

# The Supreme Court

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In *Federalist 78*, Alexander Hamilton argued “the judiciary is beyond comparison the weakest of the three branches.” Whether Hamilton’s conclusion is an accurate description of the Court’s place in our constitutional life is a question we shall consider throughout this book. In 1788, Hamilton’s observation was surely accurate. Today, appointment to the Court is a prize, the culmination of a career in law. President Washington, though, had to plead with friends and twist arms to find people to serve on the Court. The first Chief Justice, John Jay, left the Court after only five years, finding a more prestigious and powerful position as Governor of New York. Another justice resigned his commission in favor of a seat on the South Carolina supreme court.

When the Court first convened on 1 February 1790, it met in the Royal Exchange Building in New York City. Thereafter and until 1939, it met in a spare room in the basement of the capitol building. Today, the Court holds office in an impressive palace of white marble on the corner of First and A Streets in Washington, D.C. Inside, the justices and their clerks are surrounded by polished wood and gleaming brass. The Court has its own library, printing press, cafeteria, museum, gift shop, and even a basketball court.

The splendor of the Court’s residence mirrors its prominence as an institution. The Court presides over a vast bureaucracy that includes more than one hundred lower courts staffed by over eight hundred judges. In Fiscal Year 2017, the federal judiciary’s budget request was \$7.0 billion (less than one percent of the total U.S. budget), a 3.2 percent increase over the Judiciary’s FY 2016 budget of \$6.8 billion. More importantly, the Court is at the center of public debate and policymaking in such areas as abortion, affirmative action, health care, sexuality, gun control, and privacy. In nearly every term, the Court considers cases that go to the very heart of the separation of powers, federalism, and the Bill of

Rights. As Alexis de Tocqueville wrote, “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”<sup>1</sup>

It was not always so. Under the Articles of Confederation, there was no Supreme Court—indeed, no federal judiciary at all. In contrast, Article III of the Constitution provides “there shall be a Supreme Court and such inferior courts” as Congress may desire. To ensure the independence of the federal judiciary, it also gives judges lifetime tenure and protects against a reduction of their salaries. In broad strokes Article III also defines what kinds of cases the Court can hear.

On the other hand, it tells us nothing about who the justices should be, or how many there should be. Moreover, Article III provides no information about how the Court works, about how the Court decides which cases to hear, or how the justices should decide them. Thus, the federal court system is a product of an evolution that has been profoundly influenced by other features of the constitutional order, such as federalism, the separation of powers, and the tension between individual liberty and popular rule. And as we shall see in chapter 3, Congress, by expanding the jurisdiction of the federal courts and giving the Supreme Court greater control over its own jurisdiction, has also advanced the development of the federal courts.

Article III’s vagueness is due, in part, to considerable conflict at the Philadelphia Convention about whether a national judiciary was a necessary concomitant of national power. Some delegates, such as Alexander Hamilton, argued in favor of a national judiciary because “the majesty of the national authority must be manifested through the medium of the courts of justice.”<sup>2</sup> Some of the other delegates thought a national judiciary would be a terrible threat to the sovereignty of the individual states, each of which possessed its own judiciary.

## A. THE JUSTICES: POLITICS OF APPOINTMENT

The appointment of a Supreme Court justice is one of the notable events of American political life. As specified in Article II, justices are nominated by the President and must be confirmed by a majority of the Senate. If confirmed, a justice serves for life on “good behavior” and can be removed only by

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<sup>1</sup> J. P. Mayer, ed., *Democracy in America* (Garden City, N.Y.: Doubleday, 1969), 270.

<sup>2</sup> Clinton Rossiter, ed., *The Federalist Papers* No. 16 (New York: New American Library, Mentor Books, 1961), 116.

impeachment by the House of Representatives and conviction by the Senate.<sup>3</sup> On average, there is a vacancy on the Court every two years. Franklin Roosevelt made no appointments in his first term, but had nine opportunities between 1937 and 1943. President Carter made no appointments to the Court, while President Reagan made three. President George H.W. Bush made two appointments in his one term and President Clinton two appointments in two terms. President George W. Bush made two appointments to the Court. Bush nominated John Roberts as an associate justice to replace Justice Sandra Day O'Connor. Following the death of Chief Justice William Rehnquist on 3 September 2005, President Bush withdrew the nomination and instead nominated Roberts for the Chief Justiceship. The Senate confirmed Roberts by a vote of 78 to 22.

On 3 October 2005, Bush nominated Harriet Miers for O'Connor's seat. The nomination proved extremely controversial, in part because opponents, from a wide variety of positions and perspectives, thought she lacked the requisite experience and record necessary for the position. President Bush withdrew her nomination on 27 October. Four days later, Bush nominated Samuel Alito to the seat. The Alito nomination was also very controversial, although for different reasons. Critics of the nomination thought Alito would be too eager to embrace an extremely conservative approach to deciding cases. Such fears, for example, led the American Civil Liberties Union to oppose the nomination, and Senator John Kerry to attempt to filibuster it. Alito was confirmed by a vote of 58 to 42 on 31 January 2006, the second lowest on the current court (Justice Thomas was confirmed by a vote of 52 to 48).

In his two terms of office, President Obama was presented with three vacancies on the Court. In 2009, President Obama nominated Sonia Sotomayor to replace Justice Souter; the Senate confirmed Justice Sotomayor by a vote of 68–31. Obama nominated Elena Kagan to replace Justice Stevens in 2010; the Senate approved Kagan by a vote of 63–37. In March 2016, President Obama nominated Merrick Garland to fill the vacancy occasioned by the death of Justice Antonin Scalia. The Republican Party leadership in the Senate refused to hold hearings or to permit a vote on the nomination. The refusal of the Senate to take up the Garland nomination revived longstanding concerns that the nomination process is flawed if not irreparably broken, a victim both of partisan politics and unsound design. President Trump filled the vacancy left by Justice Scalia with Judge Neil Gorsuch. The Senate voted to confirm Justice Gorsuch 54–45, mostly along party

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<sup>3</sup> Only one Supreme Court justice—Samuel Chase—has been impeached. The Jeffersonians brought charges against Chase in 1805. The Senate did not convict him. For an account, see Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 57–58.

lines. Interestingly, Gorsuch is the first Supreme Court justice to serve alongside another justice for whom he once had clerked (Anthony Kennedy).

In view of the fact that many justices will serve terms that may exceed 30 years, some commentators have called for replacing life time appointments with staggered fixed terms, (say of 12, or 18 years) as is common in many other constitutional democracies. Proponents argue that this method of selection would help to depoliticize the current process by making opportunities for personnel change more frequent and less subject to chance or fortune.

Presidents typically seek out Supreme Court nominees whose judicial philosophy and record are similar to the President's own political views. As often as not, however, Supreme Court justices go their own way, surprising and sometimes disappointing presidential expectations. President Eisenhower, for example, appointed both Chief Justice Earl Warren and Justice William J. Brennan. Their "liberal" inclinations on the Court disappointed Eisenhower, who later called them "the biggest damned-fool mistakes" of his presidency.<sup>4</sup> Some presidential administrations have tried to guard against surprise by closely examining a potential nominee's writings and judicial opinions for their conformity to an ideological litmus test, a development that some observers trace to the Reagan Administration.<sup>5</sup>

The nomination process has always been political and, in recent years, has often been contentious, as the nominations of Clarence Thomas in 1991 and Merrick Garland in 2016 vividly demonstrate, albeit for different reasons. In addition to the President and the Senate, important players in the confirmation process include the American Bar Association, which on its own initiative has chosen to evaluate nominees based on judicial experience and temperament. A wide array of interest groups and political associations are also involved, such as the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Organization for Women. At times, sitting members of the Court have also tried to influence the process. The presence of so many actors testifies to the importance of the nomination process:

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<sup>4</sup> For a more detailed discussion, see Phillip Cooper and Howard Ball, *The United States Supreme Court: From the Inside Out* (Upper Saddle River, N. J.: Prentice-Hall, 1996), 31–74. On the other hand, Professor Theodore Vestal reports that the source of this quote is an oral history interview of Ralph H. Cake, a former Republican national committee member from Oregon and a longtime political enemy of Warren, which suggests it could be an effort to discredit Eisenhower. Theodore M. Vestal, *The Eisenhower Court and Civil Liberties* (Westport, Conn.: Praeger Publishers, 2002), 23–24.

<sup>5</sup> In 1985, for example, *Newsweek Magazine* reported that during the Reagan administration, all federal judicial nominees were subject to ideological screening, including an interview with Grover Rees III, Attorney General Edwin Meese's Special Assistant for judicial selection. Among the topics for screening were the interviewee's thinking about *Roe v. Wade*.

It is one of the most important ways the community has of influencing the Court and enforcing a measure of political accountability. For the same reasons, the nomination process reflects the tension between our dual commitments to democratic self-governance and constitutionalism.

Most of the people appointed to the Court have had long and distinguished careers in the law and an exemplary record of public service. Many have been members of Congress, some have aspired to the presidency, and, since 1975, all have been judges on lower courts. For many years, the overwhelming majority were Protestant, white, and males of means.<sup>6</sup> (When Justice Gorsuch joined the Court in 2017, however, there were six Catholics and three Jews, and three women.) A great number have graduated from the country's most prestigious law schools, and several justices began their careers as clerks to Supreme Court justices after graduating from law school. There is, however, no constitutional requirement that a justice have a law degree or be a lawyer.

Notwithstanding this similarity of background, Presidents have usually considered diversity an important factor in the Court's composition. For many years, the Court had a "Jewish" seat, and concerns about geographical and ideological diversity have also influenced the makeup of the Court. President Johnson appointed Thurgood Marshall as the first African American on the Court in 1967. In 1981, President Reagan appointed Sandra Day O'Connor as the first woman on the Court, and he appointed Justice Antonin Scalia, the first Italian American, in 1986. President Obama's appointment of Sonia Sotomayor made her the first Latina on the High Court.

Most nominees are confirmed without great difficulty. Between 1900 and 1967 the Senate rejected only one nominee. Since 1967, however, the Senate has rejected seven nominees and refused to hold hearings for one (Garland). On what basis may the Senate reject an appointment? There is much disagreement about how the confirmation process should work.<sup>7</sup> Should the Senate assess the moral character of a nominee? The nation struggled with this question during the Senate's hearings on Clarence Thomas. Should it inquire into the political or

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<sup>6</sup> Justice Brandeis' appointment to the Court, for example, was delayed by some Senators who objected to his supposed "radicalism" and commitment to social justice. Historians have also noted that a significant cause of senatorial opposition to Brandeis was virulent anti-Semitism. See "A History of Supreme Court Confirmation Hearings," <https://www.npr.org/templates/story/story.php?storyId=106528133> (July 12, 2009).

<sup>7</sup> See Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, N. J.: Princeton University Press, 2007); see also Susan Low Bloch, Vicki C. Jackson, and Thomas G. Krattenmaker, *Inside the Supreme Court: The Institution and Its Procedures* 2d ed. (St. Paul, Minn.: West Publishing Company, 2008), ch. 2.

jurisprudential views of nominees? Much of the controversy surrounding Robert Bork and Samuel Alito involved these issues.

Some senators and scholars argue vehemently that the Senate's role should be limited to determining whether the nominee is "competent." They argue the Senate is a threat to judicial independence when it inquires into a nominee's substantive views.<sup>8</sup> Others have called for an aggressive review of a candidate's constitutional philosophy, claiming the Senate has an obligation to the people to assess the candidate's views on matters of public importance.<sup>9</sup> Indeed, Elena Kagan made this argument when she was a law professor, but she demurred when she was questioned as a nominee herself.<sup>10</sup> Both positions rest upon a particular understanding about the relationship between constitutionalism and democracy. That tension haunts nearly every area of American constitutional law and is one of the central themes of this book.

## B. THE FEDERAL COURT SYSTEM

What kinds of cases may the Court hear? Article III gives us little guidance. It provides only that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . . ." The phrase presents two immediate difficulties: First, the Article refers to "judicial power" but does not say what the power is or what it includes. Second, the Court's power to hear cases depends upon whether it has jurisdiction over the particular case. As we shall see, the Court has original jurisdiction in a set of cases set forth explicitly in Section 2, including those affecting ambassadors and other public ministers, disputes in which the United States is a party, disputes between two or more states, and disputes between a state and citizens of another state. In all other cases the Court has appellate jurisdiction, with such exceptions and regulations as Congress shall make.

The great majority of the cases the Court hears come to it under its appellate jurisdiction, or on appeal from a federal or state court. The Constitution does not itself create lower federal courts, instead entrusting their creation and organization to Congress. Congress first created a system of lower federal courts in the Judiciary Act of 1789. Just below the Supreme Court were three circuit—or appellate—courts, each serving a group of states. Thirteen district courts served

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<sup>8</sup> Robert F. Nagel, "Advice, Consent, and Influence," 84 *Northwestern University Law Review* 858 (1990).

<sup>9</sup> Stephen Carter, "The Confirmation Mess," 101 *Harvard Law Review* 1185 (1988); Nina Totenberg, "The Confirmation Process and the Public: To Know or Not To Know," 101 *Harvard Law Review* 1213 (1988); see also Lawrence Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985).

<sup>10</sup> Elena Kagan, "Confirmation Messes, Old and New," 62 *University of Chicago Law Review* 919 (1995).

the lowest level. Although there have been substantial changes in the particular arrangements of these courts, the tripartite structure of the federal court system has remained in place ever since.

The Supreme Court is at the apogee of the system. Since 1869, the Court has had nine justices, but nine is not a constitutional command. President Washington's Court had just six justices. There have been many efforts to change the number, often because of straightforward political maneuvering by Presidents and Congresses. President Adams tried to reduce the number to five, President Lincoln expanded the number to ten, and Franklin Roosevelt's "court-packing" plan, if it had succeeded, might have increased the number to fifteen. Sometimes sitting members of the Court have joined the fray as well. Justice Field, for example, proposed that the Court should have twenty-one justices.<sup>11</sup>

Directly below the Supreme Court are the United States Courts of Appeals. These thirteen courts are organized chiefly by territory (except for the United States Court of Appeals for the Federal Circuit, which has national jurisdiction over certain appeals based on subject matter). Each court, or circuit, covers at least three states. There are 10 judges in the First Circuit, and 29 in the Ninth Circuit. The First Circuit, for example, hears cases from Maine, New Hampshire, Massachusetts, and Rhode Island. The circuit courts hear appeals from the United States District Courts and from federal agencies. Usually a three-judge panel hears cases and decides them by majority vote. On rare occasions, when an issue is especially difficult or contentious, the entire roster of judges on a circuit court may choose to hear a case en banc. The circuit courts hear about 50,000 cases every year. In the year ending June 30, 2017, the circuit courts heard 52,028 cases.

The United States District Courts are the entry level to the federal court system. The district courts are trial courts: One judge hears criminal and civil cases, sometimes with a jury. There are ninety-four district courts, with at least one in every state. The District of Columbia also has a district court, and there is a court each for the U.S. territories of Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands. In addition, Congress has created a wide variety of specialized courts, including military courts, tax courts, and customs courts. Many of these courts were created by Congress under Article I and not under Article III of the Constitution. The provenance of the court is important, for unlike Article III courts, judges on Article I courts are not guaranteed lifetime tenure.

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<sup>11</sup> Howard J. Graham, *Everyman's Constitution* (Madison: Historical Society of Wisconsin, 1968), 136ff.

## C. JURISDICTION: THE POWER TO HEAR CASES AND CONTROVERSIES

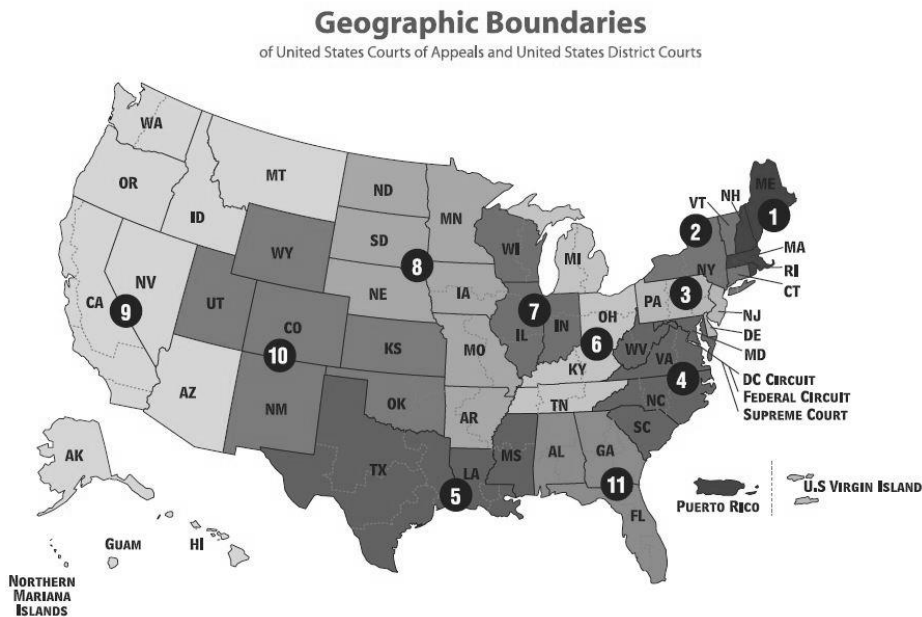
No court may hear a case unless it has jurisdiction over it. The Supreme Court has two kinds of jurisdiction—original and appellate. In cases of original jurisdiction, the Supreme Court hears a case “on first impression.” In other words, the litigants bypass state courts and the lower federal courts and go straight to the Supreme Court. Partly because of the Eleventh Amendment, congressional legislation, and the Court’s own rules (which provide that original jurisdiction may be held concurrently with lower federal courts), such cases are extremely rare.

The Court’s workload is therefore largely a function of its appellate jurisdiction. Although the Court is a passive, reactive institution and may not formally initiate cases, it does have great control over how many and what kinds of cases it will hear. In a typical year, the Court receives approximately 8,000 petitions, or requests, by litigants to hear their appeals. The Court usually decides to hear about 75 petitions yearly.<sup>12</sup> In 2016, for example, the total number of cases filed in the Supreme Court decreased by 2.63 percent from 6,475 filings in the 2015 Term, and the Court heard arguments in 71 cases. In these cases, the Court will accept briefs from the parties, schedule oral arguments, and usually issue an opinion.

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<sup>12</sup> Many observers have noted that the Court’s caseload, after holding steady for many years, began to decline visibly in the 1990s. See, for example, David M. O’Brien, “Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket,” 13 *Journal of Law and Politics* 779 (1997); see also Kenneth W. Starr, “The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft,” 90 *Minnesota Law Review* 1363 (2006).





**FIGURE 1.1** *Geographic Boundaries of United States Courts of Appeals and United States District Courts.*

SOURCE: <http://www.uscourts.gov/about-federal-courts/court-role-and-structure>.

There are three kinds of appellate jurisdiction. Every case the Court hears under appellate jurisdiction follows one of these paths:

1. *Certification.* A United States Court of Appeal can “certify” to the Supreme Court that a particular case poses exceptional difficulties. When it certifies a case, the lower court asks the Supreme Court to provide instruction about how some matter of law should be settled.
2. *Appeal.* For much of its history, the Supreme Court was required to hear cases on appeal that raised certain kinds of questions about federal law. In practice, though, the Court routinely dismissed such cases, explaining that they did not present a “substantial federal question.” In 1988, Congress passed legislation that sanctioned the practice, thus transforming the Court’s mandatory jurisdiction in such cases into discretionary jurisdiction.
3. *Certiorari.* In most cases, a party appealing a decision files a writ of certiorari with the Supreme Court. A “cert” petition is a formal request by a party that the Court hear a case. The decision to accept or deny the writ is entirely within the Court’s discretion.

Writs of certiorari are the primary means of access to the Court. The Court will grant the writ if four justices agree a case warrants the Court's attention. The Rules of the Supreme Court indicate under what circumstances it will be likely to grant the writ. Important considerations include a conflict among the Courts of Appeals on a question of law, or between a circuit court and a state supreme court, when a state court has decided a federal question in a way that conflicts with another state court or a U.S. Court of Appeals, and when a state or federal court has decided a question of federal law that the Supreme Court has not yet settled or has settled differently. In each of these instances, the Court's position at the top of the judicial hierarchy allows it to settle conflicts among lower courts and to ensure some measure of uniformity in the interpretation and application of the law.

These rules indicate when the Supreme Court has jurisdiction over a case. Whether the Court will choose to hear a case, though, is not only a function of jurisdiction. As we shall see in chapter 3, the Court has developed a number of additional devices it uses to decide whether to hear a case. Among these prudential considerations are the doctrines of standing, ripeness, mootness, and the political questions doctrine. Each represents a policy choice by the Court to limit its jurisdiction to avoid certain kinds of cases and issues, usually for reasons that go to the limited role of the Court in the larger political order.

## **1. Congressional Control over Appellate Jurisdiction**

Article III, Section 2 of the Constitution provides the Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." Section 2 is one of the primary means we have of assuring that the federal courts are accountable to the community. The principle of democratic accountability, however, exists in some tension with the principle of judicial independence. As we shall see in chapter 3, Congress has exercised its power to control the Court's appellate jurisdiction on several occasions. In each case the tension between democratic accountability and judicial independence has colored the facts and interpretive controversies involved. Among the interpretive issues raised by Section 2 are questions about the definition and scope of the words "Exceptions" and "Regulations." May Congress remove the Court's entire appellate jurisdiction, or would this exceed the meaning of "exception"? Are there other limits to congressional power under Section 2? If so, what are they and what is their source? Asking such questions raises issues about how we give meaning to those parts of the constitutional text that are vague or indeterminate, or about how we interpret the Constitution (see chapter 2). They also dramatically highlight

the tension between constitutionalism and democracy. Does popular (congressional control) over the jurisdiction of federal courts advance democratic ideals of accountability and self-governance, or does it undermine our commitment to the impartial rule of law and constitutional limitations on the powers of majorities to govern?

## D. DECIDING TO DECIDE: DECISION-MAKING PROCEDURES

Because the Court has almost complete discretion to decide which cases it will hear, the procedures and criteria it uses to winnow approximately 8,000 petitions to the worthy 75 or so are extremely important. The Court's rules give litigants some basic guidelines about what kinds of cases the Court is likely to entertain.

The first cut in the caseload is made by law clerks. Clerks are typically law school graduates with distinguished academic records. Each justice has several clerks. The clerks review every petition and prepare summaries for their justices. Some justices have asked their clerks to combine their efforts—called the cert pool—to help offset the sheer number of petitions flooding the Court every year. The clerks review the petitions in light of Rule 10 of the Court's Rules of Procedure and following whatever additional instructions they receive from their individual justices. The memos they prepare are then circulated to the justices who have chosen to participate in the cert pool.

The Chief Justice then prepares a “discuss list”: a list of petitions the various justices have indicated they believe merit the Court's consideration. If a petition is not on the Chief Justice's list, or added to it by another justice, it is dismissed. Nearly three-quarters of the petitions are rejected at this stage.<sup>13</sup>

The justices discuss the surviving petitions in conferences soon after the Court's Term begins, always on the first Monday in October. They continue to discuss petitions throughout the term, which usually ends in late June or early July. The justices have adopted a “Rule of Four” to decide which cases on the discuss list they will hear. If at least four justices do not agree to hear the case, the petition will be dismissed.

Why do some petitions attract the interest of four justices and others not? Aside from Rule 10, there are no written guidelines. As a general matter, the factors include:

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<sup>13</sup> Cooper and Ball, *supra* note 4, at 112–113.

1. The importance of the issue or issues the case raises;
2. The clarity of the issues involved;
3. Whether the lower court has developed a clear and complete record of the case; and
4. The potential impact of the case on the Court's own credibility and prestige.

In an address to the American Bar Association, Chief Justice Vinson underscored the importance of these factors:

The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights and uniformity of judgments." 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, laws, and treaties 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 upon 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.<sup>14</sup>

In addition, each justice will bring to the conference individual interests and concerns. One justice might be especially interested in petitions that raise issues of federalism. Another might be on the lookout for cases that raise free exercise of religion issues. And, of course, justices will assess cases based on the likelihood that they can get four other justices to agree with their resolution of the issue.<sup>15</sup>

Finally, the kinds of petitions the Court accepts will be influenced by the kinds of issues—political, economic, moral, and social—that preoccupy society at the time. From the founding to the Civil War, for example, the Court's agenda was dominated by questions concerning the distribution of political power between the national government and the states. The post-Civil War period and

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<sup>14</sup> Fred Vinson, Speech to the American Bar Association, 7 September 1949, reprinted in 69 *S. Ct. vi* (1949).

<sup>15</sup> H.W. Perry, Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991); Doris Marie Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

the early twentieth century brought to the Court issues about the growth of monopoly and industrialization. In the past several decades, the rapid rise of the administrative welfare state has led the Court to concentrate on issues surrounding the individual's relationship to the state. We may be on the cusp of yet another change: In recent years, the Court has increasingly considered cases that go to the heart of concentrated power, whether political or economic. These questions present themselves in renewed debates about the limits of federal power vis-à-vis the states, as well as in cases that address the limits of the state action doctrine—or the rule that the Constitution governs only the actions of state actors, and not private persons. Similarly, rapid technological change has led the Court to consider new and intractable issues about the nature of the individual and his or her relationship to the state and community. In addition, the early years of the twenty-first century have seen the Court engage once again a number of important questions about executive power in a system premised upon the separation of powers and checks and balances. The rise of the “unitary theory of the presidency” (see chapter 5 of Volume I), for example, has led the Court to consider an increasing number of cases that involve questions about the breadth of presidential powers both in domestic and in international affairs.

After the Court accepts a case and puts it on the docket, it informs the parties and schedules a deadline for them to file legal briefs. A brief is a formal legal document in which an attorney tries to persuade the Court that the relevant case law and other legal materials support his or her client's arguments. Many briefs include a great variety of nonlegal materials—such as medical information or social science—to support or to challenge the statute or policy at issue. Sometimes called “Brandeis briefs,”<sup>16</sup> these briefs illustrate how constitutional interpretation is not simply an academic or legal exercise, but also concerns and is shaped by conceptions of what constitutes good and wise public policy. In addition to the briefs of counsel, the Court will often receive amicus curiae briefs, or briefs filed by “friends of the Court.” Various interest groups and other organizations that have an interest or expertise in a particular area, will prepare these briefs. In the 2015–16 term, amici curiae filed 863 briefs, or about 13 per case. In *Obergefell v. Hodges* (2015), the Court received a record 147 such briefs. The briefs often support the arguments taken by one of the parties to the case, but they sometimes raise issues or present arguments the litigants have not addressed. According to

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<sup>16</sup> Before he became Justice Brandeis, attorney Louis Brandeis used these kinds of materials to help persuade the Court to uphold an Oregon law that regulated the number of hours women could work. The case was *Muller v. Oregon*, 208 U.S. 412 (1908). Brandeis' tactic met with outraged disapproval in some camps. See Clement E. Vose, “The National Consumer's League and the Brandeis Brief,” 1 *Midwest Journal of Political Science* 267 (1957).

some justices, amicus briefs can be quite influential. Justice Breyer, for example, has said that amicus briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”<sup>17</sup> Amicus briefs may also play an important role in helping the Court to decide which cases to accept on certiorari.<sup>18</sup>

More dramatic than legal briefs, but not necessarily as important to the process of decision-making, is oral argument. In a routine case, each party is entitled to one-half hour; in exceptional cases the Court may schedule more time, but no longer do the arguments run for days, as they sometimes used to in the nineteenth century. Argument in *Gibbons v. Ogden* (1824), for example, lasted five days. Opinions vary about the importance of the arguments, with some justices, such as Justice Harlan, holding that a good argument may make the difference between winning and losing.<sup>19</sup> Others, such as former Chief Justice Burger, complain the consistently poor quality of arguments makes them considerably less useful than the briefs. The Court hears oral argument from ten to twelve o’clock on Monday, Tuesday, and Wednesday mornings.

What are oral arguments like? It depends on the case, the justices, and the lawyers. The Rules of the Court state clearly that the Court “looks with disfavor on any oral argument that is read from a prepared text.”<sup>20</sup> The justices frequently interrupt the lawyers, and sometimes each other, with questions. As Chief Justice Rehnquist has written, oral argument is not a “brief with gestures,” but instead a conversation with “nine flesh and blood men and women.”<sup>21</sup>

## 1. Coming to Decision: Voting on Cases and Writing Opinions

The Court meets to discuss and decide cases on Wednesdays and Fridays. The meetings take place without clerks or staff. Some justices keep private

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<sup>17</sup> Quoted in *New York Times*, “Justice Breyer Calls for Experts to Aid Court in Complex Cases,” *New York Times* (February 17, 1998), <https://www.nytimes.com/1998/02/17/us/justice-breyer-calls-for-experts-to-aid-courts-in-complex-cases.html>. See also Allison Orr Larsen, “The Trouble with Amicus Facts,” William & Mary Law School Research Paper No. 09–273, 100 *Va. L. Rev.* 1757 (2014).

<sup>18</sup> Gregory A. Calderia and John R. Wright, “Organized Interests and Agenda Setting in the U.S. Supreme Court,” 82 *American Political Science Review* 1109 (1988).

<sup>19</sup> As quoted in Anthony Lewis, *Gideon’s Trumpet* (New York: Vintage Books, 1966), 162, n. 23.

<sup>20</sup> Rule 10, 28 U.S.C., Rules of the Supreme Court of the United States (1993).

<sup>21</sup> “Oral Advocacy: A Disappearing Art,” Brainerd Currie Lecture, Mercer University School of Law, October 20, 1983, msp. 4.

records, but there is no formal or public record of the meetings, no collective record about who said what to whom or how each justice voted.

After all of the justices have shaken hands, the Chief Justice states his views on the case under discussion and indicates how he intends to vote. Then each of the other justices, in descending order of seniority, gives his or her view and intended vote. The dynamics of these discussions are a matter of conjecture. The papers of some justices, such as William O. Douglas, suggest the discussions can be heated and intense.<sup>22</sup> On the other hand, Chief Justice Rehnquist once said there is more presentation than persuasion in the Court's conferences,<sup>23</sup> and it is a matter of ongoing concern for some justices.<sup>24</sup> Similarly, Justice Powell observed, "for the most part, perhaps as much as 90 percent of our total time, we function as nine small, independent law firms."<sup>25</sup> No doubt, the personalities of the justices, and the leadership style of the Chief Justice, play an important role in determining how the conferences work. According to one report, "Chief Justice Roberts is reliably said to be presiding over the justices' private after-argument conferences with a lighter hand, not watching the clock as closely and permitting more conversation."<sup>26</sup>

After the tentative vote, the justices must decide who will write the opinion. If the Chief Justice is in the majority, the opinion is his to assign. If the Chief Justice is in the minority, the power to assign falls to the senior associate justice in the majority. The assignment decision is frequently influenced by political and strategic factors. The Chief Justice, for example, may assign the majority opinion to a justice whose own vote was tentative, hoping in the process of drafting an opinion the justice may become more certain of his or her convictions.<sup>27</sup>

Each justice has a unique way of writing an opinion. Some rely heavily on their clerks, entrusting first drafts to them and only lightly editing thereafter.

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<sup>22</sup> For a general review, see Cooper and Ball, *supra* note 4, at 224–244.

<sup>23</sup> As quoted in David M. O'Brien, *Storm Center* 7th ed. (New York: Norton, 2005), 250–256. See also William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Morrow and Company, Inc.), 287–303.

<sup>24</sup> See Stuart Taylor, Jr., "Ruing Fixed Opinions," *New York Times*, February 22, 1988 at A1.

<sup>25</sup> Lewis F. Powell, Jr., "What the Justices Are Saying . . .," 62 *American Bar Association Journal* 1454 (1976).

<sup>26</sup> [www.nytimes.com/2006/05/03/washington/03memo.html](http://www.nytimes.com/2006/05/03/washington/03memo.html).

<sup>27</sup> For a more elaborate discussion, see Murphy, *supra* note 15. In *Roe v. Wade* (1973), the private papers of some of the justices indicate that there was some confusion about how Justice Blackmun had voted at the conference, and likewise some doubt about whether there was a majority to strike or uphold the statute. Chief Justice Burger, who had voted to sustain the law, assigned the opinion to Blackmun. Douglas, thinking Blackmun had voted with Burger, and that Burger was in the minority, objected. Later, Douglas and Brennan decided to wait to see Blackmun's draft before pressing the issue any further. In the end, Justice Blackmun wrote the majority opinion striking the Texas abortion law. See Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (New York: Addison-Wesley Publishing Company, 1990), 297–307.

Others insist upon writing themselves and limit their clerks to research or editorial assistance. The drafting stage is often crucial to the outcome of a case. The justices circulate opinions to each other and solicit remarks, especially if they are worried about keeping a majority or are seeking to persuade a justice who may be undecided. In short, the drafting stage is often a continuation of the conference discussions. Voting alignments often change as opinions are circulated; dissenting and concurring opinions come and go in the process of deliberation and compromise, a process that usually lasts several months.<sup>28</sup>

The Court makes its decisions public on “Opinion Days.” The decisions are announced to reporters and attorneys in the courtroom. The justices usually limit themselves to announcing the result in the case, but in unusual or controversial cases, they may read aloud all or part of their opinions. In *Brown v. Board of Education* (1954), for example, Chief Justice Warren read the opinion in its entirety to a full and silent room. In the important and controversial case of *Hamdan v. Rumsfeld* (2006), both Justice Scalia and Justice Thomas read their dissents from the bench. The public information office of the Court provides summaries of the decisions to reporters.

## E. THE IMPACT OF DECISIONS

What happens after the Court reaches a decision? Hamilton observed in *Federalist* 78 that the Court has neither the power of purse nor sword: The Court’s opinions do not enforce themselves, and the Court itself has very little power to force other actors to comply with its rulings. Consequently, in the narrowest sense, the impact of a judicial decision extends first and primarily to the parties to the case. The Court’s decision thus creates a legal obligation *inter partes*, or between the parties to the case. In the great majority of cases, however, a decision has important ramifications for the polity at large. When the Court decided *Roe v. Wade* (1973), for example, its decision voided the particular Texas antiabortion law that gave rise to the case. But more broadly, it put into question the antiabortion laws of every state in the Union. When the Court decides a matter of law in ways that go beyond the particular parties of the case, it purports to create a rule of legal obligation that is *erga omnes*, or that applies to all similarly situated parties.

Whether and when a Supreme Court decision is *erga omnes* or *inter partes* is often a matter of some conflict. Unpopular decisions are likely to provoke congressional or presidential responses that seek to overturn or limit the ruling. As we shall see in several of the chapters that follow, the forms of these responses can vary from outright disobedience, as was often the case following *Brown v. Board*

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<sup>28</sup> See O’Brien, *supra* note 22, 304–306.



of *Education* (1954) (regarding school desegregation), to feigned blindness following *INS v. Chadha* (1983) (concerning the legislative veto), to constitutional and statutory efforts to reverse specific rulings, as happened following the Court's controversial ruling in *Texas v. Johnson* (1989), the flag-burning case. In *Boerne v. Flores* (1997), the Court concluded that the Religious Freedom Restoration Act (1993), passed by Congress in reaction to the Court's decision in *Employment Div. v. Smith* (1990) (regarding the free exercise clause), was an unconstitutional infringement upon the Court's authority to determine what the Constitution means.

In some instances, as the Religious Freedom Restoration Act suggests, the Court's decisions have provoked claims by other institutional actors that they possess a coordinate and co-equal right to interpret the Constitution for themselves. As we shall see in chapter 3, President Jefferson responded to the Court's opinion in *Marbury v. Madison* (1803) by insisting "The Constitution intended that the three great branches of the government should be co-ordinate, & independent of each other. As to acts, therefore, which are to be done by either, it has given no controul to another branch."<sup>29</sup> Likewise, President Lincoln concluded in his First Inaugural Address (Appendix D) that

At the same time, the candid citizen must confess that if the whole policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

The import of Lincoln's comments remains an important subject of debate among constitutional judges and scholars; elsewhere in the same speech, for instance, Lincoln said that he did not "deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government." As we shall see in chapter 2 and again in chapters 4 and 5 in Volume II, questions about the impact and enforcement of judicial opinions inevitably raise issues of power and accountability in interpretation that go to the very heart of the constitutional order.

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<sup>29</sup> Jefferson's letter to the prosecutor in the Burr treason case, 2 June 1807.

## 1. Understanding Judicial Opinions

For most students, judicial opinions are an unusual and sometimes frustrating object of study. Filled with jargon, complicated arguments, and references to obscure legal materials, judicial opinions *are* somewhat puzzling. Most, however, follow a standard format. Learning to recognize the various parts of an opinion will make the processes of reading and understanding cases easier.

Every case includes:

- **A Title.** The title usually includes the names of the parties to a case. Hence, *Bowers v. Hardwick*, 478 U.S. 186 (1986), tells us that Bowers and Hardwick are the primary parties in the case. The first party—here it is Bowers—is the party that lost in the lower court. He or she is called the “appellant” or the “petitioner.” The second party—usually the one seeking to have the lower court decision upheld—is the “appellee” or “respondent.”
- **A Citation.** A string of numbers, or a citation, follows every title. In the *Bowers* case, the citation is 478 U.S. 186 (1986). The decisions of the Supreme Court (and of all federal courts) are kept in “reporters,” or collections, that are organized chronologically. “478” is the volume number. The initials “U.S.” tell us that the reporter is the official reporter—or collection—of Supreme Court cases. (There are also unofficial reporters prepared by private companies. The initials “L. Ed” and “S. Ct.” refer to these other companies.) “186” tells us the page number where the case begins. The last number in our example, “1986,” tells us the year when the case was decided.
- **Facts of the Case.** Usually, although not always, the Court will begin its opinion by stating the facts of the case. Often the facts are in dispute or subject to interpretation, so concurring and dissenting opinions may also include an account of the facts.
- **Questions Presented.** Every case raises at least one and usually several constitutional questions. It is important to determine what those questions are. The Court will often list them near the beginning of its opinion. As with the facts, the precise nature of the questions involved, or how they are framed, is often a matter of dispute among the justices.

- **The Majority Opinion.** Most cases are decided by a majority of the justices. One Justice, speaking for the majority, writes the Opinion of the Court. (If no opinion commands a majority, it will be a “plurality” opinion.) The majority opinion announces the holding, or the result, of the case and sets forth the reasons for the decision.
- **Concurring Opinions.** Sometimes one or more justices will agree with the majority’s result but not entirely with its reasoning. In such cases the justice will write a “concurring opinion.” Justices often use concurring opinions to add to or to clarify something in the majority opinion, and sometimes to articulate an entirely different rationale for the same result. There may be several concurring opinions in any one case, and even opinions that “concur” in part and “dissent” in part from the majority opinion.
- **Dissenting Opinions.** A justice who disagrees with the result in the case may simply note the disagreement, or he or she may choose to write a “dissenting opinion.” Unlike the majority opinion, a dissent does not have the force of law. Nevertheless, it may have a considerable impact on the law, perhaps by highlighting flaws in the majority opinion or by making a forceful argument that will influence the thinking of a future Court. Because they express the opinion of one or just a few of the Justices, dissenting opinions may sometimes seem especially pointed or blunt in their criticism of the majority opinion.

As you read the opinions, you will find it helpful to assess them in light of the three themes—interpretive, normative, and comparative—we identified in the text introduction. Every opinion, for example, adopts one or more methods of constitutional interpretation. Similarly, in every opinion the justices wrestle—often explicitly—with the political theory and ideals that inform the Constitution and give it meaning.

## F. COMPARATIVE PERSPECTIVES

Although its antecedents are ancient, the practice of judicial review is essentially an American invention. The Supreme Court’s power to review legislation for its constitutionality, whether a consequence of decision or evolution, has struck many observers as the very essence of constitutional democracy. Consequently, the Court has served as a model, both of attraction and repulsion, for many other countries. In *Democracy in America*, Alexis de Tocqueville praised the institution, but in the nineteenth century, few Europeans shared his

enthusiasm for a strong judicial body equipped with the power of constitutional review. In France and many other civil law jurisdictions the process of democratization resulted in a profound distrust of judicial power and judges, who were often associated with reactionary or aristocratic elements of society. The introduction of judicial review was easier in Latin and South America, although the transplant did not often take. As Chief Justice John Roberts noted in his “2007 Year-End Report on The Federal Judiciary,” “our federal courts provide the benchmark for emerging democracies that seek to structure their judicial systems to protect basic rights that Americans have long enjoyed as the norm.”<sup>30</sup>

In the twentieth century, especially following World War II and later the collapse of the Iron Curtain, judicial review and constitutional courts became common. Constitutional democracy and the structures associated with it blossomed in the latter half of the century, so much so that some scholars have argued that the expansion of judicial review is one of the distinguishing, although not necessarily positive, features of contemporary political life.<sup>31</sup>

The popularity of constitutionalism has contributed to the spread of judicial review and constitutional courts. More than one hundred countries have constitutions that provide for judicial review, at least on paper.<sup>32</sup> Constitutional courts exercise power, with varying degrees of success, in Canada, Germany, Spain, Italy, Austria, Israel, India, Australia, Venezuela, Japan, Ireland, South Africa, Eritrea, Uruguay, Brazil, Colombia, and in many other countries. In the former Eastern bloc countries of Europe, there are constitutional courts in the Czech Republic, Hungary, Poland, Ukraine, and elsewhere.<sup>33</sup> Indeed, the idea has proven so persuasive that in Europe there are two supranational tribunals with the power of constitutional review. The European Court of Justice, established in 1952, enforces the Treaty of the European Economic Community. The European Court of Human Rights, established in 1953, enforces the European Convention

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<sup>30</sup> <https://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf>.

<sup>31</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007); C. Neal Tate and Torbjorn Vallinder, “The Globalization of Judicial Power: The Judicialization of Politics,” in Tate and Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 5; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

<sup>32</sup> In a survey of 191 countries, Tom Ginsburg found that 158 had constitutions with some form of constitutional review. “The Global Spread of Constitutional Review,” in Keith Whittington, R. Daniel Kelman, and Gregory A. Caldeira, eds., *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 81.

<sup>33</sup> A form of judicial review has even made its appearance in England, the traditional bastion of parliamentary supremacy. Under the Human Rights Act of 1998, English courts have been empowered to make “declarations of incompatibility.” When an English court makes such a ruling, the case is tossed back to Parliament, which then has the option of repealing the law or reaffirming the statute.

on Human Rights and Fundamental Freedoms. The Court of Human Rights consists of 47 judges, equal to the number of countries that have signed on to the convention. The court sits in 5 chambers, and three judge committees conduct the initial screening of cases. Especially difficult or contentious cases are heard by a 17-judge Grand Chamber, in a process somewhat analogous to en banc judgments in the United States Circuit Courts. As we shall see in later chapters, the Convention includes a number of far-reaching guarantees for the protection of civil liberties, including guarantees of freedom of expression (Article 10), the right to a fair trial (Article 6), and respect for private and family life (Article 8).

Why have constitutional courts become so popular? The appeal is partly practical. Many countries have come to see judicial review as a mechanism for protecting democracy and human rights. Some scholars argue that political elites will favor mechanisms for judicial review in times of political uncertainty as insurance against political loss, especially when no party can expect to maintain political power for an extended period.<sup>34</sup> Others advance a theory of “hegemonic preservation,” or the hypothesis that political elites will favor some form of judicial review as a way of preserving their own power by appointing “like-minded judges to constitutional courts.”<sup>35</sup> The appeal is also symbolic: In an era when appeals to many other forms of political legitimacy, such as communism and organic statism, have lost much of their attraction, the forms of constitutional democracy have become common currency.

Broadly speaking, we can identify two systems of judicial review—or two different kinds of constitutional courts—one based on the American experience, the other based on the European model.<sup>36</sup> The models differ in the structure, methods, and effects of judicial review.<sup>37</sup> Even within the two species, though, there is wide room for variation. Different constitutions provide for different judicial structures and kinds of organizations, for different procedures, and for different methods of appointing and removing justices. As you consider the following materials, it may be useful to consider whether these different arrangements shed light on the assumptions we make about the purposes and

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<sup>34</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

<sup>35</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

<sup>36</sup> See generally Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford Clarendon Press, 1989); A.R. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989); Louis Favoreu, “American and European Models of Constitutional Justice,” in D.S. Clark, ed., *Essays in Honor of J.H. Merryman* (Berlin: Duncker & Humblot, 1990).

<sup>37</sup> Favoreu, *supra* note 36 at 111–115.

problems of constitutionalism, of the best way to structure the polity, and of human nature.

## 1. Generalized or Specialized Jurisdiction

The American Supreme Court is a court of general jurisdiction. It may hear a wide range of cases, many of which raise no constitutional issue at all. Its jurisdiction extends to all areas of public law, including administrative law, federal statutory law, and admiralty. It may also hear private law cases, such as torts or contracts that raise no questions of constitutional import. Recall also that the American Court has both original and appellate jurisdiction, as do the Supreme Courts of Argentina, Australia, Brazil, France, and India. The Supreme Court of Canada, by comparison, has a very limited “reference jurisdiction,” original in character but restricted to a narrow category of cases.

In contrast, many constitutional courts in other constitutional democracies have only special or limited jurisdiction. These courts, such as the Federal Constitutional Court of Germany and the Italian Constitutional Court, hear only cases that raise constitutional issues. They do not hear private law cases unless they raise an issue of constitutional interpretation. Their limited jurisdiction means these courts do not have the appellate jurisdiction that makes up such a prominent part of the United States Supreme Court’s jurisdiction. Similarly, they do not sit at the top of an elaborate judicial hierarchy, as does the American Court. Instead, they exist alongside or outside of the hierarchy of ordinary courts. Oftentimes these courts have the authority to determine the constitutionality of legislation that is still pending or only recently adopted. Such “abstract” review, for example, is permitted in France, Germany, Poland, and South Africa, but is prohibited in the United States by virtue of the “case and controversy” requirements of Article III, as well as by the doctrines of ripeness, mootness, and standing, which we take up in chapter 3.

Which system is better suited to constitutional democracy? Some scholars have argued that the American system of generalized and diffuse review makes the Constitution more public and accessible. Others have suggested that systems of centralized and specialized review permit judges to develop a measure of expertise in questions constitutional, as well as a superior sense of how to achieve coherence in constitutional jurisprudence more generally.<sup>38</sup>

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<sup>38</sup> It may be worth noting, however, that the United States Supreme Court’s increasing ability to control its own docket may, with time, have the effect of making it look more like the specialized constitutional courts of some other countries.

## 2. Centralized and Decentralized Systems of Constitutional Review

In the European model (sometimes called the Austrian model), only specialized constitutional courts have the power to resolve constitutional controversies. These courts usually do not share the power of review with lower courts. Hence, the power of review is centralized or concentrated in a single court. The most prominent example of a centralized system with a court of specialized jurisdiction is the Federal Republic of Germany. Created in 1951, the Federal Constitutional Court has served as a model for similar courts in Hungary, Russia, Poland, and the Czech Republic.

Even within systems of centralized review, there are significant differences. The German Court may hear constitutional controversies brought by various branches and officers of the state and national governments, as well as disputes submitted by individual citizens. The Italian Court, in contrast, can hear cases only if they are brought by one of the branches of government or if a judge on a lower court certifies them. The Italian model is the more common in Europe, though there are provisions for individual complaints in Austria, Belgium, Hungary, and in Spain, the latter through an elaborate procedure called an *amparo*. The *amparo* allows individuals and “defenders of the people” to file a complaint against an administrative or judicial act (but not directly against a statute), but the Constitutional Court itself must decide that the cause raises a constitutional question.

The American model is characterized by decentralized, or diffuse, review. The Supreme Court shares its power to hear constitutional cases with other federal and state courts. Moreover, constitutional review takes place only in the context of a concrete case. Implicit in the two models are different understandings about the demands of federalism and how the relationship between the center and periphery should be moderated by judicial structures. As we saw, this issue was a source of great conflict at the Philadelphia Convention in 1787. It remains one of the great sources of conflict in contemporary constitutional regimes. As discussed in chapter 3 and chapter 5 in Volume I, differences in the structure and makeup of constitutional courts and systems of constitutional review also reflect different understandings about which governmental actors bear primary responsibility for safeguarding and protecting the Constitution.

### 3. The Effects of Judicial Review

In every case that comes before a court, the court's decision is binding on the parties to the case. The decision, in other words, binds *inter partes*. If a decision binds all other actors, even those not party to the suit, we say that the decision binds *erga omnes*. As mentioned earlier, in the United States, there is always room for question about whether any particular decision is *inter partes* or *erga omnes*. In some other constitutions, the text plainly indicates whether a decision binds the parties alone. The decisions of the Federal Constitutional Court of the German Republic bind *erga omnes*, as do the decisions of the Austrian Supreme Court and the Italian Constitutional Court. It is also important to remember, especially in a comparative context, that the architecture of judicial review is often not as simple or as straightforward as the distinction between strong form and weak forms of review. Certain designs may facilitate democratic dialogue by inviting other actors into constitutional conversation.<sup>39</sup> Some constitutional texts, for instance, include notwithstanding clauses, which typically have the effect of permitting other actors to “override” or set aside a court ruling for a specified period, even regarding areas of constitutional law like fundamental freedoms and antidiscrimination provisions. For an example, consider Article 33 of the Canadian Constitution, which permits provincial legislatures to “override” a judicial decision for a period of five years. Provisions like Section 33 provide opportunities for dialogue between courts and legislatures (whether national or, in this case, provincial), and this is evidence, some claim, of “democratic vigor.”<sup>40</sup> As the Canadian case makes clear, behind the technical issues of *inter partes* and *erga omnes* are fundamental political questions about how to weigh the balance between judicial protection of individual liberty and respect for popular rule and democratic ideals.

### 4. Differences in Judicial Opinions

In the United States, judicial opinions are often long, elaborately reasoned, and argued in unique and highly stylized ways. Judges and justices frequently write

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<sup>39</sup> See generally, Rosalind Dixon, “Constitutional amendment rules: a comparative perspective,” in Ginsburg and Dixon, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar Publishers, 2011), 98. See also the literature on demosprudence, including Lani Guinier, “Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence—Courting the People Demosprudence and the Law/Politics Divide,” 89 *B.U. L. Rev.* 539 (2009).

<sup>40</sup> Consider the debate between Hogg/Bushell and Kelly/Manfredi about the robustness of such dialogue in Canada. Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All),” 35 *Osgoode Hall L. J.* 75 (1997); Christopher P. Manfredi and James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” 37 *Osgoode Hall L. J.* 513 (1997). On Canada’s dialogue provisions, see Jackson and Tushnet, *Comparative Constitutional Law*, 449 ff; 470.



for themselves, either in concurring opinions or dissents, and they do not hesitate to criticize other opinions, sometimes very harshly. In other countries, though, it is not unusual to find very short opinions that simply announce a conclusion or provide only sparse accounts of the reasoning the justices used to reach their conclusion.<sup>41</sup> Similarly, there are courts where separate opinions are rare and discouraged. As we shall see in chapter 2, the interpretive styles of courts vary widely as well.

## 5. Methods of Judicial Appointment and Terms of Office

Judicial independence is a critical component of constitutional governance. According to Peter Russell, “Judicial independence has been used to refer to two concepts. One is the autonomy of judges—collectively and individually—from other individuals and institutions. . . . Judicial independence is also used to refer to judicial behavior that is considered indicative of judges enjoying a high measure of autonomy.”<sup>42</sup> In the United States, Article 3 provides that “The Judges. . . shall hold their Offices during Good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

One of the most striking differences among constitutional courts is the method used for appointing and removing justices. Behind these differences are different assumptions about the purposes and limits of judicial power, and of the relationship between constitutionalism and democracy. In general, judicial appointments, especially in parliamentary systems, are an elaborate affair, entrusted in large measure to legislative bodies. The Italian Constitutional Court, for example, has fifteen judges, five nominated by the President, five by Parliament, and five by the highest state courts. The term of appointment is for nine years, with no reappointment allowed. The German Court has sixteen judges, divided into two distinct chambers. The lower house of the German legislature appoints one-half of the justices, and the upper house appoints the other half. Terms are for twelve years, with no reappointment. In Austria, the President, acting upon recommendations by the government and by the National and

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<sup>41</sup> See, for example, Michael L. Wells, “French and American Judicial Opinions,” 19 *Yale Journal of International Law* 81 (1994).

<sup>42</sup> Peter H. Russell, “Toward a General Theory of Judicial Independence,” in David M. O’Brien and Peter H. Russell, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville: University Press of Virginia, 2001), 6.

Federal Councils, appoints the twenty members of the Court. There are similar processes in Belgium, Spain, and Portugal.<sup>43</sup>

Perhaps the most notable contrast between the foregoing systems and the United States is that the justices on these other courts do not hold lifetime appointments. In the United States, lifetime appointments are generally thought to be a critical means of ensuring judicial independence. It is worth considering how unusual the American practice is: Most other constitutional democracies have devised other means of ensuring judicial independence, such as immunity from prosecution, salary guarantees, autonomy over budgets and internal administrative matters, as well as prohibitions against intervention by government ministries. No less important, limited appointments reflect a judgment that judicial independence must be weighed against the equally compelling demands of democratic and popular accountability.<sup>44</sup>

These alternative arrangements should lead us to think about a number of assumptions most students of American constitutional law take for granted. Is life tenure necessary to guarantee judicial independence? What, if any, are the costs of life tenure, and why have so many other constitutional democracies chosen other devices? And, perhaps more importantly, is the judicial independence won by life tenure necessarily a positive feature of American constitutionalism?<sup>45</sup>

## G. CONCLUSION

Although the ideas of judicial review and constitutional courts find their source in the American Supreme Court, other countries have not slavishly duplicated American practice. For the most part, the European model of specialized judicial review has been the more persuasive. In part, the aversion to the American model has stemmed from different understandings about the meaning of separation of powers and equality under law, as well as differences occasioned by the predominance of parliamentarianism rather than presidential regimes.

The prestige and influence of constitutional courts varies. Some of them, such as the German and the Canadian, have attained considerable influence and are important, persuasive voices in their countries. Other courts, especially in

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<sup>43</sup> See generally Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3rd ed. (New York: Foundation Press, 2014).

<sup>44</sup> See Cappelletti, *supra* note 36 at 83–86.

<sup>45</sup> Judith Resnik, “Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure,” 26 *Cardozo Law Review* 579 (2005); see also Lee Epstein, Jack C. Knight, Jr., & Olga Shvetsova, “Comparing Judicial Selection Systems,” 10 *William and Mary Bill of Rights Journal* 7 (2001); Sanford Levinson, “Identifying Independence,” 86 *Boston University Law Review* 1297 (2006).

Latin America and the newly democratic states of Eastern Europe, are still embryonic.

All of them, however, wrestle with the same kinds of issues and questions that dominate American constitutional interpretation. The great similarity of issues and problems that dominate constitutional politics in all countries are a testimony to what is universal in human life. But if the themes are much the same, the approaches to resolving these questions vary widely in constitutional democracies. As we shall see throughout this book, an appreciation of what we share with and how we differ from others can be a powerful tool for understanding constitutional interpretation in the United States.

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