in June.) The Court does nearly all its collective work from late September to late June. This work begins when the justices meet to act on the petitions for hearings that have accumulated during the summer and ends when the Court has issued decisions in all the cases it heard during the term.

Most of the term is divided into sittings of about two weeks, when the Court holds sessions to hear oral arguments in cases and to announce decisions in cases that were argued earlier in the term, and recesses of two weeks or longer. In May and June the Court hears no arguments but holds one or more sessions nearly every week to announce decisions. It issues few decisions early in the term because of the time required after oral arguments to write opinions and reach final positions, and about one-third of all decisions are issued in June. The justices scramble to meet the internal deadline of June 1st to circulate drafts of all majority opinions to their colleagues and to reach final decisions by the end of June. The scramble is especially frenetic for cases argued in April and for the most consequential and controversial cases. It is not surprising that a high proportion of all the Court’s major decisions are announced in the last few days of the Court’s term. This was true of the 2015 rulings on the 2010 health care law sponsored by President Obama and on same-sex marriage.36
When the Court has reached and announced decisions in all the cases it heard during the term, the summer recess begins. Cases that the Court accepted for hearing but that were not argued during the term are carried over to the next term. In summer the justices generally spend time away from Washington but continue their work on the petitions for hearings that arrive at the Court. During that time the Court and individual circuit justices respond to applications for special action. When the justices meet at the end of summer to dispose of the accumulated petitions, the annual cycle begins again.

The schedule of weekly activities, like the annual schedule, is fairly regular. During sittings, the Court generally holds sessions on Monday through Wednesday for two weeks and on Monday of the next week. The sessions begin at ten o’clock in the morning. Oral arguments usually are held during each session except on the last Monday of the sitting. They may be preceded by several types of business. On Mondays the Court announces the filing of its order list, which reports the Court’s decisions on petitions for hearing and other actions taken at its conference the preceding Friday. On Tuesdays, as well as the last Monday of the sitting, justices announce their opinions in any cases the Court has resolved. In May and June, however, opinions may be announced on any day of the week.

The oral arguments consume most of the time during sessions. The usual practice is to allot one hour for arguments in a case. On most argument days the Court hears two cases.

During sittings, the Court holds two conferences each week. The Wednesday afternoon conference is devoted to discussion of the cases that were argued on Monday. In a longer conference on Friday the justices discuss the cases argued on Tuesday and Wednesday, along with petitions for certiorari and other matters the Court must decide. In May and June, after oral arguments have ended for the year, the Court has weekly conferences on Thursdays.

The Court also holds a conference on the last Friday of each recess to deal with the continuing flow of business. The remainder of the justices’ time during recess periods is devoted to their individual work: study of petitions for hearing and cases scheduled for argument, writing of opinions, and reaction to other justices’ opinions. This work continues during the sittings.

The Court’s History

This book is concerned primarily with the Supreme Court at present and in the recent past, but I frequently refer to the Court’s history to provide perspective on the current Court. Thus, an overview of that history will
provide background for later chapters. Even a brief overview makes clear
the links between the Court’s own history and that of the nation as a
whole. The Court has played a role in American political development,
and it has been shaped by the development of other political institutions.

The Court from 1790 to 1865

The Constitution established the Supreme Court, but the Constitution
says much less about the Court than about Congress and the president.
The Judiciary Act of 1789, which set up the federal court system, granted
the Court broad but ambiguous powers.

The Court started slowly, deciding only about fifty cases and making
few significant decisions between 1790 and 1799. Several people rejected
offers to serve on the Court, and two justices—including Chief Justice
John Jay—resigned to take more attractive positions in state government.
The Court’s fortunes improved considerably under John Marshall, chief
justice from 1801 to 1835. Marshall, appointed by President John Adams,
dominated the Court to a degree that no other justice has matched. He
used his position to strengthen the Court’s standing and advance policies
he favored.

The Court’s most important assertion of power under Marshall was
probably its decision in *Marbury v. Madison* (1803), in which the Court
struck down a federal statute for the first time. In his opinion for the
Court, Marshall argued that when a federal law is inconsistent with the
Constitution, the Court must declare the law unconstitutional and refuse
to enforce it. A few years later, the Court claimed the same power of judi-
cial review over state acts.

The Court’s aggressiveness brought denunciations and threats against
the Court, including an effort by President Thomas Jefferson to have
Congress remove at least one justice through impeachment. But Marshall’s
skill in minimizing confrontations helped protect the Court from a suc-
cessful attack. The other branches of government and the general public
gradually accepted the powers that he claimed for the Court.

This acceptance was tested by the Court’s decision in *Scott v. Sandford*
(1857), generally known as the *Dred Scott* case. Prior to that decision, the
Court had overturned only one federal statute, the minor law involved in
*Marbury v. Madison*. In *Dred Scott*, however, Marshall’s successor, Roger
Taney (1836–1864), wrote the Court’s opinion holding that Congress had
exceeded its constitutional powers when it prohibited slavery in some ter-
ritories. That decision was intended to resolve the legal controversy over
slavery. Instead, the level of controversy increased, and the Court was vili-
fied in the North. The Court’s prestige suffered greatly, but its basic pow-
ers survived without serious challenge.
In using the Court’s powers, the Marshall and Taney Courts addressed major issues of public policy. They gave particular attention to federalism, the legal relationship between the national government and the states. Under Marshall, the Court gave strong support to national powers. Marshall wanted to restrict state policies where they interfered with activities of the national government, especially its power to regulate commerce among the states. The Taney Court was not as favorable to the national government, but Taney and his colleagues did little to reverse the Marshall Court’s general expansion of federal power. As a result, the constitutional power of the federal government remained strong; the Court had permanently altered the lines between the national government and the state governments.

The Court from 1865 to 1937

After the Civil War, the Court began to focus its attention on government regulation of the economy. By the late nineteenth century, all levels of government were adopting new laws to regulate business activities. Among them were the federal antitrust laws, state regulations of railroad practices, and federal and state laws regulating employment conditions. Inevitably, much of this legislation was challenged in the courts on constitutional grounds.

The Supreme Court upheld a great many government policies regulating business in this period, but it gradually became less friendly toward those policies. That position was reflected in the development of constitutional doctrines limiting government power to control business activities. Those doctrines were used with increasing frequency to attack regulatory legislation, and in the 1920s the Supreme Court struck down more than 130 regulatory laws as unconstitutional.39

In the 1930s the Supreme Court’s attacks on economic regulation brought it into serious conflict with the other branches. President Franklin Roosevelt’s New Deal program to combat the Great Depression included sweeping statutes to control the economy, measures that enjoyed widespread support. In a series of decisions in 1935 and 1936, the Court struck down several of these statutes, including laws broadly regulating industry and agriculture. Most of these decisions were by 6–3 and 5–4 margins.40

Roosevelt responded in 1937 by proposing legislation under which an extra justice could be added to the Court for every sitting justice over the age of seventy who had served at least ten years, up to a maximum of six extra justices. If the legislation were enacted, Roosevelt could appoint six new justices, thereby packing the Court with justices favorable to his programs. While this plan was being debated in Congress, however, the Court weakened the impetus behind it. In several decisions in 1937, the Court
reversed direction and upheld New Deal legislation and similar state laws by narrow margins. Many observers have concluded that this shift was a deliberate effort by one or two moderate justices to mend the Court’s contentious relationship with the other branches. In any event, the Court-packing plan died.

The Court from 1937 to 1969

During the congressional debate in 1937, one of the justices who had frequently voted to strike down New Deal laws retired. Several other justices left the Court in the next few years, giving Roosevelt the ideological control of the Court that he had sought through the Court-packing legislation. The new Court created by his appointments fully accepted New Deal regulation of the economy, giving very broad interpretations to the constitutional powers to tax and to regulate interstate commerce. And in the decades that followed, the Court continued to uphold major economic policies of the federal government.

Because of the Court’s consistent position on issues of economic regulation, that field gradually became less central to its role. Instead, the Court increasingly focused on civil liberties. By the mid-1960s, the Court was giving the most attention to interpretation of legal protections for freedom of expression and freedom of religion, for the procedural rights of criminal defendants and other people, and for equal treatment of disadvantaged groups.

During this period, the Court’s overall support for civil liberties varied. That support peaked in the 1960s, the latter part of the period when Earl Warren was chief justice (1953–1969). The Court’s policies during that period are often identified with Warren, but other liberal justices played roles of equal or greater importance: Roosevelt appointees Hugo Black and William Douglas and Eisenhower appointee William Brennan.

The most prominent decision of the Warren Court was Brown v. Board of Education (1954), in which the Court ordered desegregation of school systems that assigned students to separate schools by race. The Court supported the rights of African Americans in several other areas as well. During the 1960s the Court expanded the rights of criminal defendants in state cases. It issued landmark decisions on the right to counsel (Gideon v. Wainwright, 1963), police search and seizure practices (Mapp v. Ohio, 1961), and the questioning of suspects (Miranda v. Arizona, 1966). The Court supported freedom of expression by expanding First Amendment rights, especially on issues relating to obscenity and libel. In a line of cases beginning with Baker v. Carr (1962), the Court required that legislative districts be equal in population.
The Court from 1969 to the Present

When Earl Warren retired in 1969, he was succeeded as chief justice by Warren Burger, President Nixon’s first Court appointee. In 1970 and 1971 Nixon made three more appointments. The Court’s membership changed much more slowly after that. But each new member until 1993 was appointed by a conservative Republican president—one by Gerald Ford, three by Ronald Reagan, and two by George H. W. Bush. In 1986 Reagan named Nixon appointee William Rehnquist, the Court’s most conservative justice, to succeed Warren Burger as chief justice. Each president serving since then—Bill Clinton, George W. Bush, and Barack Obama—has made two appointments. In 2005 Bush appointed John Roberts as chief justice to succeed Rehnquist.

The Republican appointments from 1969 through 1991 gradually made the Court more conservative. Even though four of the six appointments since then have come from Democratic presidents, the net effect of personnel changes since 1991 has been to move the Court a bit more to the right.

This ideological change is reflected in the Court’s civil liberties policies, to a greater degree on some issues than on others. Perhaps the most decisive shift has come on issues of criminal procedure. The Court has not directly overturned any of the Warren Court’s landmark decisions expanding defendants’ rights, but it has cut back on the reach of decisions such as *Mapp* and *Miranda*. The Rehnquist and Roberts Courts generally have given narrow interpretations to federal statutes prohibiting discrimination. However, the Burger Court acted decisively to expand protections against sex discrimination under the Constitution, and the Rehnquist and Roberts Courts have made major rulings against legal discrimination based on sexual orientation. Those decisions culminated in the Court’s decision in *Obergefell v. Hodges* (2015), which struck down state prohibitions on same-sex marriage.

Especially under Chief Justice Roberts, the Court has expanded civil liberties that conservatives tend to favor. A series of decisions from 1976 through 2014 limited government regulation of political campaign funding on the basis of the First Amendment. In 2008 the Court held for the first time that the Second Amendment protected the right to individual gun ownership from federal abridgment, and two years later the Court ruled that this right applied to state governments as well.

The Court has also shifted direction in economic policy. On the whole, its interpretations of federal statutes on environmental protection and labor-management relations have become more conservative. More broadly, its decisions have become more favorable to the business community. Since 1995 the Court has also narrowed congressional power to
regulate the private sector and state governments in some respects.\textsuperscript{45} In \textit{National Federation of Independent Business v. Sebelius} (2012), the Court upheld the heart of President Obama’s health care law on the basis of the federal taxing power. But this decision also held that the law could not be justified on the basis of the power to regulate interstate commerce, and it narrowed the power of the federal government to withhold money from states that did not sign on to federal programs.

The absence of a more decisive shift in the Court’s policies since 1969 has disappointed some conservative observers of the Court. Still, those policies have moved considerably to the right, underlining the impact of the Court’s membership on its work. Because of that impact the selection of justices is a crucial process—a process that the next chapter examines.

NOTES

2. These decisions were \textit{United States v. Nixon} (1974) and \textit{Bush v. Gore} (2000).
4. The history of the case is summarized in the Court’s 2015 decision, \textit{Kansas v. Nebraska}.
5. \textit{Statement Concerning the Supreme Court’s Front Entrance}, 176 L. Ed. 2d i (2010).
8. The justices’ annual financial disclosure reports list the (very) approximate values of their financial assets at the end of each calendar year. They also list the justices’ outside income, including book royalties. The reports for the justices since 2002 are posted at \url{https://www.opensecrets.org/pfds}.
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19. This figure was calculated from information sheets provided by the Supreme Court.


40. The cases included *Carter v. Carter Coal Co.* (1936); *United States v. Butler* (1936); and *Schechter Poultry Corp. v. United States* (1935).

41. The cases included *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937); *Steward Machine Co. v. Davis* (1937); and *West Coast Hotel Co. v. Parrish* (1937).


43. The most important decisions were *Buckley v. Valeo* (1976) and *Citizens United v. Federal Election Commission* (2010); the most recent decision is *McCutcheon v. Federal Election Commission* (2014).
