This book is devoted to narrative and opinion excerpts showing how the U.S. Supreme Court has interpreted the Constitution.\(^1\) As a student approaching constitutional law, perhaps for the first time, you may think it is odd that the subject requires XXX pages of text. After all, in length, the Constitution and the amendments to it could fit easily into many Court decisions. Moreover, the document itself—its language—seems so clear.

First impressions, however, can be deceiving. Even apparently clear constitutional phrases do not necessarily lend themselves to clear constitutional interpretation. For example, according to Article II, Section 2, the president “shall be Commander in Chief of the Army and Navy of the United States.” Sounds simple enough, but could you, based on those words, answer the following questions, all of which have been posed to the Court?

- May the president, during times of war, order a blockade of ports in the United States?
- May Congress delegate to the president the power to order an arms embargo against nations at war?
- May the president, during times of war, order that alleged traitors or terrorists be tried by military tribunals rather than civilian courts?
- May the president, during times of international crisis, authorize the creation of military camps to intern potential traitors to prevent sabotage?

What these and other questions arising from the different guarantees contained in the Constitution illustrate is that a gap sometimes exists between the document’s words and reality. Although the language seems explicit, its meanings can be elusive and difficult to interpret. Accordingly, the justices of the Supreme Court have developed various approaches to resolving disputes.

As figure 1-1 shows, however, a great deal happens before the justices actually decide cases. We begin our discussion with a brief overview of the steps depicted in the figure. Next, we consider explanations for the choices justices make at the final and most important stage, the resolution of disputes.

**PROCESSING SUPREME COURT CASES**

During the 2014–2015 term nearly XXX petitions arrived at the Supreme Court’s doorstep, but the justices decided only XXX with signed opinions.\(^2\) The disparity

\(^1\) This is not to say that the Supreme Court alone engages in constitutional interpretation. Many commentators have suggested that the president, Congress, and even the American people can also lay claim to playing a role in constitutional interpretation. See Walter F. Murphy’s classic, “Who Shall Interpret the Constitution?,” *Review of Politics* 48 (1986): 401–423.

between the number of parties who want the Court to resolve their disputes and the number of disputes the Court agrees to resolve raises some important questions: How do the justices decide which cases to hear? What happens to the cases they reject and to those the Court agrees to resolve? We address these and other questions by describing how the Court processes its cases.

**Deciding to Decide: The Supreme Court’s Caseload**

As the figures for the 2014–2015 term indicate, the Court heard and decided less than 1 percent of the cases it received. This percentage is quite low, but it follows the general trend in Supreme Court decision making: the number of requests for review increased dramatically during the twentieth century, but the number of cases the Court formally decides each year did not increase. In 1930 the Court agreed to decide 159 of the 726 disputes it received. In 1990 the number of cases granted review fell to 141, but the sum total of petitions for review rose to 6,302—nearly nine times the number in 1930.3

But how do any of these cases get to the Supreme Court? How do the justices decide which will get a formal review and which will be rejected? What affects their choices? We consider these questions in turn below, for the answers are fundamental to an understanding of judicial decision making.

**How Cases Get to the Court: Jurisdiction and the Routes of Appeal.** Cases come to the Court in one of four ways: by a request for review under the Court’s original jurisdiction or by three appellate routes—appeals, certification, and petitions for writs of certiorari (see figure 1-1). Chapter 2 explains more about the Court’s original jurisdiction, as it is central to understanding the landmark case of Marbury v. Madison (1803). Here, it is sufficient to note that original cases are those that have not been heard by any other court. Article III of the Constitution authorizes such suits in cases involving ambassadors from foreign countries and those to which a state is a party. But because congressional legislation permits lower courts to exercise concurrent authority over most cases meeting Article III requirements, the Supreme Court does not have exclusive jurisdiction over them. Consequently, the Court normally accepts, on its original jurisdiction, only those cases in which one state is suing another (usually over a disputed boundary) and sends the rest to the lower courts for initial rulings. That is why in recent years original jurisdiction cases have made up only a tiny fraction of the Court’s overall docket—between one and five cases per term.

Most cases reach the Court under its appellate jurisdiction, meaning that a lower federal or state court has already rendered a decision and one of the parties is asking the Supreme Court to review that decision. As figure 1-2 shows, such cases typically come from one of the U.S. courts of appeals or state supreme courts. The U.S. Supreme Court, the nation’s highest tribunal, is the court of last resort.

To invoke the Court’s appellate jurisdiction, litigants can take one of three routes, depending on the nature of their dispute: appeal as a matter of right, certification, or certiorari. Cases falling into the first category (normally called “on appeal”) involve issues that Congress has determined are so important that a ruling by the Supreme Court is necessary. Before 1988 these included cases in which a lower court declared a state or federal law unconstitutional or in which a state court upheld a state law challenged on the grounds that it violated the U.S. Constitution. Although the justices were supposed to decide such appeals, they often found a more expedient way to deal with them—by either failing to consider them or issuing summary decisions (shorthand rulings). At the Court’s urging, in 1988 Congress virtually eliminated “mandatory” appeals. Today, the Court is legally obligated to hear only those few cases (typically involving the Voting Rights Act) appealed from special three-judge district courts. When the Court agrees to hear such cases, it issues an order noting its “probable jurisdiction.”

A second, but rarely used, route to the Court is certification. Under the Court’s appellate jurisdiction and by an act of Congress, lower appellate courts can file writs of certification, asking the justices to respond to questions aimed at clarifying federal law. Because only judges may use this route, very few cases come to the Court this way—fewer than a handful in the past six decades.4 The justices are free to accept a question certified to them or dismiss it.

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FIGURE 1-1  The Processing of Cases

OCCURS THROUGHOUT TERM

Court Receives Requests for Review (7,000–9,000)
- appeals (e.g., suits under the Voting Rights Acts)
- certification (requests by lower courts for answers to legal questions)
- petitions for writ of certiorari (most common request for review)
- requests for original review

OCCURS THROUGHOUT TERM

Cases Are Docketed
- original docket (cases coming under its original jurisdiction)
- appellate docket (all other cases)

OCCURS THROUGHOUT TERM

Justices Review Docketed Cases
- chief justice prepares discuss lists (approximately 20–30 percent of docketed cases)
- chief justice circulates discuss lists prior to conferences; the associate justices can add but not subtract cases

THURSDAYS OR FRIDAYS

Conferences
- selection of cases for review, for denial of review
- Rule of Four: four or more justices must agree to review most cases

BEGINS MONDAYS AFTER CONFERENCE

Announcement of Action on Cases

Clerk Sets Date for Oral Argument
- usually not less than three months after the Court has granted review

SEVEN TWO-WEEK SESSIONS, FROM OCTOBER THROUGH APRIL ON MONDAYS, TUESDAYS, WEDNESDAYS

Conferences
- discussion of cases
- tentative votes

Oral Arguments
- Court typically hears two cases per day, with each case usually receiving one hour of Court’s time

OCCURS THROUGHOUT TERM

Attorneys File Briefs
- appellant must file within forty-five days from when Court granted review
- appellee must file within thirty days of receipt of appellant’s brief

Assignment of Majority Opinion

THURSDAYS OR FRIDAYS

Drafting and Circulation of Opinions

Issuing and Announcing of Opinions

REPORTING OF OPINIONS

- U.S. Reports (U.S.) (official reporter system)
- Lawyers’ Edition (L.Ed.)
- Supreme Court Reporter (S.Ct.)
- U.S. Law Week (U.S.L.W.)
- electronic reporter systems (WESTLAW, LEXIS)
- Supreme Court Web site (http://www.supremecourt.gov/)

SOURCE: Compiled by the authors.
That leaves the third and most common appellate path, a request for a writ of certiorari (from the Latin meaning “to be informed”). In a petition for a writ of certiorari, the litigants desiring Supreme Court review ask the Court, to literally become “informed” about their cases by requesting that the lower court send up the record. Most of the eight thousand or so cases that arrive each year come as requests for certiorari. The Court, exercising its ability to choose the cases it will review, grants “cert” to less than 1 percent of the petitions. A grant of cert means that the justices have decided to give the case full review; a denial means that the decision of the lower court remains in force.

In sum, Article III of the U.S. Constitution enables the Supreme Court to decide cases that have not been heard by any other court, but the vast majority of disputes that reach the justices have already been resolved by another judicial body. The United States’ approach is not the only way to design a legal system. For example, in a society that has created a single constitutional court, that tribunal may have a judicial monopoly on interpreting matters of constitutional law; it may be the only forum in which citizens can bring constitutional claims (see box 1-1).

**How the Court Decides: The Case Selection Process.** Regardless of the specific design of a legal system, in many countries jurists must confront the task of “deciding to decide”—that is, choosing which cases to resolve from among the hundreds or even thousands they receive. The U.S. Supreme Court is no exception; it too has the job of deciding to decide, or identifying those cases to which it will grant cert. This task presents something of a mixed blessing to the justices. Selecting the seventy or so cases to review from the large number of petitions is an arduous undertaking that requires the justices or their law clerks to look over hundreds of thousands of pages of briefs and other memoranda. The ability to exercise discretion, however, frees the Court from one of the major constraints on judicial bodies: the lack of agenda control. The justices may not be able to
BOX 1-1  THE AMERICAN LEGAL SYSTEM IN GLOBAL PERSPECTIVE

The American legal system can be described as dual, parallel, and (for the most part) three-tiered. It is dual because one federal system and fifty state systems coexist, each ruling on disputes falling under its particular purview. This duality does not mean, however, that state courts never hear cases involving claims made under the U.S. Constitution or that federal courts necessarily shun cases arising out of state law. In fact, the U.S. Supreme Court can review cases involving federal questions on which state supreme courts have ruled and can strike down state laws if they are incompatible with the U.S. Constitution. Similarly, many cases arising from state law and heard in state courts also contain federal issues that must be resolved.

Differences exist among the state court systems, but most today roughly parallel the federal system. Trial courts—the lowest rungs on the ladder—are the entry points into the system. In the middle of the ladder are appellate courts, those that upon request review the records of trial court proceedings. Finally, both systems have supreme courts, bodies that provide final answers to legal questions in their own domains.

Although a supreme court sits atop each ladder, the U.S. Supreme Court plays a unique role—it is the apex of both state and federal court systems. Because it can hear cases and ultimately overrule the rulings of federal and state court judges, it is presumably the authoritative legal body in the United States.

Some nations have created legal systems that, to greater or lesser extents, resemble the American system. For example, Japan, whose constitutional document was largely drafted by Americans, also has a three-tiered structure. Cases begin at the district (trial) court level, move to high courts (Japan’s version of midlevel appellate courts), and, finally, move to the Supreme Court.1 But other nations—first Austria, Germany, and Italy and later Belgium, Portugal, South Africa, Spain, and most of the countries of Eastern and Central Europe—have taken a much different approach. In these countries, the highest court is not a supreme court but a single constitutional court, which has a judicial monopoly on interpreting matters of constitutional law. Such a constitutional court is not a part of the “ordinary” court system; litigants do not typically petition the justices to review decisions of lower courts. Rather, when judges confront a law whose constitutionality they doubt, they are obliged to send the case directly to the constitutional court. This tribunal receives evidence on the constitutional issue, sometimes gathers evidence on its own, hears arguments, perhaps consults sources that counsel overlooked, and hands down a decision. But, unlike in the United States, the constitutional court does not decide the case because it has not heard a case—it has only addressed a question of constitutional interpretation. Although the court publishes an opinion justifying its ruling and explaining the controlling principles, the case still must be decided by regular tribunals. In some countries—for example, Germany, Italy, and Russia—public officials also may bring suits in the constitutional court challenging the legitimacy of legislative, executive, or judicial acts, and under some circumstances private citizens may initiate similar litigation. Where judicial action is challenged, the constitutional court in effect reviews a decision of another court, but the form of the action is very different from an appeal in the United States.

This type of court system is often called “centralized” because the power of judicial review—that is, the power to review government acts for their compatibility with the nation’s constitution and to strike down those acts that are not compatible—rests in one constitutional court; other courts are typically barred from exercising judicial review, although they may refer constitutional questions to the constitutional tribunal. In contrast, the U.S. system is deemed “decentralized” because ordinary courts—not just supreme courts—can engage in judicial review. We shall return to this distinction in chapter 2 (see box 2-1).

1. Japan has summary courts with jurisdiction over minor civil and criminal cases. District courts (trial courts of general jurisdiction) can hear civil appeals from summary courts. For more details, see Herbert Jacob, ed., Courts, Law, and Politics (New Haven, CT: Yale University Press, 1996), chap. 6.

reach out and propose cases for review the way members of Congress can propose legislation, but the enormous number of petitions they receive ensures that they can resolve at least some issues important to them.
Many scholars and lawyers have tried to determine what makes a case “certworthy,” that is, worthy of review by the Supreme Court. Before we look at some of their findings, let us consider the case selection process itself. The original pool of seven thousand to eight thousand petitions faces several checkpoints along the way (see figure 1-1), which significantly reduce the amount of time the Court, acting as a collegial body, spends deciding what to decide. The staff members in the office of the Supreme Court clerk act as the first gatekeepers. When a petition for certiorari arrives, the clerk’s office examines it to make sure it is in proper form, that it conforms to the Court’s precise rules. Briefs must be “prepared in a 6¾-by-9¼-inch booklet, . . . typeset in a Century family 12-point type with 2-point or more leading between lines.” Exceptions are made for indigents who cannot afford to pay the Court’s fees. The rules governing these petitions, known as in forma pauperis briefs, are somewhat looser, allowing indigents to submit briefs on 8½-by-11-inch paper.5

The clerk’s office gives each acceptable petition an identification number, called a “docket number,” and forwards copies to the chambers of the individual justices. On the current (2015) Court, all the justices but Samuel Alito use the “certiorari pool system,” in which clerks from the different chambers collaborate in reading and then writing memos on the petitions.6 Upon receiving the preliminary or pool memos, the individual justices may ask their own clerks for their thoughts about the petitions. The justices then use the pool memos, along with their clerks’ reports, as a basis for making a determinations about which cases they believe are worthy of a full hearing.

During this process, the chief justice serves as yet another checkpoint on petitions. Before the justices meet to make case selection decisions, the chief circulates a “discuss list” containing those cases he feels the Court should consider; any justice (in order of seniority) may add cases to this list but may not remove any. Less than a third of the cases that come to the Court make it to the list and are actually discussed by the justices in conference. The rest are automatically denied review, leaving the lower court decisions intact.7

This much we know. Because only the justices attend the Court’s conferences, we cannot say precisely what transpires there. We can offer only a rough picture based on scholarly writings, the comments of justices, and our examination of the private papers of several retired justices. These sources tell us that the discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating his vote. The associate justices, who sit at a rectangular table, then comment on each petition, with the most senior justice speaking first and the newest member last. The associate justices may provide some indication of how they will vote on the merits of the case if it is accepted. As figure 1-3 shows, the justices record certiorari and merits votes in their docket books. But, given the large number of petitions, the justices apparently discuss few cases in detail.

By tradition, the Court adheres to the so-called Rule of Four: it grants certiorari to those cases receiving the affirmative vote of at least four justices. The Court identifies the cases accepted and rejected on a “certified orders list,” which is released to the public. For a case granted certiorari or in which probable jurisdiction is noted, the clerk informs the participating attorneys, who then have specified time limits in which to turn in their written legal arguments (briefs), and the case is scheduled for oral argument.

Considerations Affecting Case Selection Decisions. This is how the Court considers petitions, but why do the justices make the decisions that they do? Scholars have developed several answers to this question. Two sets are worthy of our attention: legal considerations and political considerations.8


6. Supreme Court justices are authorized to hire four law clerks each. Typically, these clerks are outstanding recent graduates of the nation’s top law schools. Pool (or preliminary) memos, as well as other documents pertaining to the Court’s case selection process, are available at http://epstein.wustl.edu/blackmun.php. See also Ryan C. Black and Christina L. Boyd, “The Role of Law Clerks in the U.S. Supreme Court’s Agenda-Setting Process,” American Politics Research 40 (2012): 147–173.


8. Some scholars have noted a third set: procedural considerations. These emanate from Article III, which—under the Court’s interpretation—places constraints on the ability of federal tribunals to hear and decide cases. Chapter 2 considers these constraints, which
Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process. Under Rule 10, the Court emphasizes “conflict,” such as when a U.S. “court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter,” or when decisions of state courts of law resort collide with one another or with the federal courts.9

To what extent do the considerations in Rule 10 affect the Court? The answer is mixed. On one hand, the Court seems to follow the rule’s dictates. The presence of actual conflict between or among federal courts, a major concern of Rule 10, substantially increases the likelihood of review; if actual conflict is present in a case, it has a 33 percent chance of gaining Court review, as compared with the usual 1 percent certiorari rate.10 On the other hand, although the Court may use the existence of actual conflict as a threshold consideration (cases that do not present conflict may be rejected), it does not accept all cases with conflict because there are too many.11

In short, Rule 10’s stress on conflict in the lower courts may act as a constraint on the justices’ behavior, but it does necessarily further our understanding of what occurs in cases meeting the criteria. That is why scholars have looked elsewhere—to political factors that may influence the Court’s case selection process. Three such factors are particularly important. The first is the U.S. solicitor general (SG), the attorney who represents the U.S. government before the Supreme Court. Simply stated, when the office of the SG files a petition, the Court is very likely to grant certiorari. In fact, the Court accepts about 70 to 80 percent of the cases in which the federal government is the petitioning party. Why is the SG so successful? One is that the Court is well aware of the SG’s special role. A presidential appointee whose decisions often reflect the administration’s philosophy, the SG also represents the interests of the United States. As the nation’s highest court, the Supreme Court cannot ignore these interests. In addition, the justices rely on the SG to act as a filter; that is, they expect the SG to examine carefully the
cases to which the government is a party and bring only the most important to their attention. Furthermore, because solicitors general are involved in so much Supreme Court litigation, they acquire a great deal of knowledge about the Court that other litigants do not. They are “repeat players” who know the “rules of the game” and can use them to their advantage. For example, they know how to structure their petitions to attract the attention and interest of the justices. Finally, a recent study on the topic emphasizes less the SG’s experience and more the professionalism of the SG and the lawyers working in his or her office. As the authors put it, they are “consummate legal professionals whose information justices can trust.”

The second political factor is the amicus curiae (friend of the court) brief. These briefs are usually filed by interest groups and other third parties after the Court makes its decision to hear a case, but they can also be filed at the certiorari stage (see box 1-2). Research by political scientists shows that amicus briefs significantly enhance a case’s chances of being heard, and multiple briefs have a greater effect. Another interesting finding of these studies is that even when groups file in opposition to granting certiorari, they increase—rather than decrease—the probability that the Court will hear the case.

These findings suggest that the justices may not be strongly influenced by the arguments contained in amicus briefs (if they were, why would briefs in opposition to certiorari have the opposite effect?), but they seem to use them as cues. In other words, because amicus briefs filed at the certiorari stage are somewhat uncommon—less than 10 percent of all petitions are accompanied by amicus briefs—they do draw the justices’ attention. If major organizations are sufficiently interested in an appeal to pay the cost of filing briefs in support of (or against) Court review, then the petition for certiorari is probably worth the justices’ serious consideration.

In addition, we have strong reasons to suspect that a third political factor—the ideology of the justices—affects actions on certiorari petitions. Researchers tell us that the justices during the liberal period under Chief Justice Earl Warren (1953–1969) were more likely to grant review to cases in which the lower court reached a conservative decision so that they could reverse, while those of the moderately conservative Court during the years of Chief Justice Warren Burger (1969–1985) took liberal results to reverse. It would be difficult to believe that the current justices are any less likely than their predecessors to vote on the basis of their ideology. Scholarly studies also suggest that justices engage in strategic voting behavior at the cert stage. In other words, justices are forward thinking; they consider the implications of their cert vote for the later merits stage, asking themselves, “If I vote to grant a particular petition, what are the odds of my position winning down the road?” As one justice explained his calculations, “I might think the Nebraska Supreme Court made a horrible decision, but I wouldn’t want to take the case, for if we take the case and affirm it, then it would become precedent.”

The Role of Attorneys

Once the Supreme Court agrees to decide a case, the clerk of the Court informs the parties. The parties present their side of the dispute to the justices in written and oral arguments.

Written Arguments. Written arguments, called briefs, are the major vehicles for parties to Supreme Court cases to document their positions. Under the Court’s rules, the appealing party (known as the appellant or petitioner) must submit its brief within forty-five days of the time the Court grants certiorari; the opposing party (known as the appellee or respondent) has thirty days after receipt of the appellant’s brief to respond with arguments urging affirmance of the lower court ruling.

As is the case for cert petitions, the Court maintains specific rules covering the presentation and format of merits briefs. The briefs of both parties must be submitted in forty copies and not exceed 15,000 words. Rule 24 outlines the material that briefs must contain, such as a description of the questions presented for review, a list of the parties, and a statement describing the Court’s authority to hear the case. Also worth noting: the Court’s rules now mandate electronic submission of all


The amicus curiae practice probably originates in Roman law. A judge would often appoint a consilium (officer of the court) to advise him on points where the judge was in doubt. That may be why the term amicus curiae translates from the Latin as “friend of the court.” But today it is the rare amicus who is a friend of the court. Instead, contemporary briefs almost always are a friend of a party, supporting one side over the other at the certiorari and merits stages. Consider one of the briefs filed in United States v. Windsor (2013), the cover of which is reprinted here. In that case, the American Psychological Association and other organizations filed in support of Edith Windsor. They, along with Windsor, asked the Court to invalidate the Defense of Marriage Act (DOMA), which defined marriage under federal law as a “legal union between one man and one woman.” These groups were anything but neutral participants.

How does an organization become an amicus curiae participant in the Supreme Court of the United States? Under the Court’s rules, groups wishing to file an amicus brief at the certiorari or merits stage must obtain the written consent of the parties to the litigation (the federal and state governments are exempt from this requirement). If the parties refuse to give their consent, the group can file a motion with the Court asking for its permission. The Court today almost always grants these motions.

BOX 1-2  THE AMICUS CURIAE BRIEF

To invalidate the Defense of Marriage Act (DOMA), which defined marriage under federal law as a “legal union between one man and one woman.” These groups were anything but neutral participants.

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briefs (including amicus briefs) in addition to the normal hard copy submissions.

The clerk sends the briefs to the justices, who normally study them before oral argument. Written briefs are important because the justices may use them to formulate the questions they ask the lawyers representing the parties. The briefs also serve as a permanent record of the positions of the parties, available to the justices for consultation after oral argument when they decide the case outcome. A well-crafted brief can provide the justices with arguments, legal references, and suggested remedies that later may be incorporated into the opinion.

In addition to the briefs the parties submit to the suit, Court rules allow interested persons, organizations, and government units to participate as amici curiae on the merits—just as they are permitted to file such briefs at the review stage (see box 1-2). Those wishing to submit amicus curiae briefs must obtain the written permission of the parties or the Court. Only the federal government and state governments are exempt from this requirement.

**Oral Arguments.** Attorneys also have the opportunity to present their cases orally before the justices. Each side has thirty minutes to convince the Court of the merits of its position and to field questions from the justices, though sometimes the Court makes small exceptions to this rule. In the 2011 term, it made a particularly big one, hearing six hours of oral argument, over three days, on the Patient Protection and Affordable Care Act, the health-care law passed in 2010. This was unprecedented in the modern era, but not in the Court’s early years. In the past, because attorneys did not always prepare written briefs, the justices relied on oral arguments to learn about the cases and to help them marshal their arguments for the next stage. Orals were considered important public events, opportunities to see the most prominent attorneys of the day at work. Arguments often went on for days: *Gibbons v. Ogden* (1824), the landmark commerce clause case, was argued for five days, and *McCulloch v. Maryland* (1819), the litigation challenging the constitutionality of the national bank, took nine days to argue.

The justices are allowed to interrupt the attorneys at any time with comments and questions, as the following exchange between Justice Byron R. White and Sarah Weddington, the attorney representing Jane Roe in *Roe v. Wade* (1973), illustrates. White got the ball rolling when he asked Weddington to respond to an issue her brief had not addressed: whether abortions should be performed during all stages of pregnancy or should somehow be limited. The following discussion ensued:

**White:** And the statute doesn't make any distinction based upon at what period of pregnancy the abortion is performed?

**Weddington:** No, Your Honor. There is no time limit or indication of time, whatsoever. So I think—

**White:** What is your constitutional position there?

**Weddington:** As to a time limit—

**weddington:** As to a time limit. . . . It is our position that the freedom involved is that of a woman to determine whether or not to continue a pregnancy. Obviously, I have a much more difficult time saying that the State has no interest in late pregnancy.

**White:** Why? Why is that?

**Weddington:** I think that's more the emotional response to a late pregnancy, rather than it is any constitutional—

**White:** Emotional response by whom?

**Weddington:** I guess by persons considering the issue outside the legal context, I think, as far as the State—

**White:** Well, do you or don't you say that the constitutional—

**Weddington:** I would say constitutional—

**White:** right you insist on reaches up to the time of birth, or—

**Weddington:** The Constitution, as I read it . . . attaches protection to the person at the time of birth.

In the Court’s early years, there was little doubt about the importance of such exchanges, and of oral arguments in general, because, as noted above, the justices did not always have the benefit of written briefs. Today, however, some scholars and even justices have questioned the effectiveness of oral arguments and their role in decision making. Chief Justice Earl Warren contended that they made little difference to the outcome. Once the justices have read the briefs and studied related cases, most have relatively firm views on how the case should be decided, and orals change few minds. Justice William J. Brennan Jr., however, contended that they are extremely important because they help justices to clarify core arguments.
Recent scholarly work seems to come down on Brennan’s side. According to a study by Timothy Johnson and his colleagues, the justices are more likely to vote for the side with the better showing at orals. Along somewhat different lines, a study by Lee Epstein, William Landes, and Richard Posner shows that orals may be a good predictor of the Court’s final votes: all else equal, the side that receives the greater number of questions tends to lose.\footnote{Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs II, “The Influence of Oral Arguments on the U.S. Supreme Court,” \textit{American Political Science Review} 100 (2006): 99–113; Lee Epstein, William M. Landes, and Richard A. Posner, “Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument,” \textit{Journal of Legal Studies} 39 (2010): 433–467.} One possible explanation is that the justices use oral argument as a way to express their opinions and attempt to influence their colleagues, because formal deliberation (described below) is often limited and highly structured.

The debate will likely continue. Even if oral arguments turn out to have little effect on the justices’ decisions, we should not forget the symbolic importance of the arguments: they are the only part of the Court’s decision-making process that occurs in public and that you now have the opportunity to hear. Law professor Jerry Goldman has made the oral arguments of many cases available online at https://www.oyez.org. Throughout this book you will find references to this Web site, indicating that you can listen to the arguments in the case you are reading.

\textbf{The Supreme Court Decides: Some Preliminaries}

After the Court hears oral arguments, it meets in a private conference to discuss the case and to take a preliminary vote. Below, we describe the Court’s conference procedures and the two stages that follow the conference: the assignment of the opinion of the Court and the opinion circulation period.

\textit{The Conference}. Despite popular support for “government in the sunshine,” the Supreme Court insists that its decisions take place in a private conference, with no one in attendance except the justices. Congress has agreed to this demand, exempting the federal courts from open government and freedom of information legislation. There are two basic reasons for the Court’s insistence on the private conference. First, the Supreme Court—which, unlike Congress, lacks an electoral connection—is supposed to base its decisions on factors other than public opinion. Opening up deliberations to press scrutiny, for example, might encourage the justices to take notice of popular sentiment, which is not supposed to influence them. Or so the argument goes. Second, although the Court reaches tentative decisions on cases in conference, the opinions explaining the decisions remain to be written. This process can take many weeks or even months, and a decision is not final until the opinions are written, circulated, and approved. Because the Court’s decisions can have a major impact on politics and the economy, any party having advance knowledge of case outcomes could use that information for unfair business and political advantage.

The system works so well that, with only a few exceptions, the justices have not experienced information leaks—at least not prior to the public announcement of a decision. After that, clerks and even justices have sometimes thrown their own sunshine on the Court’s deliberations. \textit{National Federation of Independent Business v. Sebelius} (2012) (excerpted in chapters 7 and 8), involving the constitutionality of the health-care law passed in 2010, provides a recent example. Based on information from reliable sources, Jan Crawford of CBS News reported that Chief Justice Roberts initially voted to join the Court’s four conservative justices to strike down the law but later changed his vote to join the four liberals to uphold it.\footnote{Jan Crawford, “Roberts Switched Views to Uphold Health Care Law,” CBS News, \textit{Face the Nation}, July 1, 2012, http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody.} So, while it can be difficult to know precisely what occurs in the deliberation of any particular case, from journalistic accounts and the papers of retired justices we can piece together the procedures and the general nature of the Court’s discussions. We have learned the following: First, we know that the chief justice presides over the deliberations. The chief calls up the case for discussion and then presents his views about the issues and how the case should be decided. In order of seniority, the remaining justices state their views and vote. By Court practice, no justice speaks a second time until all other justices have had an opportunity to express their views.

The level and intensity of discussion, as the justices’ notes from conference deliberations reveal, differ from case to case. In some, it appears that the justices had
very little to say. The chief presented his views, and the rest noted their agreement. In others, every Court member had something to add. Whether the discussion is subdued or lively, it is unclear to what extent conferences affect the final decisions. It would be unusual for a justice to enter the conference room without having reached a tentative position on the cases to be discussed; after all, he or she has read the briefs and listened to oral arguments. But the conference, in addition to oral arguments, provides an opportunity for the justices to size up the positions of their colleagues. This sort of information, as we shall see, may be important as the justices begin the process of crafting and circulating opinions.

Opinion Assignment and Circulation. The conference typically leads to a tentative outcome and vote. What happens at this point is critical because it determines who assigns the opinion of the Court—the Court’s only authoritative policy statement, the only one that establishes precedent. Under Court norms, when the chief justice votes with the majority, he assigns the writing of the opinion. The chief may decide to write the opinion or assign it to one of the other justices who voted with the majority. When the chief justice votes with the minority, the assignment task falls to the most senior member of the Court who voted with the majority.

In making these assignments, the chief justice (or the senior associate in the majority) takes many factors into account. First and perhaps foremost, the chief tries to equalize the distribution of the Court’s workload. This makes sense: the Court will not run efficiently, given the burdensome nature of opinion writing, if some justices are given many more assignments than others. The chief may also take into account the justices’ particular areas of expertise, recognizing that some justices are more knowledgeable about particular areas of the law than others. By encouraging specialization, the chief may also be trying to increase the quality of opinions and reduce the time required to write them.

Along similar lines, there has been a tendency among chief justices to self-assign especially important cases. Warren took this step in the famous case of Brown v. Board of Education (1954) and Roberts did the same in the health-care case. Some scholars and even some justices have suggested that this is a smart strategy, if only for symbolic reasons. As Justice Felix Frankfurter put it, “[T]here are occasions when an opinion should carry extra weight which pronunciation by the Chief Justice gives.” Finally, for cases decided by a one-vote margin (usually 5–4), chiefs have been known to assign the opinion to a moderate member of the majority rather than to an extreme member. The reasoning seems to be this: if the writer in a close case drafts an opinion with which other members of the majority are uncomfortable, the opinion may drive justices to the other side, causing the majority to become a minority. A chief justice may try to minimize this risk by asking justices squarely in the middle of the majority coalition to write.

Regardless of the factors the chief considers in making assignments, one thing is clear: the opinion writer is a critical player in the opinion circulation phase, which eventually leads to the final decision of the Court. The writer begins the process by circulating a draft of the opinion to the others. Once the justices receive the first draft of the opinion, they have many options. First, they can join the opinion, meaning that they agree with it and want no changes. Second, they can ask the opinion writer to make changes, that is, bargain with the writer over the content and even the disposition—to reverse or affirm the lower court ruling—offered in the draft. The following memo sent from Brennan to White is exemplary: “I’ve mentioned to you that I favor your approach to this case and want if possible to join your opinion. If you find the following suggestions . . . acceptable, I can join you.”

Third, they can tell the opinion writer that they plan to circulate a dissenting or concurring opinion. A dissenting opinion means that the writer disagrees with the disposition the majority opinion reaches and with the rationale it invokes; a concurring opinion generally agrees with the disposition but not with the rationale. Finally, justices can tell the opinion writer that they await further writings, meaning that they want to study various dissents or concurrences before they decide what to do.


As justices circulate their opinions and revise them—the average majority opinion undergoes three to four revisions in response to colleagues’ comments—many different opinions on the same case, at various stages of development, will be floating around the Court over the course of several months. Because this process is replicated for each case the Court decides with a formal written opinion, it is possible that scores of different opinions may be working their way from office to office at any point in time.

Eventually, the final version of the opinion is reached, and each justice expresses a position in writing or by signing an opinion of another justice. This is how the final vote is taken. When all of the justices have declared themselves, the only remaining step is for the Court to announce its decision and the vote to the public.

SUPREME COURT
DECISION MAKING: LEGALISM