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# THE COURT

In the current era, the U.S. Supreme Court reaches full decisions in fewer than eighty cases a year. But in those cases, the Court addresses some of the most important and controversial issues in the United States. The decisions it reaches on those issues sometimes have a powerful impact on government and society. Thus the attention that the Court receives in American society is fully justified, and there is good reason to gain an understanding of the Court.

In this book, I try 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 do the justices 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 sets of questions is the subject of a chapter in the book. As I focus on each question, I seek 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

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The Supreme Court is an unusual institution in some respects, so it is useful to begin by considering some important attributes of the Court.

### The Court and the World Around It

The Court has considerable insulation from the rest of government and society. The key source of that insulation is the justices' life terms, which give them some freedom to chart their own course without concern about the potential reactions of political leaders and voters.

Individually and collectively, the justices have adopted other practices that help them to maintain distance from the outside world. Ordinarily, litigants and their lawyers cannot make arguments to individual justices in person; rather, they are limited to written briefs and oral presentations to the Court as a whole. In contrast with Congress, the Court's collective deliberations over cases are held in private. The justices have not allowed their oral arguments to be televised despite pressure from members of Congress and others to do so.

The Court's insulation is far from total. Presidents determine which people sit on the Court. Political interest groups sponsor cases in an effort to shape the legal policies that the Court adopts. An array of people lobby the Court indirectly with statements and commentaries about pending cases. Some of those people, including presidents and members of Congress, occasionally try to pressure the justices to rule in certain ways. And after the Court reaches its decisions, the consequences of those decisions depend heavily on the reactions of government officials and other people.

The president's power to appoint justices has a powerful effect on the Court, an effect that is underlined by the impact of President Donald Trump's three appointees on the Court's current direction. The strength of other potential influences on the Court is less certain. But the views that justices bring to the cases that they decide are inevitably shaped by what goes on outside the Court. To take one example, justices could hardly be immune to the heightened concern about terrorism in the early twenty-first century. Similarly, the campaigns against discrimination based on race, sex, and sexual orientation over the past several decades affected justices' thinking as they did the thinking of other people.

The Court still stands out for its autonomy: far more than most other people in government, the justices are free to take the actions that they want to take. But one central theme of this book is that a full understanding of the Court requires close attention to the activities and impact of individuals and institutions outside the Court.

## Law, Policy, and Politics

The Supreme Court, of course, is 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. The Court justifies its rulings primarily on the basis of the justices' reading of the law, usually a provision of the Constitution or a statute enacted by Congress.

In interpreting the law, however, the Court inevitably makes public policy as well. *United States v. Vaello Madero* (2022) concerned a federal statute that made residents of Puerto Rico ineligible for a social security benefit called Supplemental Security Income (SSI). The Court ruled that this exclusion did not violate the constitutional guarantee of equal protection of the laws that applied to the federal government. In reaching this decision, the Court was choosing one interpretation of the Fifth Amendment over another. But it was also taking a position on the legal status of people in Puerto Rico and other territories, a position that could affect their economic situations and other aspects of their lives. Thus the Court was shaping policy, just as it does in other fields such as civil rights, environmental protection, and labor–management relations.

The Court affects politics as well as policy. Its 2019 ruling on partisan gerrymandering of legislative seats and a series of rulings on the Voting Rights Act have had substantial effects on the electoral success of the Republican and Democratic parties.<sup>1</sup>

One of its decisions ensured that President Richard Nixon would leave office in 1974, another ensured that George W. Bush would become president in 2001, and still another turned away the most serious legal challenge to the election of Joe Biden in 2020.<sup>2</sup> Other decisions have indirect but powerful effects on politics. *Roe v. Wade* (1973) spurred political action and shaped partisan politics for half a century, and its overruling by the Court in 2022 is having the same kinds of effects.<sup>3</sup>

For some people in the legal community, the most important aspect of Supreme Court decisions is how, and how well, they interpret the law. But most people care about the Court's decisions because of their impact on policy and politics. Presidents and senators sometimes talk about nominees to the Court in terms of their legal philosophies, but their primary concern is whether the votes and opinions of prospective nominees are likely to favor liberal or conservative policies.

What about the justices themselves? When justices talk about their work, they usually emphasize that their job is simply to interpret the law. The opinions they write analyze cases primarily in terms of their legal merits. Indeed, the goal of reaching good interpretations of the law almost surely is an important element in their decision making.

But even more surely, the justices' views about what constitutes good policy strongly affect their choices. That effect is unavoidable, for two reasons. First, in the cases that the Court decides, it is often quite uncertain which of the alternative decisions that are available to the justices constitutes the best interpretation of the law. As a result, other considerations must come into play. Second, people who become justices have developed strong views about an array of policy questions: they are unlikely to be neutral on issues such as government regulation of abortion or protection of the environment. Because of those conditions, it is not surprising that justices' disagreements in cases often mirror differences in their ideological positions.

Like other people who are interested in politics and government, most if not all justices have partisan loyalties and feelings. Those feelings may be especially strong in the current era of bitter rivalry between Republicans and Democrats. And it might be that justices' partisan views affect their positions in certain cases alongside their interest in making good law and good policy. This motivation and others that may shape the justices' votes and opinions are a central concern of this book.

## THE COURT IN THE JUDICIAL SYSTEM

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Because the Supreme Court is part of a court system, 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 of these cases are brought to federal court.

Second are cases in 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 of money 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 Massachusetts sues a citizen of Nebraska for \$100,000 for injuries from an auto accident, the plaintiff (the Massachusetts resident) might bring the case to federal court, or the defendant (the Nebraskan) 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.

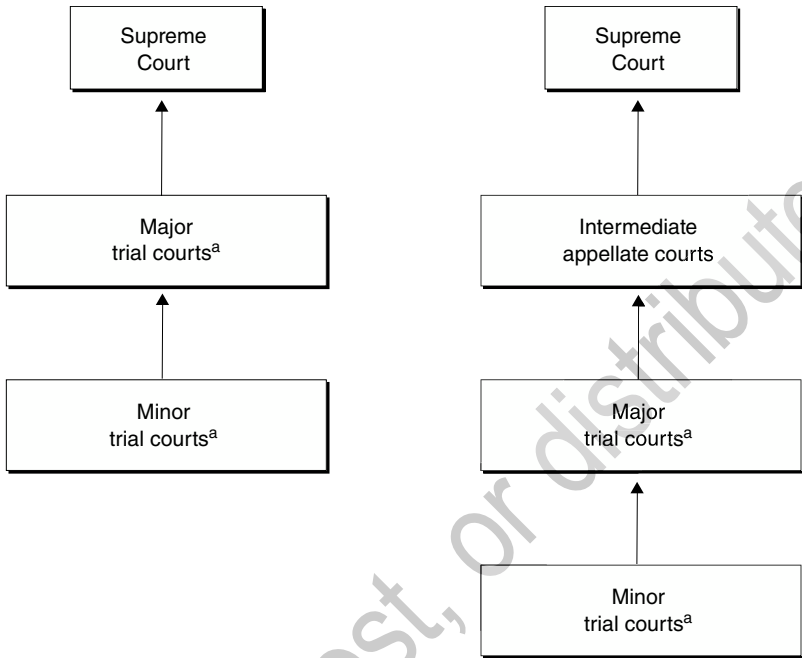
Only a small proportion of all court cases fit in any of those categories. The most common kinds of cases—criminal prosecutions, personal injury suits, divorces, actions to collect debts—typically are heard in state court. The courts of a single populous state such as Illinois or Florida hear far more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

State court systems vary considerably in their structure, but some general patterns exist (see Figure 1.1). Each state system has courts that are primarily 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, mostly 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 state 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 U.S. territories such as Puerto Rico and Guam. District courts hear all federal cases at the trial level, with the exception of a few types of cases that are heard in specialized courts.

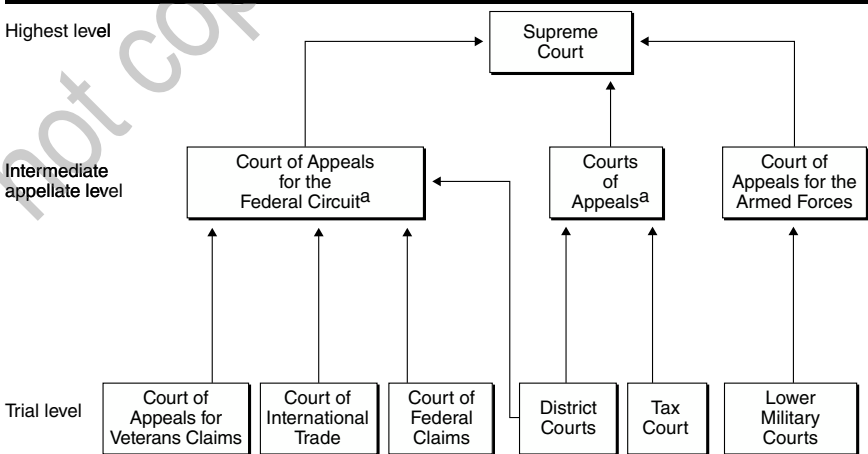
**FIGURE 1.1 ■ The Most Common State Court Structures**



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.

**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.

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. The Court has two types of jurisdiction, summarized in Table 1.1. 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. Congress and the Court itself have narrowed its original jurisdiction in some respects.<sup>4</sup>

Under federal statutes, most cases within the Court's original jurisdiction can be heard alternatively by a district court. The exception is lawsuits between two states, which can be heard only by the Supreme Court. This category accounts for the great preponderance of cases that the Court decides under its original jurisdiction. Some disputes between states have involved state borders, and water rights have become a common issue in recent decades. The Court frequently refuses to hear cases that are brought under its original jurisdiction. Justices Clarence Thomas and Samuel Alito have strongly questioned that practice, especially as it applies to the lawsuits between

**TABLE 1.1 ■ Summary of Supreme Court Jurisdiction**

Types of jurisdiction	Categories of cases
Original	<ul style="list-style-type: none"> <li>Disputes between states</li> <li>Some types of cases brought by a state</li> <li>Disputes between a state and the federal government</li> <li>Cases involving foreign diplomatic personnel</li> </ul>
Appellate <sup>a</sup>	<ul style="list-style-type: none"> <li>All decisions of federal courts of appeals and specialized federal appellate courts</li> <li>All decisions of the highest state court with jurisdiction over a case, concerning issues of federal law</li> <li>Decisions of special three-judge federal district courts (mandatory)</li> </ul>

a. Some minor categories are not listed.

states that only the Court can hear.<sup>5</sup> Altogether, the Court has decided fewer than 200 original jurisdiction cases in its 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.

The disputes that produce original cases can take a long time to resolve. A conflict over water rights between New Mexico and Texas was brought to the Court in 1974, and the Court was still dealing with that case in 2022.<sup>6</sup>

All the other cases that come to the Court are based on its appellate jurisdiction. Under the Court’s appellate jurisdiction, parties that are dissatisfied with the lower-court decisions in their cases bring those cases to the Court. Within the federal court system such cases can come from the federal courts of appeals and from the two specialized appellate courts.

The Court can hear a case before a federal court of appeals has reached judgment in the case. Until recently, it seldom did so. But between 2019 and 2022, it accepted eighteen cases that awaited decisions in the courts of appeals, most of them involving important issues.<sup>7</sup>

Cases also come to the Court directly from special three-judge district courts that are set up to decide specific cases. Most of these cases involve voting and election issues. One example was *Allen v. Milligan* (2023), a challenge under the Voting Rights Act to the drawing of districts for Alabama’s seats in the U.S. House after the 2020 census.

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. As shown in Table 1.2, the great majority of the cases brought to the Court and an even larger majority of the cases it hears originated in federal courts.

**TABLE 1.2 ■ Sources of Supreme Court Cases in Recent Periods (in percentages)**

	Federal courts			State courts
	Courts of appeals	District courts	Specialized courts	
Cases brought to the Court <sup>a</sup>	74	0	2	24
Cases decided on the merits <sup>b</sup>	87	2	3	9

*Note:* Original jurisdiction cases are not included. Non-federal courts of the District of Columbia and of U.S. territories are treated as state courts. For cases decided on the merits, the cases included are those listed as “opinions of the Court” on the Court’s website, [www.supremecourt.gov](http://www.supremecourt.gov).

a. Cases in which the Court issued rulings on petitions for hearings in the first sitting of the 2022 term, October 3–17, 2022 (1,158 cases).

b. Cases that the Court decided on the merits, ruling on the issue or issues in the case, including summary reversals, 2021 and 2022 terms (122 cases).

The rule under which state cases come to the Supreme Court may be confusing, because cases based on federal law usually 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 from a lower court for a decision “on the merits”—that is, ruling on the legal issue or issues in the case. 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 to the Court in only the few types of cases that come directly from three-judge district courts.

The Supreme Court hears only a tiny fraction of the cases brought to federal and state courts. As a result, courts other than the Supreme Court have ample opportunities to make law and 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.

## THE COURT AS AN INSTITUTION

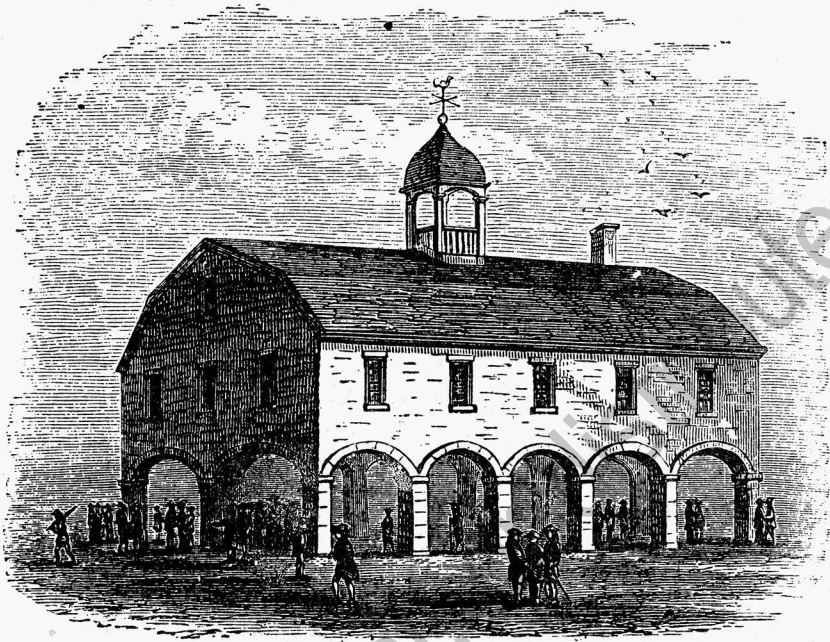
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Several attributes of the Supreme Court shape the Court as an institution. Especially important are the activities of justices and the people who help them do their work.

### The Court’s Building and Grounds

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. In 1808, during renovation work in the Capitol, the Court’s hearings were moved temporarily to a nearby tavern.<sup>8</sup>





GRANGER

## ROYAL EXCHANGE, 1752.

The Royal Exchange building in New York City, the location at which the Supreme Court first met in 1790. The Court did not have its own building until 1935.

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 intense 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 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 discuss 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. On the top floor is a basketball court, "the highest court in the land," that law clerks and some justices use during breaks from their official duties.<sup>9</sup>

Parts of the building are open to the general public. The building has been closed to the public twice, after anthrax spores were discovered in the Court's mail warehouse at another site in 2001 and during the coronavirus pandemic beginning in March 2020. Public access to the building was almost fully restored in November 2022.

People who want to attract attention to their causes sometimes use the area around the Court building to publicize those causes. In 1983, the Court struck down the part of a federal statute that prohibited an array of such activities on the sidewalks around the building. But in 2015, a federal court of appeals upheld the provision of the statute that prohibited the same activities in the building and on the Court grounds, and the Court made that decision final by choosing not to hear the case.<sup>10</sup> A security fence was put up around the Court building in May 2022 after a leak of the draft opinion overruling *Roe v. Wade* led to protests in front of the building. The fence was removed four months later.<sup>11</sup>



Chip Somodevilla/Getty Images

A demonstration outside the Supreme Court building on the day that the Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization* (2022), the case in which the Court overruled *Roe v. Wade*.

## Personnel: The Justices

Under the Constitution, Supreme Court justices are nominated by the president and confirmed by the Senate. If a nominee is confirmed, the president then appoints the successful nominee to the Court. When the chief justice leaves the Court, the president can elevate an associate justice to chief and also appoint a new associate justice (as President Ronald Reagan did in 1986 when he named William Rehnquist as chief justice) or appoint a chief justice from outside the Court (as President George W. Bush did in 2005 when he chose John Roberts).

By long-established Senate practice, a simple majority is required for confirmation. But a supermajority was required to end a filibuster and thus allow a vote on a nomination until Senate rules were changed in 2017. 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.

Congress has imposed some ethical rules such as financial reporting requirements on federal judges, and the federal Judicial Conference has established a Code of Conduct for judges. Supreme Court justices are exempt from both the statutory rules and the Code of Conduct. But justices adhere to the financial reporting requirements voluntarily, and they have said that they also follow the Code of Conduct.

Observers of the Court criticize the justices' conduct on ethical grounds from time to time, and that criticism has become more widespread and more intense in the 2020s. Commentators have argued that the justices should make themselves formally subject to the Code of Conduct or adopt its own code. Some members of Congress have said that if the justices do not act, Congress should impose a code on them, though it is not clear whether Congress has that power.

Responding to this criticism, the justices reportedly considered adopting an ethical code for the Court in 2023, but they ultimately did not do so.<sup>12</sup> Instead, they issued a joint "Statement on Ethics Principles and Practices" reiterating their agreement to follow the Code of Conduct and other rules adopted by the Judicial Conference with some modifications. At the same time, Chief Justice Roberts declined to appear at a Senate Judiciary Committee hearing on Supreme Court ethics.<sup>13</sup>

Within Congress and elsewhere, recent questioning of the justices' conduct has come primarily from liberals who argue that some conservative justices have acted unethically in certain respects. In response, conservatives in Congress have defended the Court and have charged that criticisms of conservative justices are unfounded partisan attacks. In 2023 the Senate Judiciary Committee approved a bill that would have established new ethical requirements for the justices, but the partisan division on this issue ensured that the bill would not pass either house of Congress.<sup>14</sup>

The Constitution says nothing about the number of justices. The Judiciary Act of 1789 provided for six justices. Later 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 and 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 that number has become firmly established. The most serious effort to change that number, President Franklin Roosevelt's proposal to increase the number of justices, failed in 1937. Efforts by some Democrats to increase the Court's size in recent years have not gotten far.

In 2023, each associate justice received an annual salary of \$285,400, and the chief justice received \$298,500. There are limits on the amount of outside income that justices can receive from activities such as teaching (about \$31,800 in 2023), but there are no limits on income from books. Clarence Thomas earned around \$1.5 million from his memoir and Sonia Sotomayor more than \$3 million from hers, and Amy Coney Barrett will receive a total advance payment of \$2 million for her forthcoming book.

## Personnel: Law Clerks and Other Support Staff

A staff of about 600 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 handles 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, law clerks have the most direct effect on the Court's decisions.<sup>15</sup> Associate justices may employ four clerks each, the chief justice five (though the chief almost always hires only four). A retired justice has one clerk, who often works primarily with one of the sitting justices. Clerks almost always serve for only one year. The typical clerk is a recent, high-ranked graduate of a prestigious law school. The clerks who were hired to serve sitting justices in the 2020–2023 terms went to twenty-two law schools, but more than three-quarters came from four of those schools (Yale, Harvard, Chicago, and Stanford), and about one-third from Yale alone.<sup>16</sup> One study found that among Harvard law students who had the same academic achievements, those who had undergraduate degrees from Harvard, Yale, and Princeton were considerably more likely to win Supreme Court clerkships than their fellow students.<sup>17</sup>

Typically, clerks come to the Supreme Court after clerkships with one or two lower-court judges, most often on the federal courts of appeals. Some clerks in the Court also have experience in law firms, academia, or government. In an era of political polarization, there has come to be a strong ideological element in hiring: as a group, law clerks selected by conservative justices are considerably more conservative than those selected by liberal justices. And the great majority of the clerks—about 85 percent in the 2021–2023 terms—previously served with lower-court judges who had been appointed by a president of the same party as the justice.<sup>18</sup>

Law clerks play integral parts in the work of the Court. They typically spend much of their time on the petitions for certiorari, reading the case materials and summarizing them for the justices. After cases are accepted for decisions on the merits, clerks provide memoranda to their justices and discuss cases with them before the conference in which the justices reach a tentative decision; Justice Thomas has described how closely he works with his clerks in that process.<sup>19</sup> When a justice is assigned the Court's opinion or chooses to write a separate opinion, clerks are heavily involved in that writing process. Indeed, it appears that all the current justices have their clerks write the first drafts of their opinions. As the justices work toward a final decision, their clerks sometimes consult clerks for other justices to help in the process of winning support for opinions and reaching consensus.

The extent of law clerks' influence over the Court's decisions is a matter of considerable interest and wide disagreement.<sup>20</sup> 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. In at least one instance, a clerk's influence extended even further: because of a misunderstanding, a clerk for Justice William Brennan in the 1960s drafted an opinion arguing for a result that was the opposite of what Brennan intended, but the opinion persuaded both Brennan and the Court as a whole to reverse their positions in the case.<sup>21</sup>

After law clerks leave the Court, they are in great demand among law firms that do Supreme Court litigation. Some former law clerks receive a "signing bonus" of \$400,000 or more in addition to substantial salaries. They take a variety of career paths, and many have had distinguished careers as practicing lawyers, law professors, and government officials. A substantial number ultimately become federal court judges. Six of the current justices, including chief justice John Roberts and the five most recent appointees—Elena Kagan, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson—first served on the Court as law clerks.

## The Court's Schedule

The Court has a regular annual schedule.<sup>22</sup> It holds one term each year, lasting from the first Monday in October until the beginning of the succeeding term a year later. (However, the clerk's office treats terms as starting and ending earlier, when the Court announces its final decisions for a term.) Ordinarily, the Court does nearly all its collective work between late September and 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 and recesses between the sittings. During a sitting the Court holds sessions to hear oral arguments in cases and to announce decisions in cases that were argued earlier in the term. 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 a substantial proportion of all decisions—50 percent in both the 2021 and 2022 terms—are issued in June. The justices scramble to meet the internal deadline of June 1 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 late April and for the most consequential and controversial cases. It is not surprising that a high proportion of the Court's major decisions are announced in the last few days of the Court's term.

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 individual

work on the petitions for hearings that arrive at the Court. During that time, the Court and individual justices respond to applications for special action by the Court such as issuing injunctions. 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. The sessions begin at ten o'clock in the morning. Oral arguments are held during each session, one or two on each day. They may be preceded by several other 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 that were taken at its conference the preceding Friday. Opinions can be announced on any day of the week.

During sittings, the Court holds two conferences each week. At the Wednesday afternoon conference, justices discuss 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 address. In May and June, after oral arguments have ended for the term, 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.

## WHAT THE JUSTICES DO

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Supreme Court justices carry out an array of tasks on the job. Many of them also have busy professional lives outside the Court.

### Work in the Court

On a day-to-day basis, the justices do most of their work separately from each other. But the Court makes its decisions as a collective body. The most visible decisions are rulings on petitions for certiorari and on the merits of cases that the Court accepts. Both types of decisions will be discussed extensively in later chapters.

A third type of decision involves responses to applications for various forms of preliminary action in cases.<sup>23</sup> The most important form is a request for the Court to issue or vacate (remove) a stay of action by a court or another government body. A stay prevents this action from going into effect while the Supreme Court or a lower court considers final action in the underlying case. One common subject of these requests is executions, with prisoners seeking a stay of execution or—less often—state governments seeking to dissolve stays issued by lower courts. In a smaller number of cases, a party asks for an injunction to prevent another party from taking a particular action.

The justices' work on applications for preliminary action is a partial exception to the rule that the Court acts collectively, an exception that has historical roots. Originally, each justice had the duty of sitting alongside lower-court judges to decide appeals within a federal circuit. This "circuit-riding" duty was arduous, especially in an era when travel was difficult. This duty was gradually cut down and then eliminated in 1891.

One vestige remains: an application for preliminary action ordinarily goes first to the justice who has been assigned to the relevant circuit. The circuit justice almost never grants a stay request, so the real choice is between denying the request or sending it to the full Court for consideration. If the circuit justice denies the request, it can then be made to a second justice of the applicant's choosing. That second justice almost always refers the request to the full Court, which always denies it. But in the cases referred by the circuit justice, with the exception of stays of execution, the Roberts Court has granted the request about 40 percent of the time. A simple majority is required for a grant.

Requests regarding stays and injunctions are common: on average, there have been more than 150 such requests per term during the Roberts Court. There has been a substantial increase in the significance of stay applications. Until the late 2010s, the great majority of applications grew out of the problems and goals of individual litigants. But in the 2020-2022 terms, by one count, more than one third of the applications involved efforts to shape public policy or political outcomes.

Circuit justices refer most of this subset of applications to the full Court. The Court's rulings on them often have considerable impact, especially when those rulings constitute the Court's final word in disputes over policy and politics. Box 1.1 describes some of the consequential rulings of the Court on applications in recent years. Because these rulings are often so important, it is not surprising that a high proportion of them evoke dissents by justices who disagree with them. Dissenting justices and commentators have criticized the Court for reaching important decisions without the full consideration that occurs when it decides cases on the merits and usually without writing substantial opinions to justify these decisions.

### **BOX 1.1: SOME CONSEQUENTIAL RULINGS ON APPLICATIONS FOR STAYS AND INJUNCTIONS IN 2018–2023**

The Trump administration adopted several policies that restricted immigration through executive orders and other mechanisms without new legislation. These changes were challenged in litigation, and in some instances, lower federal courts issued injunctions that blocked the changes. The Supreme Court acted on several applications to stay those injunctions and thus allow the administration's policies

to go forward. Its grants of several applications facilitated Trump administration policies restricting immigration. In 2021 and 2022, the Court denied applications from the Biden administration to override court orders that blocked its efforts to ease restrictions on immigration.

In 2020 and early 2021, the Justice Department sought to execute some federal prisoners who had been sentenced to death. The Supreme Court denied stays to prisoners who were scheduled for execution and dissolved lower-court stays and injunctions that had blocked executions. As a result, the administration was able to carry out the executions it sought before the end of President Trump's term.

During the early stages of the COVID pandemic in 2020, election administrators and judges changed voting procedures in several states to make it easier for people to cast votes without going to the polls on election days. The changes were perceived as benefiting Democratic candidates, and Republican groups sought stays of the changes. The Supreme Court granted these stays in four states.

When state governments imposed limits on public gatherings after the onset of the pandemic, religious groups sought injunctions from the Court to overturn restrictions on their observances. The Supreme Court granted injunctions in several cases. In one of those cases (*Tandon v. Newsom* 2021), the Court issued an opinion that expanded the right to exemptions from government regulations on religious grounds under the First Amendment.

In 2023, a federal district judge suspended the approval by the federal Food and Drug Administration of one of the two drugs used in medication abortions, thereby requiring that it be removed from the market at least temporarily. The Fifth Circuit Court of Appeals modified the district court ruling but maintained its stay. Before the stay went into effect, the Supreme Court issued its own stay of the district court order until the Fifth Circuit reached a final ruling in the case and the Supreme Court took further action in the case.

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*Source:* Some information was drawn from Stephen Vladeck, *The Shadow Docket* (New York: Basic Books, 2023).

In collective decision making, typically every justice participates in every case—nine justices unless there is a vacancy on the Court. Occasionally a justice's poor health leaves the Court temporarily shorthanded, but a justice who misses oral argument in a case can still participate in that case. Sometimes, a justice recuses, not participating in a case because of a perceived conflict of interest. The Court's 2023 "Statement on Ethics Principles and Practices" said that the justices follow the same general principles as the Code that governs lower federal courts. But it noted that the justices must take into account the fact that the Court, unlike lower courts, cannot bring in a substitute judge to replace a judge who has recused. The statement also reiterates the long-established rule that individual judges alone determine whether they should recuse.

Across all the cases that are brought to the Court for consideration, recusals are common. In the 2018–2022 terms, justices recused in more than 750 cases that were brought to the Court, about 3 percent of all cases.<sup>24</sup> But few of those recusals came in cases that the Court accepted for full decisions on the merits.



Justices seldom explain why they recused in a case, but reasons for recusal usually can be discerned. Most recusals result from a justice's prior involvement in a case as a lower-court judge or in another capacity. For this reason, justices typically have their highest rates of recusal in their first few terms. But even though Justice Kagan ended her service as solicitor general for the federal government to join the Court in 2010, she recused from cases because of that work as recently as 2023. One commentator suggested that she has exercised "an abundance of caution" in doing so.<sup>25</sup> Financial conflicts of interest have become relatively uncommon because the justices collectively own fewer stocks in individual companies than they once did. But Justice Alito's continued ownership of company stocks causes him to recuse in some cases, and he has the highest rate of recusals among the current justices.

Controversies about justices' recusal decisions have arisen in recent years, spurred primarily by justices' public statements 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, sometimes in formal requests. After Justice Ruth Bader Ginsburg made several comments highly critical of **Donald Trump** during his 2016 campaign for president, conservative commentators—including President Trump—argued that she should recuse from cases that directly involved him.<sup>26</sup> For their part, liberal commentators argued that Justice Thomas should recuse from cases involving challenges to the outcome of the 2020 presidential election because of the involvement in those challenges of his spouse Virginia Lamp Thomas.<sup>27</sup> Justices very seldom recuse in response to these initiatives.

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 disclosed and no opinions are written. To avoid that undesired **outcome**, justices may work to achieve a compromise outcome that a majority of the **eight justices** can accept. And they may set a case for rehearing at a time when a **full complement** of nine justices becomes available.

Similarly, the lower-court decision in a case is affirmed if the Court cannot reach a **quorum** of six members. This situation is uncommon. When it occurs, it is usually **because** a litigant named at least four justices as defendants in a lawsuit, as litigants did in two 2017 cases.<sup>28</sup>

The eight associate justices are equal in formal power. The chief justice is the formal leader of the Court. The chief presides over the Court's conferences and public sessions 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.

One justice—by tradition, the most junior in seniority—sits with other Court employees on the cafeteria committee. It is a thankless task, because the cafeteria has long been viewed as substandard (a 2010 review in the *Washington Post* said that "this food should be unconstitutional") and colleagues are happy to complain to the junior justice about deficiencies in the cafeteria. After he joined the cafeteria committee in

2018, Justice Kavanaugh succeeded in getting pizza added to the menu. He said that “my legacy is secure. It’s fine by me if I’m ever known as the pizza justice.” But his initiative went unrewarded: two reviews of the new pizza offering in the news media were decidedly negative.<sup>29</sup>

The chief justice has additional administrative responsibilities as head of the federal court system, a role reflected in the official title of Chief Justice of the United States. In that role, the chief justice appoints judges to administrative committees and some specialized courts. Since 1975, the chief has issued a “Year-End Report on the Federal Judiciary,” which usually includes recommendations to Congress about matters such as court budgets and the creation of additional judgeships.<sup>30</sup> Chief Justice Roberts presided over the first Senate impeachment trial of President Trump in 2020. He declined to preside over Trump’s second impeachment trial in 2021, apparently because he interpreted the Constitution to give him that duty only for a sitting president.<sup>31</sup>

Roberts has served as an advocate for federal judges. In 2007, he met with President George W. Bush and won his support for a bill that would raise judges’ salaries.<sup>32</sup> In 2018, after President Trump referred to a district judge who had ruled against one of his administration’s immigration policies as an “Obama judge,” Roberts issued a statement arguing that federal judges should not be seen as partisans.<sup>33</sup> In 2020, after Senate minority leader Chuck Schumer threatened retaliation against Justices Gorsuch and Kavanaugh for their prospective positions in an abortion case, Roberts condemned Schumer’s remarks as “inappropriate” and “dangerous.”<sup>34</sup>

Like any other job, the position of Supreme Court justice has both positive and negative elements. The positive elements include the prestige and status of the position and the satisfaction of shaping legal policy in important ways. Those attractions explain why so many people want to serve on the Court.

The respect that justices receive may be all the more attractive because it is combined with considerable anonymity. One commentator said that justices are in an enviable position: “Almost nobody knows what you look like, but you always get the reservation you want.”<sup>35</sup> The desire to maintain that enviable position probably helps to explain justices’ aversion to televising of their public sessions.

Yet the justices are not immune to the dangers that go along with celebrity and power: some receive death threats, and they sometimes request protection by security personnel when they travel or make public appearances. After Justice Alito’s draft majority opinion overruling *Roe v. Wade* was leaked in 2022, there were threats against conservative justices and protests, sometimes loud, at their homes. A man who was reported to be unhappy with that prospective decision and with the Court’s potential decisions on gun regulation went to Justice Kavanaugh’s home with the intent to kill him before he saw a security detail at the home and decided to turn himself in instead.<sup>36</sup> That episode increased the level of security provided for the justices. Alito reported in 2023 that he was “driven around in basically a tank, and I’m not really supposed to go anywhere by myself without the tank and my members of the police force.”<sup>37</sup> That episode also helped to spur enactment of a federal statute to improve security for federal judges.

The tasks and responsibilities that go with the job may weigh heavily on justices. That is especially true of new justices, whether or not they have extensive experience on lower courts. Justice Thomas said that “by the end of my first Term, I was very ill,” and Justice Breyer said that “I was frightened to death for the first three years.”<sup>38</sup>

As some observers of the Court see it, once justices become acclimated their workload is relatively light. These observers point to the relatively small number of cases that the Court now hears and the excellent support that the justices get from their law clerks. One law professor, exaggerating for emphasis, said that in many ways “it’s the cushiest job in the world.”<sup>39</sup> In contrast, justices often refer to the time their work requires, especially 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.

In the current era, it seems clear that the satisfactions of serving as a justice outweigh the burdens of the job. The best indication is the justices’ tenure on the Court: in the past half century, no justice has resigned to take another position and only two justices have retired before the age of seventy.

## Activities Outside the Court

Supreme Court justices attract wide interest from lawyers and from other people who are interested in government and politics. That interest has grown in the current era, in part because more information about the Court and the justices has become available.

The extent of this interest is striking. Some of the Court’s decisions receive extensive coverage in newspapers, television broadcasts, and blogs. *Dobbs v. Jackson Women’s Health Organization*, which overruled *Roe v. Wade* in 2022, got enormous attention. Justices are satirized in stories and cartoons, and their activities are extensively chronicled. Coverage of the Court in the news media has come to include more probing stories and more questioning of what the Court and the justices do, largely because of the development of new media such as blogs that are less respectful of the Court than news reporters traditionally were.

Beyond the news media, individual justices and the Court as a whole have been the topics of many books for a general audience over the years, as well as plays, movies, and an opera. Among many other honors, several justices have had schools named after them, and three of the current justices are honored with street names in their home states.<sup>40</sup> Antonin Scalia, who sat on the Court from 1986 to 2016, was a folk hero among conservatives. Ruth Bader Ginsburg’s fame and following extended even further, and her celebrity was underlined by the issuance of a postage stamp with her name and picture three years after her 2020 death.

Because of this widespread interest in the justices, they have ample opportunities to interact and communicate with people outside the Court. Law schools and an array of groups, both in the legal profession and outside it, vie with each other to attract visits from justices. Reporters would be delighted to gain an interview with a justice. Any book by a justice attracts the interest of publishers and wide attention after its

publication. According to one legal scholar, “individual Justices have become celebrities akin to the Kardashians.”<sup>41</sup>

Justices differ in their use of opportunities for attention and adulation. David Souter, who served from 1990 to 2009, kept his distance from the news media and seldom made public appearances. Most other justices in this century have been more active than Souter but in limited ways, such as speaking with reporters from time to time, making occasional visits to law schools and other legal groups, participating in other public events, and attending Washington social events. Among the current justices, Clarence Thomas, Sonia Sotomayor, Amy Coney Barrett, and Ketanji Brown Jackson have written memoirs or are currently writing them, and Neil Gorsuch has published a collection of his writings. Justices who write books often make appearances and grant interviews to promote those books.

A year after she joined the Court in 2009, Justice Sotomayor estimated that what a friend called “her celebrity” took up about 40 percent of her time.<sup>42</sup> Among the current justices, she is almost surely the most active in the public arena. Along with her best-selling memoir about her life before she became a judge, she has written three books for children. Many of her personal appearances outside the Court are related to her books.

Justices sometimes receive awards at their public appearances. Perhaps the most unusual of these awards was for “Small Town Lawyer Made Good,” presented to both John Paul Stevens and Antonin Scalia in the 1980s by the lawyers in Poulso, Washington. Neither justice had been a lawyer in anything like a small town. When Stevens was invited to come to Poulso to receive his award, he pointed out that he had practiced antitrust law in Chicago. The lawyer who invited him responded, “Justice Stevens, more than most people, you should understand that words have many interpretations. We define a ‘small town lawyer’ as anyone who practices in a town under 50,000 or any US Supreme Court Justice we can get here.”<sup>43</sup>

Box 1.2 illustrates the array of public activities in which justices participate.

## BOX 1.2: EXAMPLES OF PUBLIC ACTIVITIES BY JUSTICES IN 2022

Participating in a mock trial at the Shakespeare Theater Company (Stephen Breyer)

Speaking at meetings of the Federalist Society (Samuel Alito, Neil Gorsuch, Amy Coney Barrett)

Attending the investiture of Second Circuit Judge Alison Nathan (Sonia Sotomayor, Elena Kagan, Ketanji Brown Jackson)

Speaking remotely at the dedication of Don R. Willett Elementary School (John Roberts)

Attending the unveiling of a statue of her at the Bronx Terminal Market (Sotomayor)

Speaking at the Eleventh Circuit Judicial Conference (Roberts, Clarence Thomas)

Participating in a judges' conference sponsored by Notre Dame's Kellogg Institute for International Studies (Brett Kavanaugh)

*Source:* Information about justices' appearances was obtained from reports in the news media, from the justices' financial disclosure reports, and from lists at the website of Fix the Court, <https://fixthecourt.com/the-justices/>.



Justice Sonia Sotomayor views a statue of her at the Bronx Terminal Market on the day it was unveiled in September 2022. Among the current justices, Sotomayor probably makes the most public appearances.

## HISTORICAL DEVELOPMENTS

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 in order to provide perspective on the current Court. A brief examination of some major developments in that history will give some background for later chapters.

One key development was a strengthening of the Court as an institution. In its first decade, the Court was not viewed as an important body. Several people rejected offers to serve on the Court, and two justices—one of them Chief Justice John Jay—resigned to take more attractive positions in state government. But John Marshall, chief justice

from 1801 to 1835, worked to strengthen the Court's standing. Marshall asserted the Court's power to rule that federal statutes are unconstitutional in his opinion for the Court in *Marbury v. Madison* (1803). A few years later, the Court claimed the same power of judicial review over state acts.

Some of the Marshall Court's actions led to denunciations and threats, including an effort by President Thomas Jefferson to have Congress remove at least one justice through impeachment. Marshall's skill in minimizing confrontations helped to prevent a successful attack on the Court. The other branches of government and the general public gradually accepted the powers that he claimed for the Court. Those powers are challenged from time to time, and the Court is frequently denounced for decisions that critics see as overstepping its proper role. But the Court's position as the ultimate interpreter of federal law, with the power to strike down actions by other government institutions, is firmly established.

The Court has been strengthened in other respects as well.<sup>44</sup> The elimination of the justices' circuit-riding duties in 1891 allowed them to focus on their duties in the Court, and the shift in the Court's jurisdiction from mostly mandatory to nearly all discretionary gave it control over its agenda. The Court's move from the Capitol to its own building in 1935 was an important symbolic step that also improved the justices' working conditions. The gradual growth in the size of the Court's staff, especially the law clerks, has also enhanced the justices' ability to do their work.

A second development has been evolution in the subjects of the Court's work.<sup>45</sup> In the period when the Court had little control over its agenda, the subject matter of its work reflected the cases that came to it. But even then, the justices could emphasize some types of cases over others, especially in their interpretations of the Constitution. After 1925, when the Court gained substantial control over its agenda, the justices had even greater ability to determine what kinds of issues they would address.

In the nineteenth century, up to the Civil War, the primary emphasis was federalism, the division of power between the federal government and the states. That emphasis reflected the heated battles in government and politics over federalism and the justices' efforts to develop constitutional principles relating to the federal–state balance. In the late nineteenth and early twentieth centuries, as government increasingly enacted legislation to regulate economic activity, constitutional challenges to that regulation became the most prominent element of the Court's agenda.

After a confrontation between the Court and President Franklin Roosevelt over decisions that struck down several of Roosevelt's New Deal programs, the Court in 1937 retreated from the limits that it had put on government power to regulate the economy. Beginning in the 1940s, the Court gave greater attention to civil liberties. Since the 1960s, that has been the most prominent area of the Court's work. Its decisions address a wide range of civil liberties issues, among them freedom of expression, privacy, equality, and the procedural rights of criminal defendants. The Court also plays a significant role in other fields, including government regulation of business and other economic issues.

A third development is change in the legal policies that the Court makes on the issues it addresses. In the eras when the Court focused on federalism and economic regulation, its policies shifted over time. The same has been true of the Court in the second half of the twentieth century and the early twenty-first century.

In the 1960s, the Court was highly liberal, by the usual meaning of that term, in both economic policy and civil liberties. Its civil liberties policies were especially noteworthy, with major rulings expanding defendants' rights, supporting freedom of expression, and favoring racial equality.

A series of appointments by Republican presidents beginning in 1969 shifted the Court's ideological balance. Since the early 1970s, the Court has almost always had a conservative majority—by a small margin until 2020 and a more substantial one since then. With some major exceptions, the Court's policies have become more conservative in this era on both economic and civil liberties issues. The close balance between liberals and conservatives before 2020 helped to raise the stakes in the selection of new justices, and those high stakes have been reflected in battles over Supreme Court appointments.

One constant in the Court's history is that the Court is shaped in powerful ways by events and trends elsewhere in government and society. The most important change in American politics over the last few decades has been a growth in polarization: the views of people in politics have moved toward more extreme positions, the ideological distance between the Republican and Democratic parties has grown considerably, and there is greater hostility between partisan and ideological camps.<sup>46</sup> Polarization has affected the Court in powerful ways, ways that are discussed later in the book. Its most direct effect has been on the nomination and confirmation of justices, which I discuss in the next chapter.

## NOTES

1. The gerrymandering decision was *Rucho v. Common Cause* (2019). Among the major Voting Rights Act decisions are *Shelby County v. Holder* (2013) and *Brnovich v. Democratic National Committee* (2021).
2. These decisions were *United States v. Nixon* (1974), *Bush v. Gore* (2000), and *Texas v. Pennsylvania* (2020). The 2020 ruling was a brief statement holding that Texas lacked standing to challenge the election results in other states.
3. *Dobbs v. Jackson Women's Health Organization* (2022).
4. This and other aspects of the Court's original jurisdiction are discussed in Steve Vladeck, "'Original' Jurisdiction and the Wyandotte Doctrine," *One First*, July 31, 2023, <https://stevevladeck.substack.com/p/38-original-jurisdiction-and-the>.
5. *Texas v. California* (2021).
6. The history of the case is summarized in its docket sheet, *Texas v. New Mexico*, 22065. Docket sheets for cases are available at <https://www.supremecourt.gov/docket/docket.aspx>.

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10. The decisions were *United States v. Grace* (1983) and *Hodge v. Talkin* (2015).
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16. These percentages were calculated from posts by David Lat on his blog *Original Jurisdiction*, at [davidlat.substack.com](http://davidlat.substack.com).
17. Tracey E. George, Albert H. Yoon, and Mitu Gulati, "Some are More Equal than Others: U.S. Supreme Court Clerkships," *Vanderbilt Law Research Paper No. 23-06* (2023), 24–25.
18. The clerks' own ideological positions are analyzed in Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema, and Maya Sen, "Measuring Judicial Ideology Using Law Clerk Hiring," *American Law and Economics Review* 19 (April 2017): 143. The patterns of party affiliations of lower-court judges for whom the clerks had served were calculated from postings by David Lat on his blog *Original Jurisdiction*. When a clerk had served with multiple judges, the clerk was coded according to the percentage of those judges who were from the party of the justice's appointing president. Lower-court clerkships with the appointing justice were not counted.
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