



# Issues of Democracy

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A P R I L 2 0 0 5



THE SUPREME COURT  
OF THE UNITED STATES

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Highest Court in the Land

Bureau of International Information Programs

U.S. Department of State

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## ISSUES OF DEMOCRACY

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# ABOUT THIS ISSUE

The United States is sometimes known as a society of laws. The phrase reflects Americans' ability to conduct our business and personal affairs and to exercise the rights guaranteed to us by the U.S. Constitution against a background of predictable and peaceably enforceable legal norms. So accepted are these norms that they seem often to blend into the background, taken almost for granted until a dispute arises. When disputes do arise, Americans from all walks of life turn to their judicial system to adjudicate their legal rights and responsibilities.

The ultimate interpreter of American law and the American Constitution itself is the United States Supreme Court. Nearly 220 years old, the Court has grown dramatically in stature and authority. Unlike its early predecessors, today's Court largely controls its docket, choosing the cases it will hear. Its authority to invalidate as unconstitutional actions of the legislative and executive branches now is long settled. When Chief Justice John Marshall first asserted this prerogative in 1803, he had to consider whether the fledgling Court could enforce an unpopular decision; today, Americans may disagree—and often do—volubly and with great zest, with one or another of the Court's decisions, but defying the Court is simply beyond the bounds of political, even social, legitimacy.

We present a collection of essays in this journal that explain how the Court functions. They also illustrate how it commands the respect of Americans and plays a vital role in the constitutional system. We are fortunate to feature an introduction by Chief Justice William H. Rehnquist and contributions by a number of the nation's premier legal scholars.

Professor A.E. Dick Howard of the University of Virginia outlines broadly the Supreme Court's role in the U.S. constitutional system at discrete points in American history. "What is the place of an unelected judiciary in a democracy?" he asks, affording us greater understanding of how Americans of different eras have answered that question.

Professor John Paul Jones of the University of Richmond explains Supreme Court jurisdiction—the Court *must* hear certain cases, *may* hear others, and *may not* address still others. This valuable primer stresses the Court's great adaptability, one key to its success.

Professor Robert S. Barker of Duquesne University explains the nomination and confirmation processes that govern appointments to the Court. While the president and Congress each have their say, the result has been a series of independent-minded justices.

The Honorable Peter J. Messitte, U.S. District Judge in the District of Maryland, demystifies the writ of *certiorari*, the legal device by which the Supreme Court chooses the appeals it will hear in a given term. Judge Messitte negotiates the applicable procedures and explains which kinds of cases are most likely to be selected.

*Brown v. Board of Education*, in which the Court declared unconstitutional the practice of segregating public schools by race, is possibly the most acclaimed Supreme Court decision of the 20th century. Jack Greenberg was one of the attorneys who argued that case for the African-American plaintiffs, and we are proud to offer his first-hand account of those historic arguments.

The nine justices could not discharge their duties without the assistance of numerous Court officials. Four of them—the Court clerk, the marshal, the reporter of decisions, and the public information officer—describe their jobs, backgrounds, and how they came to work for the Court.

We conclude this e-journal with brief summaries of landmark Supreme Court decisions, a bibliography, and a guide to Internet resources. We are pleased to offer this portrait of a quintessentially American institution.

*The Editors*



## ISSUES OF DEMOCRACY

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### CONTENTS

#### THE SUPREME COURT OF THE UNITED STATES: HIGHEST COURT IN THE LAND

##### 4 Introduction

HON. WILLIAM H. REHNQUIST  
CHIEF JUSTICE OF THE UNITED STATES

##### 5 "To Say What the Law Is": The Supreme Court As Arbiter of Constitutionality

A.E. DICK HOWARD  
PROFESSOR OF LAW AND PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA

The Supreme Court has assumed a leading role in ensuring the rule of law in the United States.

##### 9 The Supreme Court: A Unique Institution

JOHN PAUL JONES  
PROFESSOR OF LAW, UNIVERSITY OF RICHMOND

The constitutional provisions establishing the Supreme Court afford it the adaptability required to address contemporary issues, controversies, and needs.

##### 14 "I Do Solemnly Swear"

ROBERT S. BARKER  
DISTINGUISHED PROFESSOR OF LAW, DUQUESNE UNIVERSITY

The appointment of a Supreme Court justice involves legal, political, and personal considerations, but the typical result is an independent-minded justice.

##### 18 The Writ of Certiorari: Deciding Which Cases to Review

HON. PETER J. MESSITTE  
U.S. DISTRICT JUDGE, DISTRICT OF MARYLAND  
The Supreme Court chooses most of its docket by means of the writ of *certiorari*; Americans from all walks of life can petition the Court for such a writ.

##### 22 Arguing Brown

A MEMOIR BY JACK GREENBERG  
PROFESSOR OF LAW, COLUMBIA UNIVERSITY  
A legendary civil rights advocate recounts his experience arguing the landmark *Brown v. Board of Education* litigation before the Supreme Court.

##### 27 Landmark Decisions

Capsule summaries of some of the Court's most memorable and significant cases: *Marbury v. Madison*; *Gibbons v. Ogden*; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*; *Brown v. Board of Education*; *Gideon v. Wainwright* / *Miranda v. Arizona*; *New York Times Co. v. Sullivan*.

### **31 The Supreme Court Justices**

Meet the nine members of the Court. They are Chief Justice William H. Rehnquist and Associate Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David Hackett Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen G. Breyer.

### **33 Working Behind the Scenes**

Personal accounts by four Court officers who help the justices do their jobs: the Clerk of the Court, the Court Marshal, the Reporter of Decisions, and the Public Information Officer.

### **37 Bibliography**

### **38 Internet Resources**

## **AUDIO AND VIDEO ONLINE**



For audio of arguments before the Supreme Court, visit Oyez at:

<http://www.oyez.org/>



For video of interviews with Supreme Court Justices, visit the video library of C-SPAN at:

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# INTRODUCTION



Photograph by Richard Strauss, Smithsonian Institution, Collection of the Supreme Court of the United States.

“... the Supreme Court of the United States as a constitutional court ... is the most significant single contribution the United States has made to the art of government.”

WILLIAM H. REHNQUIST  
Chief Justice of the United States

In 1787, our Founding Fathers drafted a constitution that divided the authority of the federal government among the three branches of government: the legislative, the executive, and the judiciary. Each branch was granted certain limited powers. But the Constitution also established an institution designed to enforce its terms—the Supreme Court of the United States. This idea of a constitutional court has been widely followed in some European countries, particularly since the Second World War, and in the countries that were previously part of the Soviet Union. But in 1787, it was unique to our country.

Our Constitution was ratified in 1789, and two years later, in 1791, the first 10 amendments were adopted. These amendments, known as the Bill of Rights, guarantee freedom of speech, freedom of the press, freedom of religion, and various rights such as that of jury trial to defendants in criminal cases. These guarantees are not uniquely

American. Long before 1791, England had produced the Magna Carta, the Petition of Right, and the Declaration of Rights. And in 1789, the French had adopted the Declaration of the Rights of Man and of Citizens. But the idea that these rights would be enforced by judges who were independent of the executive was not found in any other system of government at that point in history.

I believe that the establishment of the Supreme Court of the United States as a constitutional court with the authority to enforce the provisions of the Constitution—including its guarantees of individual liberty—is the most significant single contribution the United States has made to the art of government. ■

A handwritten signature in cursive script that reads "William H. Rehnquist". The ink is dark and the signature is written on a light-colored background.

# “TO SAY WHAT THE LAW IS” The Supreme Court As Arbiter of Constitutionality

A.E. DICK HOWARD

*The U.S. Supreme Court established the principle of judicial review—the power to determine the constitutionality of legislative acts—in one of its earliest rulings. A distinguished legal scholar discusses the Court’s application of judicial review over its 220-year history, including examples from the 19<sup>th</sup> century to the present. Regardless of the Court’s decisions in particular cases, the author concludes that “the Court’s role in ensuring the rule of law commands widespread assent among the American people.”*

*A.E. Dick Howard is White Burkett Miller Professor of Law and Public Affairs and Roy L. and Rosamond Woodruff Morgan Research Professor of Law at the University of Virginia in Charlottesville. He is an expert in the fields of constitutional law and the Supreme Court, and from 1985 to 1992 he chaired Virginia’s Commission on the Bicentennial of the U.S. Constitution.*

**T**he framers of the U.S. Constitution made clear that the document was to be regarded as fundamental law. Article VI states that the Constitution and those laws “which shall be made in pursuance thereof” (as well as treaties) shall be “the supreme Law of the Land.” The framers also provided, in Article III, for one Supreme Court and such inferior courts as Congress might establish. Do those two provisions, read together, give the Supreme Court the power to strike down laws, including acts of Congress, found to be inconsistent with the Constitution?

While the framers clearly intended that the new federal government include a judicial branch, at the Constitutional Convention of 1787 in Philadelphia, Pennsylvania, they spent little time mulling how far the “judicial power” might extend. They spent far more time debating the powers the new federal government would have, the composition of the federal Congress, the balance that ought to be struck between state and federal power, and the nature of the new federal executive. When the proposed Constitution was put to the several states for their approval, the ratification debates focused heavily on concerns about federal power generally—and on the lack of a bill of rights.

## JUDICIAL REVIEW

At the state level, judicial review—the power of a court to declare a legislative act to be unconstitutional—was only just emerging in the early years of the republic. The very idea of democracy was thought to emphasize the role of legislatures as being the voice of popular will. But Americans soon discovered that their own legislatures, like kings or parliaments, could threaten rights and freedoms. Hence, along with ideas like separation of powers and checks and balances, judicial review emerged as a linchpin of ensuring constitutional supremacy.



The third chief justice, John Marshall, authored several landmark decisions, including *Marbury v. Madison* (1803), which established the principle of judicial review. (Painted by Rembrandt Peale, Collection of the Supreme Court of the United States)

At the federal level, it was Chief Justice John Marshall who, in *Marbury v. Madison* (1803), made explicit the courts' power of judicial review. In famous language, oft quoted in later cases, Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is." And that duty, he concluded, encompasses the courts' power to strike down even acts of Congress if they are found to conflict with the Constitution.

Until the American Civil War (1861-1865), the Supreme Court's constitutional jurisprudence focused largely on matters of federalism. The Bill of Rights, added to the Constitution in 1791, applied only to federal actions, not to the states. After the Civil War, however, the adoption of the 14<sup>th</sup> Amendment enjoined the states from denying any person due process of law or equal protection of the laws. In time these provisions would be the basis both for major congressional actions (such as the Civil Rights Act of 1964) and for more sweeping judicial power (notably including the Supreme Court's 1954 decision in *Brown v. Board of Education*, finding racial segregation in public schools to be unconstitutional).

In the early decades of the 20th century, the Supreme Court often was perceived as protecting property and enterprise against progressive legislation. In 1905, for example, the Court, striking down a New York law



Chief justice from 1953 to 1969, Earl Warren presided during a period that saw an expansion of civil rights. *Brown v. Board of Education* and *Miranda v. Arizona* were among the Warren Court's signature decisions. (Copyright © Bettmann/CORBIS)

limiting the number of hours bakers could work in a day, called such statutes "meddlesome interferences" with the rights of individuals. That kind of judicial thinking put the Court on a collision course, in the 1930s, with President Franklin Roosevelt's New Deal. Threatened with "Court packing"—the proposal that more seats might be added to the Court—the justices changed course and took a more deferential approach to state and federal social and economic reform legislation.

Today's Supreme Court undertakes to review a remarkable range of issues. America is sometimes referred to as a "litigious society." Certainly Americans seem to have a knack for converting disputes into judicial contests—a trait commented on in the 19th century by that preeminent observer of the American character, Alexis de Tocqueville. In the 1960s, in the era of Chief Justice Earl Warren, the Court embarked on an especially ambitious agenda. The Warren Court decreed one person, one vote (each legislative district to encompass, to the extent feasible, equal population) to be the rule in legislative appointment, applied most of the procedural guarantees of the Bill of Rights to the states, gave heart to the civil rights movement, and opened the door to a constitutional right of privacy and autonomy. Even with a number of justices appointed by Republican presidents who have advocated a "judicial restraint," the Court has



shown a discernible self-confidence in tackling many of the country's great issues.

What role does the Supreme Court play in American life? Among its key functions is that of being an arbiter of the federal system. No issue occupied more of the framers' attention at Philadelphia than giving the national government adequate powers while at the same time protecting the interests of the states. Thus the Supreme Court regularly is called upon to decide whether a federal statute or regulation preempts a state action. Likewise, the Court often is asked to decide whether a state law, otherwise valid, impinges upon some national interest such as the free flow of commerce. For example, when North Carolina passed a law that, neutral on its face, discriminated against Washington state apples in favor of local growers, the Court saw protectionism at work and invalidated North Carolina's law.

### INDIVIDUAL RIGHTS

The Supreme Court also plays a fundamental role in ensuring the rights and liberties of individuals. James Madison once worried lest the Bill of Rights be only a "parchment barrier." In modern times the Court has actively enforced its guarantees, not only against the federal government (their original purpose), but also against the states. The Court's reading of constitutional protections has often been robust and assertive. For example, in 1963 the Court held that the Sixth Amendment's guarantee of the right to counsel means not only one's right to have a lawyer in court, but also the right to have counsel appointed, at state expense, if the defendant is too poor to afford a lawyer. The justices are especially solicitous of freedom of expression. Thus, in 1964 the Court held that a "public official" who brings a libel suit must meet a demanding standard—"actual malice," that is, proving that the speaker knew that the statement was false or acted in reckless disregard of its truthfulness.

One hears lively debate over whether the Constitution should be read as a "living" document. Some argue that judges should search for the Constitution's "original meaning," that is, the meaning ascribed to it by its framers, augmented perhaps by tradition and precedent. Others see the document as more organic. Thus in cases arising under the Eighth Amendment's ban on cruel and unusual punishment, the Court has invoked a notion of "evolving standards," permitting the Court, as it did in 2005, to declare the death penalty for youthful offenders to be unconstitutional.



Visitors to the Supreme Court in Washington. Oral arguments are open to the public. (AP/WWP/Stephen J. Boitano)

There is no doubt that the Court has gone beyond the literal text of the Constitution in recognizing and securing particular rights. A conspicuous example is the right of privacy or autonomy. Drawing upon the Fifth and 14th Amendments' guarantee of due process of law, the Court has found such a right and extended it to such interests as the right of contraception, a woman's right to choose to have an abortion, and, in 2003, the right not to be punished by a state for homosexual behavior. While possibly every case that reaches the Court requires some interpretation of the law, these holdings, and particularly the last two, have been especially controversial; in the absence of specific constitutional text declaring a right to privacy, they rest heavily upon judicial reasoning and elucidation. Whatever the justices may do in future cases, it is hard to imagine the Court as presently constituted declaring that there is no constitutional basis, in general, for some notion of personal privacy.

Under the Constitution, justices of the Supreme Court serve for life "during good Behaviour." No justice has ever been removed from the Court by impeachment. Nominations to the Court, however, have in recent decades become highly political events. The more territory the Court's decisions cover, the higher the stakes when a vacancy occurs. To what extent, then, do the Court's decisions reflect the social and political attitudes of the day? Some cynics suggest that the justices "read the newspapers"—that they take public opinion into account when they shape opinions. There is little basis for this view. A fairer judgment is that, over the long term, the Court tends to reflect the country's dominant mood. Thus the Warren Court, in the 1960s, was sympathetic to national solutions for national problems. The current

Rehnquist Court is, in some respects, a more conservative tribunal, more respectful of the states' place in the federal union.

The Supreme Court's decisions raise a fundamental question: What is the place of an unelected judiciary in a democracy? There is an inherent tension between two basic principles in a constitutional liberal democracy—accountable government by a democratically elected majority and enforcement of the Constitution even if it requires striking down laws favored by that majority. Judicial review is especially attractive when it reinforces democratic principles such as one person,

one vote; free and fair elections; and freedom of speech and press. The rule of law—indeed, the very idea of a constitution—requires that the Constitution be enforced as the supreme law of the land. The Supreme Court may err in particular cases. But the Court's role in ensuring the rule of law commands widespread assent among the American people. ■

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*The opinions expressed in this article are those of the author.*

# THE SUPREME COURT A Unique Institution

JOHN PAUL JONES

*Established by the U.S. Constitution in 1789, the Supreme Court is both the final arbiter of significant legal cases and the prevailing authority on the constitutionality of individual laws. While the Constitution specifies the Court's original jurisdiction, it does not spell out how the Court should conduct its business, or even the number of justices who should serve on the Court or what their qualifications should be. Thus, the Founding Fathers provided a High Court for the nation with the adaptability to respond to the needs of its citizens.*

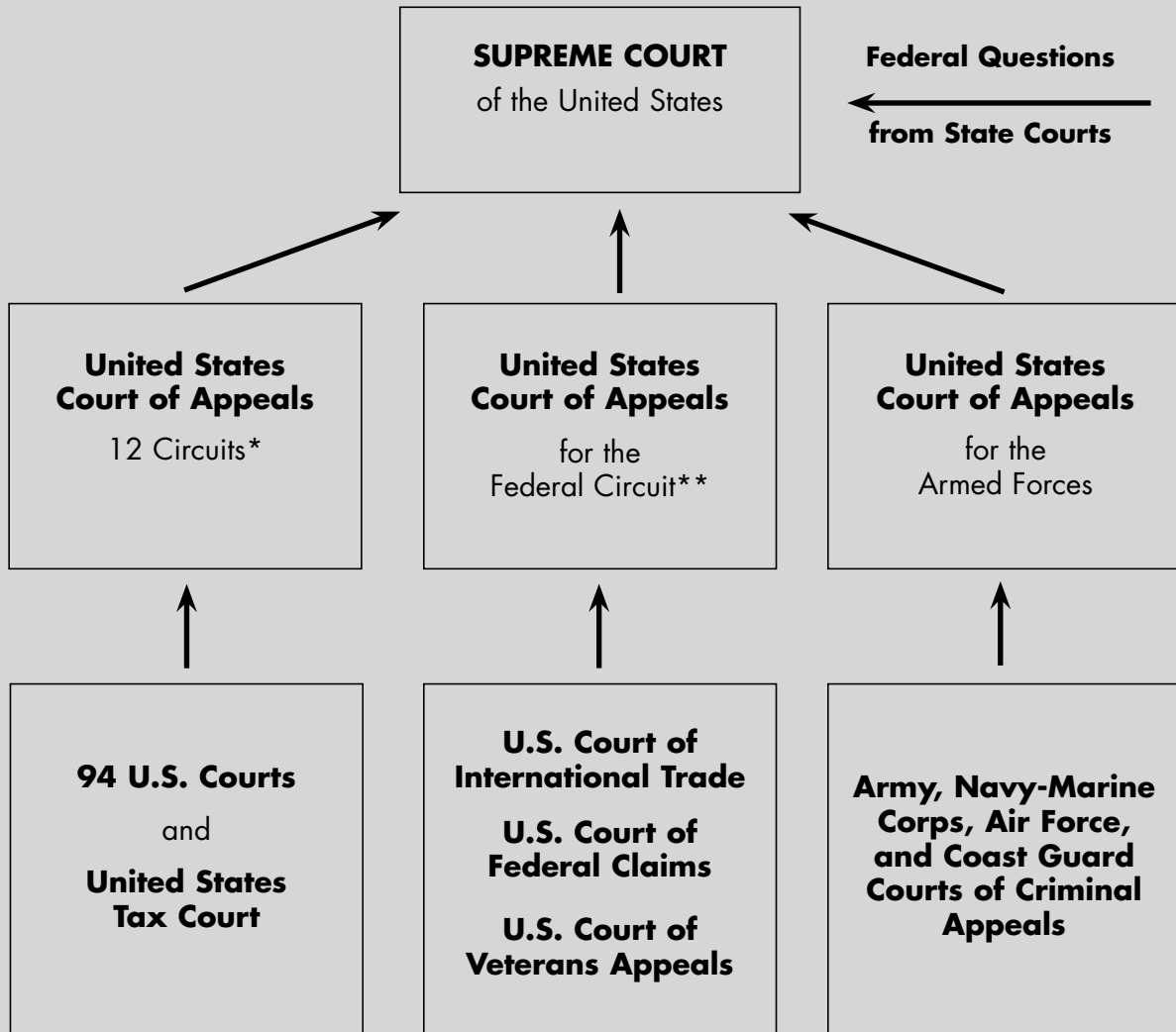
*John Paul Jones is a professor of law at the University of Richmond in Virginia and editor of the Journal of Maritime Law and Commerce, a contributor to A Biographical Dictionary of U.S. Supreme Court Justices, and the author of numerous publications on admiralty and administrative law and other legal specialties.*

In the majority of modern states, one tribunal is empowered to assess the constitutionality of actions by parliament and the executive while another acts as the final court of appeal. The Supreme Court of the United States is among the distinct minority empowered as both the highest national court and the legal arbiter of constitutionality. One day's work at the Court thus might address matters of historic import, while others are filled with the ordinary chores of a review court, including the supervision of the federal judicial department and the correction of nonconstitutional decisions by subordinate courts.

The U.S. Constitution makes the Supreme Court of the United States a court of first instance (the court of "original jurisdiction") for only two rare types of cases: those in which one American state sues another (usually about a disputed boundary or water rights) and those in which a foreign diplomat is involved. It is a court of review ("appellate jurisdiction") for all other types of cases within the reach of federal judicial power, which in the U.S. federalist system is limited both by the nature of the litigants (federal "diversity" jurisdiction applying to cases between citizens of different states) and the subject matter of their dispute (the case must arise under the Constitution, a federal law, or a treaty to which the United States is a party). In the federal system, the highest courts of the 50 states remain the courts of last resort for all cases in which state law is applied to disputes between citizens of the forum state. Like the federal and state courts below, the U.S. Supreme Court generally decides cases by reference to norms found in the common law, in previously decided cases, in legislation, or in a constitution, state or federal. Since *Marbury v. Madison* (1803), American courts are empowered to review government action for conformity with the supreme law of the land, the U.S. Constitution.

Given the limited nature of its original jurisdiction, the great controversies about public power in America have come to the Supreme Court on appeal or by similar device from other state or federal courts. Thus, by the

## THE UNITED STATES COURT SYSTEM



\* The 12 regional Courts of Appeals also receive cases from a number of federal agencies.

\*\* The Court of Appeals for the Federal Circuit also receives cases from the International Trade Commission, the Merit Systems Protection Board, the Patent and Trademark Office, and the Board of Contract Appeals.



Because the Court addresses fundamental questions in American society, interested citizens often exercise their free speech rights outside the Court building. Here, Native Americans stage a rally for tribal sovereignty. (AP Photo/WVWP/Ken Lambert)

time that national constitutional controversies reach the Supreme Court, they have been debated, refined, and sometimes dramatically refocused in prior rounds of lawyers' arguments and judicial decisions in one or more courts below. The Supreme Court is the tribunal of last resort for virtually all cases of this sort.

By the same token, constitutional controversies come to the Supreme Court only when they are embedded in specific cases between real litigants. According to Article III of the Constitution, the Supreme Court's power, in common with that of other federal courts, is limited to "cases in Law and Equity." No federal court, including the Supreme Court of the United States, can render an advisory opinion, even at the request of the president or Congress. No matter how great the controversy, the Court will not hear it unless it is reduced to one concrete manifestation for a particular person or specific class of persons, in the form of an injury of the sort the law will notice. At times, outside groups interested in establishing a legal principle will assist a litigant in a particular case, in hopes of framing an appeal that will reach the Supreme Court.

While the U.S. Constitution (Article III, Section 2) specifies the types of cases over which the Supreme Court possesses original jurisdiction, it is silent on whether and how that jurisdiction might be changed. The Court has ruled that its original jurisdiction cannot be enlarged except through amendment of the Constitution itself, and the logic of this reasoning dictates the same conclusion for any limitation of original jurisdiction.

The Constitution is not silent, however, about whether and how the Supreme Court's appellate jurisdiction

may be changed; Article III, Section 2 assigns Congress the power to alter it with "exceptions or regulations." Thus, it is only with legislative branch acquiescence that the Supreme Court continues to entertain appeals that pose great constitutional controversies. Even so, Congress has only once (in a case involving the detention of Civil War [1861-1865] prisoners) seen fit to restrict the Court's appellate jurisdiction. Any effort today by Congress to limit the appellate jurisdiction of the Court would undoubtedly prove highly controversial.

Jurisdiction, of course, merely defines the universe of cases that are *eligible* for review; the Constitution does not compel the Court to accept any particular appeal.

Indeed, conventional wisdom suggests it could not be otherwise, given the overwhelming number of such applications and the relatively limited decision making resources of the Court. The Court itself selects the overwhelming majority of its docket by means of the writ of *certiorari*, a legal order directing a lower court to send up a complete record of the case below for review.

### FEW BASIC RULES

The Constitution provisions that established the Supreme Court deliberately provide only a few basic jurisdictional rules. They do not dictate the procedures under which the Supreme Court does its business. Indeed, they are quite vague about the Court's composition. Article III does not limit the number of Supreme Court judges (justices), and Congress, which has the power to alter the Court's size and composition, has not done so in more than a century, even as the volume of applications to the Court has grown dramatically. Moreover, by its own decision, the Court continues to hear cases sitting only *en banc* (with all justices participating).

Unlike some modern constitutions, the U.S. Constitution does not explicitly command judges to explain their decisions in writing, but American courts, including the Supreme Court, long ago adopted the practice of issuing written opinions explaining and enlarging upon their judgments. Whereas it was (and is) the practice of multijudge English courts to publish the separate opinions of each judge involved, the U.S. Supreme Court early embraced the alternative of joint opinions written by one of the justices and endorsed



James Earle Fraser's "Contemplation of Justice," and the West Pediment of the Supreme Court building, with the motto "Equal Justice Under Law." (Photography by Steve Peteway, Collection of the Supreme Court of the United States)

by one or more of the others. The complete text of these opinions has long been widely published, so that all in America, and elsewhere for that matter, may review almost immediately the legal reasoning on which important judgments are founded. From the beginning, dissenting justices have been heard and their dissents published alongside the majority opinion (or opinions). This allows readers to see, for example, how close the minority view came to persuading one or more justices in the majority. There are several examples in U.S. constitutional history of dissents embodying interpretations that later supplanted the then-majority view.

Although the Constitution imposes specific age, residency, and citizenship qualifications for the president of the United States and members of Congress, it sets no similar qualifications for Supreme Court justices, except that every candidate must be the president's choice and acceptable to a majority in the Senate. No prior experience as a judge, no expertise as a constitutionalist, indeed, no training in the law at all, is formally necessary. Nevertheless, virtually every appointment has come from the pool of those with training in the law and professional experience as lawyers and judges. On a few occasions, great constitutional controversies with obviously moral dimensions (slavery, abortion, segregation) have polarized American opinion about the selection of Supreme Court justices, but whether any candidate's sympathy with one side of a particular issue should determine his or her selection remains an open question.

According to the Constitution as amended, each U.S. president serves a term of four years and may be re-elected for only one additional term. U.S. senators serve

six-year terms and may be re-elected without limit, while members of the House of Representatives serve terms of two years and similarly may be re-elected without limit. On the other hand, federal court judges, including the justices of the Supreme Court, serve effectively without any limit short of their life spans. The youngest justice was appointed to the Supreme Court of the United States when he was only 29 years old. Another served on the Court for 34 years, and no new justice has joined the present Court in more than 10 years.

### CONSTITUTIONAL MATTERS

Not all American constitutional controversies are large and notorious. Nor are they all decided by the Supreme Court, or indeed by any court. As elsewhere in the world, countless constitutional questions are decided daily in the performance of their duties by officers of the federal and state governments, as well as by legislators voting in Congress and state assemblies. Thus, most constitutional questions in America are answered by democratically elected officials who come and go from the offices in which this power resides. As they come and go, so changes the working version of the Constitution. That said, there remain the relatively few controversies, usually persistent and notorious, that come finally to the Supreme Court. To the extent that any jurist's opinions of fundamental constitutional matters remain more or less intact after weathering term after term of debate, those of a Supreme Court justice are, therefore, relatively more deeply rooted and comparatively more influential than those of decision makers in the political branches of government. Leaving aside any question of inevitable debility, we are left to ponder whether the Constitution itself is well served by such a system, in which a particular constitutional jurisprudence can become so personally entrenched. Calls for limiting judicial tenure, in particular that of the Supreme Court, have sounded occasionally since the turn of the 19<sup>th</sup> century, so far without persuading the super-majorities required to enact the necessary constitutional amendment.

In the federal democratic republic that is the United States of America, we sometimes look with awe upon the evolution of the judicial power outlined by the Constitution. A nonelected and tenured federal judiciary, led by the Supreme Court of the United States, has assumed the power to declare unconstitutional and, therefore, void the acts of elected assemblies and executives, state and federal. It might seem surprising that the politico-legal culture has for so long and without

great stress accommodated that development. The Court's constitutional judgment has been overridden by constitutional amendment only three times so far—by ratification of the Constitution's 11<sup>th</sup> (limiting federal lawsuits by a citizen of one state [or of a foreign nation] against another U.S. state), 14<sup>th</sup> (overruling the decision in *Scott v. Sanford* that blacks could not be citizens with access to the federal courts), and 16<sup>th</sup> (allowing Congress to levy an income tax) Amendments. Yet a closer look ought to reveal the largely self-imposed (but no less

effective) limits within which judicial power has been constrained, as well as the political forbearance upon which its continued exercise depends. American rule of law is fluid, collaborative, and adaptable; a less-supple constitutional order might not have survived as long. ■

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*The opinions expressed in this article are those of the author.*

# “I DO SOLEMNLY SWEAR”

*A historical perspective on the nomination, confirmation, and appointment of justices to the U.S. Supreme Court*

ROBERT S. BARKER

*The appointment of a Supreme Court justice involves legal, political, and personal considerations. A legal scholar discusses several factors that have influenced presidents in choosing nominees for the High Court and the Senate in confirming—or rejecting—their nominations. In spite of the president’s and the Senate’s efforts to appoint justices who may share their political philosophies, members of the Court have consistently displayed independence from the other branches of government, and Americans wouldn’t have it any other way.*

*Robert S. Barker is distinguished professor of law at the Duquesne University School of law in Pittsburgh, Pennsylvania. He was for 12 years chairman of the Inter-American Bar Association’s Committee on Constitutional Law; as a Fulbright scholar, he has taught constitutional law at the University of Buenos Aires, Argentina; and he is the author of *La Constitución de los Estados Unidos y su dinámica actual* (to be published in 2005).*

In 1791, when the United States Supreme Court had been in existence less than two years, one of its original members, John Rutledge, resigned from the Court in order to become chief justice of his home state, South Carolina. Four years later, the first chief justice of the U.S. Supreme Court, John Jay, resigned to become governor of his home state, New York. In 1800, when President John Adams asked Jay to return to the Court and nominated him to again become chief justice, Jay declined, observing that the Supreme Court lacked “energy, weight, and dignity.” Indeed, during the Supreme Court’s first decade of operation (1790-1800), five of the first 12 men to serve on the Court resigned, while three other nominees (including Jay in 1800) declined either appointment to the Court or promotion to chief justice. While one or two of these resignations and refusals were for personal reasons, most reflected a consensus that, as Jay put it, the Court lacked “energy, weight, and dignity.”

That perception would soon change as the influence of the Supreme Court began to grow. The Court’s momentous 1803 decision in *Marbury v. Madison*, establishing “judicial review” (that is, the power of judges to refuse to apply statutes determined by the judges themselves to be contrary to the Constitution), and the Court’s remarkable ability ever since to maintain its independence from the other branches of government, have given the United States Supreme Court great prestige and authority in American law and politics.

## CHOOSING JUSTICES

Because the Supreme Court is itself important, the process by which its members are chosen is perforce of great significance. Article III, Section 1 of the Constitution vests the judicial power of the national (or “federal”) government in “one Supreme Court, and in such inferior courts as the Congress may from time to time . . . establish,” provides that the justices of the Supreme Court (as well as all other federal judges) shall



have life tenure during good behavior, and guarantees that their salaries shall not be reduced during their time in office. Article II, Section 2 provides that the president of the United States “. . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court. . . .”

Alexander Hamilton, an influential member of the Convention of 1787, which drafted the Constitution, explained the wisdom of the appointment process in *The Federalist*, Number 77:

To this union of the Senate with the President, in the article of appointments, it has in some cases been suggested that it would serve to give the President an undue influence over the Senate, and in others that it would have an opposite tendency, —a strong proof that neither suggestion is true.

Since 1789, when President George Washington initiated the process, presidents have made a total of 148 nominations to the Supreme Court. Of these, six were declined by the nominees, 12 were rejected by the Senate, nine were withdrawn by the president (usually because of Senate opposition), and five were not acted on by the Senate (and consequently lapsed). Thus, historically, approximately four out of five presidential nominations have been successful.

What kinds of persons have been nominated and appointed? And why have about 20 percent of nominations been unsuccessful? Each nomination to the Supreme Court involves a unique interplay of legal, political, and personal considerations; nevertheless, some generalizations are possible. First of all, nominees to the Supreme Court have always been lawyers. While the Constitution does not require this, common sense demands that those whose principal duty is to interpret and apply the law, be themselves learned in the law. Second, nominees have usually been personal allies of the president, prominent members of the president’s political party, or jurists sympathetic to the president’s positions on the major legal issues of the day. Thus, for example, Roger Brooke Taney, a leading figure in President Andrew Jackson’s opposition to the existence of a national Bank of the United States, was appointed chief justice by Jackson in 1836; and Abe Fortas, a close advisor to President Lyndon Johnson, was appointed to the Court by Johnson in 1965.

Many appointees have been major political figures in their own right: Salmon P. Chase, appointed chief justice by Abraham Lincoln in 1863, had been governor

of Ohio; Charles Evans Hughes, first appointed to the Court by William Howard Taft in 1910, was governor of New York; Franklin D. Roosevelt’s first appointment to the Court (in 1937) was Senator Hugo L. Black of Alabama, and a later appointee, Frank Murphy, had been governor of Michigan. Earl Warren was governor of California when Dwight Eisenhower named him chief justice in 1954. Most famously, President Warren G. Harding in 1921 named former president Taft to the Court, as chief justice.

Sometimes presidents have appointed members of the opposition party. Thus, President Lincoln, a Republican, appointed Stephen J. Field, a prominent Democrat, to the Court in 1863. In 1940, President Franklin Roosevelt elevated Justice Harlan Fiske Stone, a Republican, to the chief justiceship. In 1945, President Harry Truman, a Democrat, appointed Senator Harold H. Burton of Ohio, a Republican, to the Court. In 1956, three weeks before the presidential election, President Eisenhower appointed William J. Brennan, a Democrat. There are other examples of such “bipartisanship”; however, while bipartisan, these appointments were nonetheless political, since they were calculated to win popular or congressional support for the president.

The practice of appointing prominent politicians to the Supreme Court has decreased markedly over the past half-century. Recent presidents have tended to nominate men and women who were already sitting judges. Of the nine justices now on the Court, six (John Paul Stevens, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Stephen G. Breyer) were federal appellate-court judges at the time of their nomination, and two (Sandra Day O’Connor and David H. Souter) were state appellate-court judges. Today a nominee’s political prominence is less important than his or her philosophical compatibility with the president.

## SENATE CONFIRMATION

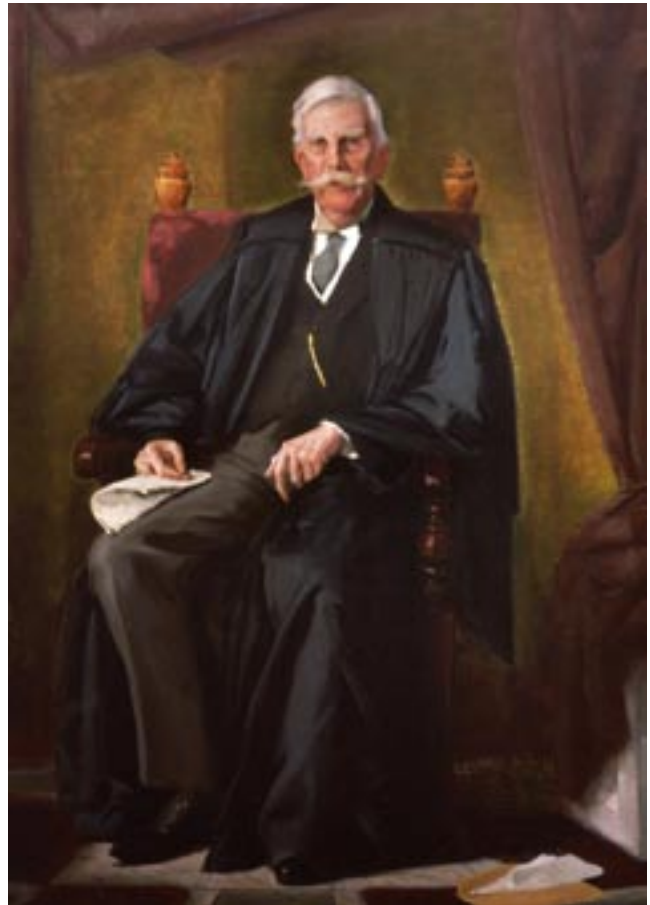
The Constitution does not establish criteria for Senate approval or rejection of nominees; thus, each senator is free to apply his or her own standards. The first Supreme Court nominee to be rejected by the Senate was John Rutledge in 1795. Rutledge, an original member of the Court, had resigned in 1791. Four years later, when President Washington nominated him to be chief justice, many senators opposed Rutledge because of his vociferous criticism in 1794 of a controversial treaty between the United States and Great Britain. Other nominations have failed for a variety of reasons: Alexander Wolcott

was rejected in 1811 because of a combination of partisan opposition and the bipartisan doubts about his ability. In 1844 and 1845, President John Tyler made six attempts to fill vacancies on the Court, five of which were unsuccessful. Tyler, a Democrat who had been elected vice president on the Whig ticket and who succeeded to the presidency upon the death of President William Henry Harrison, lacked a sufficiently strong base of support in either political party to secure favorable Senate action. Several nominees, such as Ebenezer Hoar in 1870 and Wheeler H. Peckham in 1894, were rejected because their opposition to political patronage demands had antagonized influential senators. In 1930, the Senate rejected President Herbert Hoover's nomination of John J. Parker amid charges that the nominee was anti-labor. In 1969 and 1970, the Senate rejected two of President Richard Nixon's nominees over criticism of the nominees' personal qualities and philosophical positions. The defeat of President Ronald Reagan's nominee, Robert H. Bork, in 1987 was, all sides agree, based on considerations of judicial philosophy. In short, nominees have been rejected for a wide variety of reasons, partisan, personal, and philosophical.

The Constitution does not specify the size of the Supreme Court; the number of justices has always been determined by federal statute. Congress originally fixed the number of justices at six. Since then, there have at various times been as many as 10 justices and as few as five. Usually the size of the court has been based on considerations of judicial efficiency; but on one notable occasion the motive was political. In 1866, Congress provided that the number of justices would be reduced, by attrition, from 10 to seven, to prevent President Andrew Johnson from making any Supreme Court appointments. In 1869, after Johnson had left office, the number of justices was raised to nine, where it has remained ever since.

### JUDICIAL INDEPENDENCE

While the aforementioned conflicts illustrate the political aspects of Supreme Court appointments, two other phenomena demonstrate deeper, more important realities: the first is that, whatever the circumstances of their appointment, Supreme Court justices, once in office, have consistently shown independence of the political branches of government, including independence of the very presidents who appointed them. For example, in 1902, President Theodore Roosevelt appointed Oliver Wendell Holmes Jr. to the Court. Less than two years



A renowned legal scholar before his service on the Court, Oliver Wendell Holmes Jr. was an associate justice from 1902 to 1932. (Painted by Charles Sydney Hopkinson, Collection of the Supreme Court of the United States)

later, in an antitrust case of considerable importance to Roosevelt's program, Holmes voted against the president. In 1952, when President Truman's seizure of the country's major steel mills was challenged on constitutional grounds, the Supreme Court decided, by vote of 6 to 3, against the president. Of the four justices who had been appointed by Truman himself, two voted against him. Earl Warren, appointed chief justice by President Eisenhower, voted contrary to Eisenhower's position so often that the president, upon leaving office, called his appointment of Warren, "the worst damn-fool mistake I made as president." In 1974, in *United States v. Nixon*—a case involving President Nixon's refusal to turn over subpoenaed White House tape recordings on grounds of executive privilege—three of the four justices who had been appointed by Nixon voted against him, while the fourth recused himself.

The second phenomenon of overriding importance—one closely related to the first—is that the American people *expect and demand* that the Supreme Court will

be independent of the political branches of government. In 1805, the Jeffersonian majority in the House of Representatives, intent upon subduing the federal judiciary (which was then dominated by judges of Federalist persuasion), impeached Supreme Court Justice Samuel Chase. In accordance with the Constitution, the matter then proceeded to trial before the Senate, where the Jeffersonians had a 25-9 majority, more than the two-thirds required to remove an impeached official. However, enough Jeffersonians voted for Chase that he was acquitted. No other justice of the Supreme Court has ever been impeached, and the Chase controversy stands as evidence that judicial independence is more important than partisan advantage.

An even more vivid example occurred in the 1930s.

Between 1933 and 1936, the Supreme Court declared unconstitutional many laws enacted as part of President Franklin D. Roosevelt's New Deal, his program to revive the American economy during the Great Depression. In 1936, Roosevelt was overwhelmingly re-elected and his supporters won large majorities in both houses of Congress. Soon after his re-election, Roosevelt announced his intention to deal with the problem of the Supreme Court by proposing legislation that would permit him to appoint as many as six additional justices. Most popular and congressional reaction was hostile to the president's plan, and it was not adopted. Although the people and their representatives favored Roosevelt's

economic policies, they considered the independence of the Supreme Court more important than the policy disagreements of the moment.



President Franklin D. Roosevelt's 1937 "Court packing" proposal to appoint additional members to the Supreme Court, which had blocked much of his New Deal legislation, proved unpopular. (Copyright © 1937, Richmond Times-Dispatch)

Today there is again controversy over the jurisprudence of the Supreme Court. However, the debate is over whether this or that decision is faithful to the Constitution. Such debate is healthy, indeed necessary, in a free and democratic society. But about the desirability of judicial independence from the other branches of government, there is virtually no disagreement; on this, as on the wisdom of the method of choosing Supreme Court justices, the lessons of history are clear and positive.

Perhaps the ultimate guarantee of both judicial independence and judicial fidelity is the people's simultaneous attachment to democracy and to the rule

of law. More than a century ago, James Bryce, British jurist and historian, in his classic study of United States government, *The American Commonwealth*, closed his discussion of the judiciary as follows: "To the people we come sooner or later; it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend." ■

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*The opinions expressed in this article are those of the author.*

# THE WRIT OF CERTIORARI

## Deciding Which Cases to Review

PETER J. MESSITTE



A cartoon from 1885 depicts Supreme Court justices being deluged with petitions to review cases from lower courts. (*Puck Magazine*, Library of Congress)

*Since the U.S. Supreme Court was established by the Constitution, the justices' caseload has grown exponentially. To ensure that only the most important legal matters reach the nation's High Court, Congress has given the Court increasing authority over its docket. Federal Judge Peter J. Messitte explains how the Supreme Court uses the writ of certiorari to control its appellate caseload and determine which cases to hear.*

*Messitte has served since October 1993 as U.S. district judge for the District of Maryland. From 1997 to 2003, he served on the International Judicial Relations Committee of the Judicial Conference of the United States, which makes administrative policy for the federal court system, and chaired its Subcommittee for Latin America and the Caribbean.*

Article III, Section 2 of the U.S. Constitution gives the Supreme Court original jurisdiction to function as a trial court—but it does so only in a very limited number of cases, such as those involving boundary disputes between states. The Court's principal function is to exercise appellate jurisdiction over lower court rulings on constitutional and ordinary federal law issues. The Constitution authorizes Congress to regulate this appellate jurisdiction. In its early years, the Court was obliged to hear and decide every appeal that came before it, but that became unwieldy as its caseload increased. Over time, the Court secured greater control over its appellate docket, both in the number of cases it hears and in the selection of those cases.

With the Judiciary Act of 1891, Congress for the first time gave the Court authority to accept or reject at least some appeals on a discretionary basis. The act authorized use of the writ of *certiorari* (or “*cert*”, from the Latin “to be informed”), by which the Court directs an inferior court to certify and transmit for review the record of a particular case. This device solved the problem for a time, but within 30 years the Court was once again burdened with mandatory appeals, for each of which the justices were required to study briefs, hear oral arguments, and

issue written opinions. In the words of one justice, this seriously affected the Court's time for "adequate study, reflection, discussion, and learned and impressive opinions."

Accordingly, Congress again substantially reduced the number of mandatory appeals on the Court's docket. Through the Judiciary Act of 1925, Congress simultaneously expanded the Court's *certiorari* jurisdiction, giving it much greater power to control the volume of its business. In 1988 Congress reduced the Court's mandatory jurisdiction even further, and since then virtually all of the Court's jurisdiction has been discretionary. Today, using the writ of *certiorari*, the Court considers only cases of "gravity and general importance" involving principles of wide public or governmental interest.

How many petitions for *cert* are filed each year and how many are granted?

In recent terms (a term runs from October to June), petitioners have submitted and paid the filing fee in connection with an average of 1,825 petitions. Of these, an average of 80, or roughly 4 percent, have been granted. At the same time, more than 6,000 *in forma pauperis* petitions (petitions by persons who cannot afford to pay the filing fee, primarily prisoners) have been filed. On average, only five of these are granted annually.

By granting *cert*, the Court adds a case to its docket. The usual practice is to hold oral argument and decide the case that same term, although as many as 40 cases typically are carried over to the next term.

What are the criteria for granting *cert*?

Given the Court's inability to hear more than a fraction of the cases for which *cert* is requested, it is not surprising that the justices accept only those raising particularly significant questions of law, and/or those where there is a division of legal authority, as where lower courts have produced conflicting interpretations of constitutional or federal law. In such cases, the Supreme Court may grant *cert* for the purpose of establishing a nationally uniform understanding. The Court necessarily accepts relatively few appeals based primarily on alleged error in a trial court's findings of fact or the misapplication of a properly stated rule of law; review of these issues by the intermediate federal or state court typically is final.

Who can petition for review by *certiorari* and how do they go about it?

Any party to a litigation who feels aggrieved by a final judgment of a federal Court of Appeals or by the highest state court, in any civil or criminal case, may file

a petition with the Supreme Court. Except where the petitioner demonstrates eligibility to proceed *in forma pauperis* [in the form of a pauper—i.e., without the ability to pay], a petitioner files 40 copies of a properly formatted petition and pays the filing fee (currently \$300). The respondent may, but is not required to, file a brief opposing the petition, arguing that the Court should not grant *certiorari*, and the petitioner is permitted to file a response to that reply brief. The Rules of the Supreme Court specify the applicable time frames and procedures.

Much can be said about what makes a petition worthy of a grant of *cert* or "certworthy," as lawyers say. Perhaps the main point of interest is whether and how much the petitioner must argue the merits of his case in his petition. Inevitably, some part of the petition must do this, but, again, the primary showing must be whether there is a split of authority over the legal questions posed by the given case and/or why it is in the public interest that the questions be decided.

## POINTS TO CONSIDER

There are a few other points to consider before looking at what happens with petitions for *cert* after they are filed.

What about the record of proceedings in the court below, the court whose decision is being appealed? In appeals from a trial court to an intermediate appellate court, the appellant normally submits a full transcript of the proceedings below. This makes sense, as these appeals represent the losing litigant's opportunity to assert trial court error. As the Supreme Court is primarily concerned with choosing cases that require major interpretations of law, the *cert* petitioner need not—and indeed cannot—file the record with the petition, except for attaching a copy of the opinion of judgment of the court below. The High Court is free to request the record, however, and an attorney may incorporate or quote pertinent parts of the transcript in the body of the *cert* petition.

Another item worth mentioning is the *amicus curiae* or "friend of the court" brief. Filed by individuals, but more typically by organizations, these bring to the Court's attention matters possibly not raised by the parties yet relevant to its *cert* determination. *Amicus* briefs may enable the Court to select high-stakes cases, ones whose legal significance transcends the interest of the actual litigants. The Court has said that briefs of this type "may be of considerable help," but that those that simply restate the arguments of the parties are "burdens" and are "not favored." An example of a helpful *amicus* filing

occurred in *New Mexico v. Reed*, a 1998 case involving one state's duty to honor another's extradition request. There the *amicus* brief filed by 40 states set forth practical reasons for granting *cert* and for reversing a state supreme court decision.

Once the Court has the petition for *cert* and any opposition or *amicus* briefs, what happens?

Before 1925, each of the nine justices would examine these pleadings and prepare a memorandum indicating his view of what should be done. With the expansion of the Court's *cert* jurisdiction and the consequent increase of *cert* petitions (from 300 to 400 per term to eventually four to five times that number), this became very difficult if not impossible. Accordingly, with the occasional exception, it is no longer true that each justice actually reviews each *cert* petition. Instead, the task of reading the hundreds of petitions that circulate each week is assigned to the justices' law clerks (each justice has four law clerks, except for the chief justice, who is entitled to five). These clerks, acting as a pool, divide up the cases and prepare memoranda for each case. Distributed to all the justices participating in the pool, these memoranda summarize the facts, the lower court's ruling, and the parties' contentions. They also contain the clerks' recommendations as to whether the justices should grant or deny review. Of course, each justice in the end must exercise his or her personal judgment as to each case. As Justice Byron White once remarked, this is "not as hard as it might sound." It has been estimated that more than 60 percent of the paid *cert* cases and more than 90 percent of the *in forma pauperis cert* cases turn out to be "utterly without merit for review purposes."

### CASES FOR DISCUSSION

Another device to focus the justices' attention on the most certworthy cases is the "discuss list." This list, prepared and circulated by the chief justice, identifies the cases that any justice believes worthy of discussion in a conference of the justices. The discuss list is never made public.

Counsel are not permitted to make any oral argument or in any way contact a justice to attempt to support or object to a petition for *cert*. Ordinarily, action on the petition is taken within the next eight weeks, though this is not a firmly fixed deadline.

What happens at the Court's conference?

The practice is for the Court to consider every petition on the discuss list at its regular Friday conference and then announce its decisions on the following Monday,

unless consideration of the petition is deferred to the following conference. Only justices attend this conference. There are no law clerks, secretaries, tape recorders, or the like present.

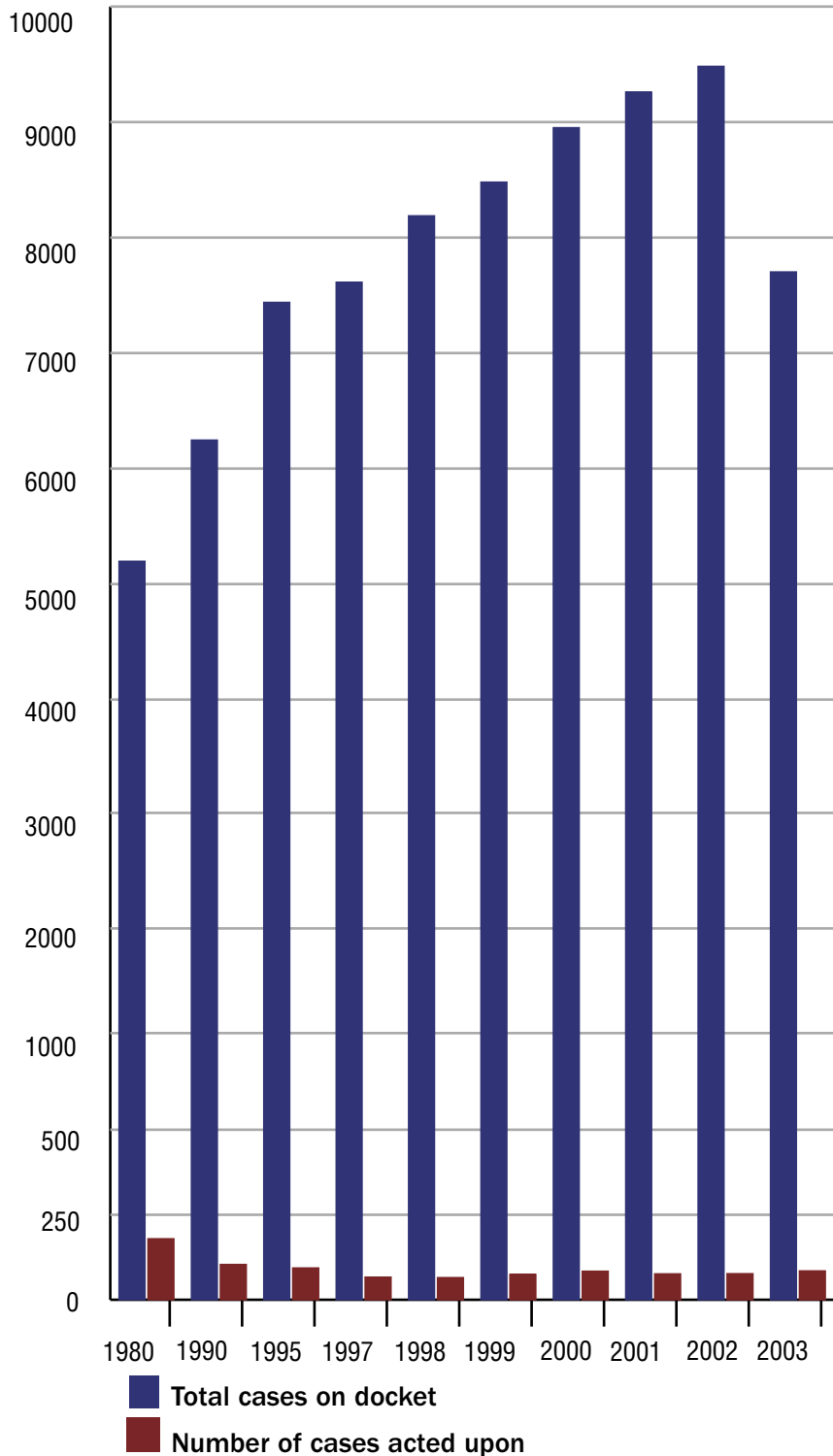
The justices operate by what is known as the "Rule of Four"; that is, *cert* will be granted if a minimum of four of the nine justices favor the grant. This is not a written rule, but rather a long-standing tradition. Accordingly, *cert* has been denied even when as many as three justices have favored it. The philosophy is that if a "substantial minority" feels the case should be heard and decided (not necessarily that it should be decided a certain way), the Court should consider the merits and decide the case.

The Court does not ordinarily give reasons for granting a *cert* petition, although it may state that it will review only certain questions raised in the petition or only questions that the Court itself reformulates based on the petition. Nor does the Court usually give reasons for a denial. As Justice Felix Frankfurter once observed, the writ may be denied for a number of reasons. They may be narrow technical reasons, such as untimeliness, lack of finality of the order appealed from, or the existence of independent and adequate state grounds that justify the lower court decision. It may also be that the case involves a settled question of law, but the lower court simply misstated or misapplied the law. For just such reasons, the Court has emphasized on numerous occasions that denial of the writ has no significance. Denial means only that the Court has refused to take the case. Denial cannot be cited as approval of the lower court's decision, even though its effect is that the decision of the lower court remains in effect.

It is true, however, that a justice will occasionally record publicly his or her dissent from the decision of the Court to deny *cert*. This may be a simple registration of dissent or it may take the form of a more elaborate opinion. These dissents, as one might suppose, do not so much discuss how the case should be decided as why the issues are sufficiently important to merit a grant of *cert* and why the decision below should be reviewed for that reason. Such a dissent may signal that in the future the dissenting justice likely will be responsive to the claims raised in the petition.

If the Court grants a petition for *cert*, the clerk of the Court prepares and signs an order to that effect and notifies the attorneys and the court whose judgment will be reviewed. If the record below has not already been filed with the Supreme Court, the clerk will request the clerk of the lower court to certify and transmit it.

## Supreme Court Cases Filed and Accepted for Disposition 1980 to 2003



Once *cert* is granted, the Court can pursue several options. First, it may dispose of the case summarily on the merits without calling for briefing or oral argument. The Court has done this in an average of about 50 cases annually in recent terms. Summary disposition does not necessarily mean that the judgment of the lower court will be affirmed. In fact, summary reversals are more common. The implication of such a reversal is that a Court majority deems the lower court opinion so erroneous that briefing and argument would be a waste of time. Summary affirmances are less common and are issued, for example, when a number of related petitions are pending and a new decision of the Court will control the outcome of all. (Note: An affirmance after a grant of *cert* does have value as precedent.) After a grant of *cert*, the Court also may simply vacate, or set aside, the lower court decision and send the case back for reconsideration in light of an intervening Supreme Court ruling.

Alternatively, the Court may dispose of a case summarily by what is known as a *per curiam* (Latin for “by the court”) opinion. This may occur even before the parties have filed briefs or argued the case; they may not even be warned that their case may be decided on this basis. In these cases, the Court usually reverses the lower court—that is, decides in favor of the petitioner—but goes on to discuss the facts and issues of the case before deciding the case on its merits. The Court issued only five *per curiam* decisions in the 2003–2004 term.

In the remaining cases in which *cert* is granted each term, there will be formal briefing, oral argument, and eventually a decision by the Court. The cases the justices do decide to hear each year, those in which it grants *certiorari*, invariably result in decisions that have a profound impact on America and, for that reason, are followed by the public with the greatest interest. ■

*The opinions expressed in this article are those of the author.*

# ARGUING BROWN

JACK GREENBERG

*A 27-year-old lawyer was among the seven attorneys who persuaded the U.S. Supreme Court in 1954 that racial segregation is unconstitutional. That lawyer, Jack Greenberg, shares his experience as a participant in what was arguably the most important Court decision of the 20<sup>th</sup> century, and he reflects on the profound effect that Brown v. Board of Education has had on U.S. society. A professor of law at Columbia University in New York City, Greenberg is the author of several books, including Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994).*

**B**rown v. Board of Education, decided on May 17, 1954, is a landmark decision, certainly among the Supreme Court's most important. It demonstrates that judicial review, particularly by the Supreme Court of the United States, has potential for effecting vast social change. Brown contributed substantially to the transformation of American race relations. Brown's principle also has moved the country toward equality for women, handicapped persons, and older people, and it underlies all other claims to equal treatment. But when I, among a group of seven lawyers led by future Justice Thurgood Marshall, argued the case, we could not foresee how far-reaching it would be. We anticipated a victory would start a slow march toward eliminating school segregation. We had not imagined the fierce Southern resistance that would develop, the civil rights movement that arose in response, the civil rights legislation of the 1960s, and other radiating effects.

On December 9, 1952, and December 8, 1953, I stood before the Supreme Court of the United States to argue a case from Delaware, one of the five cases known as *Brown v. Board of Education*, or the School Segregation Cases. Our aim was to persuade the Supreme Court to overrule *Plessy v. Ferguson*, a case it had decided in 1896, which approved racial segregation so long as facilities

offered to blacks were equal to those for whites—the so-called separate-but-equal doctrine. I argued, along with Louis L. Redding, the only African-American lawyer in the entire state of Delaware, a case that arose in that state.

Why had we gone to court? Wasn't there a better way? In a democracy, one would think the right to vote would be enough to correct such grave injustices. But in that era, suffrage was for many African Americans an illusion. Southern legislators had achieved this result by outright refusal, trickery, illegal rule changes, and other stratagems. Elected and re-elected by all-white constituencies, they gained seniority and great influence in Congress and were positioned to stifle any possibility of legislative change.

We believed that the judicial branch offered a means of addressing this injustice. The U.S. Constitution provides for an independent judiciary, largely free of politics. It includes a Bill of Rights designed to protect the fundamental rights of all Americans from encroachment by their government, even when that government is elected by and reflects the wishes of the majority. Even so, *Brown* asked a lot of the judicial system. We demanded that a large part of the country put an end to racial segregation, a practice with roots that ran to the days of slavery.

We had two main lines of argument. First, separate schools rarely, if ever, were equal. Wherever black schools were inferior in tangible, measurable terms (buildings, grounds, funding, books, teachers, etc.), equal treatment required admission of the black plaintiffs into the better schools. This was a narrow argument, as it did not necessarily require ending segregation, just improving the African-American schools. But until the schools were equalized and stayed that way, blacks and whites had to go to the same schools. No court had ordered schools to be integrated on this basis.

Our second argument was that segregation was per se unconstitutional even if the separate schools really were equal.

Our case differed from the other four *Brown* suits in that we had prevailed in the Delaware courts, while plaintiffs in the South Carolina, Virginia, Kansas, and District of Columbia cases had lost. The Delaware courts had found that the black schools there were inferior and ordered their immediate desegregation. In light



of the *Plessy* decision, however, they declined to rule segregation unconstitutional. The state had appealed the desegregation order to the U.S. Supreme Court. The stakes thus were enormous, and I knew it.

I was 27 years old, had practiced law only since 1949, and was the most junior of the lawyers who argued that day. I did not know it then, but *Brown* would be the first of more than 40 times that I would argue a civil rights case before the Supreme Court, most coming after I succeeded Thurgood Marshall as director-counsel of the NAACP Legal Defense and Educational Fund (LDF) that had been created by the National Association for the Advancement of Colored People as its tax-exempt litigation arm. Not much later, the LDF spun off to become an independent organization.

It's almost impossible to imagine, but when I began practicing law in 1949, most African Americans lived in states where restaurants would not serve them, hotels would not admit them, trains and buses required that they sit in sections reserved for blacks only, department stores wouldn't allow them to try on clothes, labor unions required that they belong to separate locals, employers paid them less to do the most difficult, dirtiest jobs. While in theory black citizens had the right to vote, in practice throughout most of the South they did not, even though the post-Civil War constitutional amendments had abolished slavery, required that the states afford each American equal protection of the laws, and promised that no American would be denied the right to vote "on account of race, color, or previous condition of servitude."

### PREPARING FOR COURT

By the time *Brown* reached the Supreme Court we all were meticulously prepared. In the course of the state litigation, I studied carefully every aspect of the schools involved and the effects of segregation on the children who attended them. We had studied and analyzed the law and its history so many times that I could recite most of it in my sleep. At the Delaware and other trials, we put on extensive evidence about buildings, grounds, equipment, books, teachers, and so forth. Our witnesses were educators, psychologists, and a psychiatrist who testified about how segregation impaired learning by black children. Then Louis Redding and I argued in the state supreme court. We wrote extensive briefs for the U.S. Supreme Court. For days before the Supreme Court arguments we rehearsed before a pretend court of lawyers and law professors. Our colleagues in the other



Jack Greenberg, second from left, and NAACP chief counsel Thurgood Marshall, far right, argue a 1952 case in Florida. (Copyright © Bettmann/CORBIS)

cases engaged in similar preparation. I rehearsed for all my Supreme Court cases, and almost never did I get a question from the actual Supreme Court that had not been asked first by a role-playing justice.

A Supreme Court argument is very different from what is depicted on television or in the popular press. Before the argument, lawyers file written briefs, formal written arguments addressing the issues before the Court. As the lawyers argue the case, the Court has before it those briefs, the opinions of lower courts in the case, and the record of all the testimony and evidence that was before the trial court. Lawyers speak in conversational tones. They inform the Court about constitutional provisions, other laws and their history, precedents, the facts with which a case is concerned, consequences of a decision, and so forth. No shouting, no sound-bites, no arm-waving. It all sounds very rational, and usually it is. Occasionally some lawyers stray from this conventional, restrained format, but usually to their detriment. The justices can be counted on to ask questions—many questions—and to interrupt attorneys' answers with still more questions.

I wasn't nervous. I had done everything possible to prepare and thought that I knew everything there was to know as well as everything that might come up. Whether one is nervous is a function not only of the situation, but of individual personality. I don't become nervous in difficult situations. It's not a very good analogy, but the one that occurs to me comes out of my experience in World War II. I was on an LST (Landing Ship Tank) that took the first wave onto the beach at Iwo Jima. Perhaps I should have been nervous, but I wasn't. I had done everything I possibly could have done to prepare.

None of the justices was hostile to our side during

the arguments, but they probed relentlessly with questions. There were easily a hundred questions before arguments ended. As usual, the most persistent questioner was Justice Felix Frankfurter, a former law professor. Questions ranged from whether the meaning of equality could change over time to whether the Court should order immediate or gradual desegregation in the event it ruled with us. Since the Delaware plaintiffs had already been admitted to white schools, albeit on grounds of school inequality rather than the illegality of segregation, Louis Redding and I were asked why we sought a ruling on the segregation issue. I gave the obvious answer: segregation might return if the schools were equalized. It would make no sense to hold segregation unconstitutional in the other cases, but not Delaware. (As it turned out, the Court would hold segregation unconstitutional in all the cases, Delaware included.) When the argument ended I couldn't think of anything I should have said or done that I had failed to do.

### THE OPPOSITION

Our opponents were led by John W. Davis, the leading Supreme Court lawyer of his time. He had been Democratic Party candidate for president of the United States. He had argued hundreds of cases before the Court. He was head of the most powerful law firm in the United States. He made an excellent argument. Its essence was that the equal protection clause of the 14th Amendment could not have been intended to abolish school segregation. None of the debates in Congress demonstrated such intent. The Congress that adopted the 14th Amendment also appropriated funds to maintain segregated schools in the federally controlled District of Columbia. Some of the Northern states that ratified the amendment had segregated schools. As to legal precedents, Davis argued that the Court had on many occasions accepted the separate-but-equal doctrine. In the 1927 case, *Gong Lum v. Rice*, the Court upheld the constitutionality of segregated schools in Mississippi. But, of course, Davis had to cope with the fact that constitutional concepts evolve. As one of the justices pointed out, something deemed equal in 1865 might not be so considered in 1952. Davis's precedents were not precisely on point, and he had a hard time distinguishing recent cases that struck down racial segregation in graduate and professional school education because of the educational value of attending classes with a diverse population.

Davis made one grand rhetorical error. He recalled



Jack Greenberg, center, with his NAACP Legal Defense Fund colleagues—the team that argued *Brown v. Board of Education*—in front of the Supreme Court. Thurgood Marshall is fourth from right. (Courtesy NAACP Legal Defense and Educational Fund, Inc.)

Aesop's fable of the dog that, in crossing a stream, dropped a piece of meat in a greedy attempt to seize another, only to learn it was a mere reflection of the now-lost original. Davis admonished us to be content with the equality that existed or soon would exist between black and white schools and not throw it away simply to achieve "prestige." Thurgood Marshall seized on the allegory and argued forcefully that "prestige" was precisely the issue at stake. Segregation stigmatized and marginalized blacks. Equality required that the state afford them the same prestige it did other citizens.

After the argument we all thought we had won, but weren't sure that the Court's decision would be unanimous. As records of the Court's deliberations now show, all of the justices believed that segregation was unconstitutional. But several were reluctant to make such a ruling because they feared resistance by the South. They did not want to risk the Court's credibility by issuing a decision that it could not enforce. To deal with this problem, the Court decided to separate the decision on constitutionality of segregation from the question of how to implement such a decision. In 1954 it held segregation unconstitutional. In 1955 it laid down standards by which schools should be desegregated.

### THE DECISION

Thurgood Marshall got a tip—maybe from the clerk's office, but no one will ever know—that the cases would be decided on May 17, 1954. Possibly, since it was near the end of the Court's term, he merely took a chance and went to court that day. Indeed, that was decision day. He called me in the office and I informed other

staff members. Usually, whenever we won a big case there would be an office celebration. But *Brown* was so awesome, we just stood or sat around and said and did little or nothing. Of course, there were many press conferences on that day and those that followed.

The Court had indeed unanimously ruled school segregation unconstitutional. In his written opinion, Chief Justice Earl Warren held that the historical arguments were inconclusive but accepted our view of recent legal precedents requiring the admission of African-American applicants to graduate and professional schools. The Court also emphasized the harmful effects of segregation:

Separation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

But *Brown* reached far beyond the public schools. As soon became evident in cases involving other aspects of life, the Court intended to prohibit all state-imposed segregation.

One sub-theme of the oral arguments was whether the South would comply with a court order to desegregate. Some predicted outright resistance and even violence. Indeed, it had been possible that one or more justices would dissent for fear that such an outcome might risk the Court's institutional standing and credibility. To separate the question of implementation, the Court scheduled a separate argument on the question of how to desegregate. That was decided in 1955 in an opinion often called *Brown II*. In *Brown II*, the Court held that hostility to desegregation would not justify delay, but that school districts could take some time to make administrative changes, such as reassigning teachers and students. In a phrase that signaled recognition of these difficulties, the *Brown II* Court ruled that desegregation must proceed with "all deliberate speed."

There has been much debate over whether those words allowed opponents to slow the pace of desegregation. I think not. No language in the implementation



Thurgood Marshall, the first African-American justice of the U.S. Supreme Court, served from 1967 to 1992. As head of the NAACP legal defense team, Marshall had led the argument for *Brown v. Board of Education*. (AP/WWP Photo)

decision could have overcome the fierce reaction against *Brown* by those states where laws had required racial segregation. Enforcement resources were meager. All Southern congressmen and senators but three (Lyndon Johnson, Albert Gore Sr., and Estes Kefauver) signed the Congressional Southern Manifesto that denounced the Supreme Court. Eleven Southern states adopted Resolutions of Interposition and Nullification (similar to resolutions they adopted at the beginning of the Civil War). A number of Southern states created State Sovereignty Commissions, government agencies dedicated to fighting desegregation. Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia passed laws requiring that schools be closed should they admit black children. Arkansas repealed its compulsory school attendance law.

Some states commenced legal action against the National Association for the Advancement of Colored People and the NAACP Legal Defense Fund to limit their activities or to prevent them from functioning—a tactic blocked by two important Supreme Court decisions. State bar officials commenced disbarment proceedings against civil rights lawyers in Virginia, Mississippi, Florida, and elsewhere—efforts that were frustrated by vigorous defense. States trying to block desegregation passed Pupil Placement or Pupil Assignment laws requiring that black

children go through complex administrative procedures in order to change schools. Some black families who had the courage to seek desegregation were attacked physically, fired from jobs, or denied credit for their farms and businesses, strategies designed to intimidate others.

There were almost no resources to fight these attacks and to seek school desegregation too. During part of the school desegregation struggle, Delaware, Alabama, and Louisiana each had only a single black lawyer, and other Southern states had no more than a handful—the consequence of a near-total ban on blacks obtaining graduate or professional degrees from an accredited institution anywhere in the South until 1950. (Even after *Brown*, as late as the 1960s, litigation was required to admit blacks to universities in Mississippi, Georgia, Alabama, and South Carolina. The U.S. Department of Justice did not have authority to seek school desegregation until 1964.)

### **FAR-REACHING EFFECTS**

Even so, in time *Brown* accomplished its ambitious goals. These were not only to end school segregation but also, in the words of Nathan Margold, a former U.S. attorney who in 1931 advised the NAACP to challenge the underfunding of black schools as a violation of the 14<sup>th</sup> Amendment's equal protection clause, to “stir the spirit of revolt” among African Americans. *Brown* helped inspire the civil rights movement: sit-ins (blacks sitting at whites-only lunch counters, refusing to move until served), Freedom Rides (blacks and whites sitting in forbidden sections of trains and buses with blacks in the front seats reserved for whites), a series of marches led by Martin Luther King Jr.

The courts protected the demonstrators almost uniformly. Public protest worked intimately with legal action to bring about the Civil Rights Act of 1964 and similar laws of the mid-1960s. While *Brown* did not solve the nation's racial problems, it was in most respects a great success. Many beneficial social changes can be traced at least in part to *Brown*. As a result of the Voting Rights Act of 1965, there are currently 43 (more or less,

year to year) black members of Congress. The mayors of many, if not most, large cities are or have been black. Public accommodations throughout the country are equally open to blacks and whites and patronized freely by all. A few years ago I sat in a restaurant in Memphis, Tennessee, and observed an interracial couple holding hands at a nearby table. Before the 1964 Civil Rights Act transformed public accommodations, there was a good chance that this young black man would have been harassed or assaulted.

Equal employment has increasingly become a reality. There no longer exist racially segregated union locals. Fair housing laws are somewhat effective and would be more so if blacks were not limited by lower incomes. There are black CEOs at major American corporations like Time Warner, Xerox, Citibank, Merrill Lynch, and American Express. When I began my legal practice in 1949, there were states with only a single black lawyer, and the black bar was infinitesimally small. In those days nowhere in the South could a black get a graduate or professional degree from an accredited school, with the exception of Howard University in Washington, D.C., and Meharry Medical School in Nashville, Tennessee. In the North, while there was no formal prohibition, opportunities for blacks were limited. There was no American black student in my Columbia Law School class of 1948 and only one in my college class of 1945. Now there are more than 10,000 black law students. Some 17 percent of African Americans hold a college degree.

None of this is to imply that full equality has been achieved. Data on income, wealth, health, and incarceration, to name a few indicators, confirm that in many ways the lives of blacks are not as good as that of whites. Nevertheless, *Brown* continues to stand for Americans' determination to live up to the ideals of their Constitution and for the proposition that our Supreme Court can be a catalyst for fundamental change. And, of course, that enormous change has occurred. ■

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*The opinions expressed in this article are those of the author.*

# LANDMARK DECISIONS



A cartoon illustrates that while the Court pays great respect to legal precedent, it also interprets the law in light of contemporary conditions. (Source Unknown)

*“The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”*

— Louis D. Brandeis, Associate Justice of the U.S. Supreme Court,  
*Burnet v. Coronado Oil and Gas Co.*, 1932

Since the U.S. Supreme Court first convened in 1790, it has rendered thousands of opinions on everything from the powers of government to civil rights and freedom of the press. Although many of these decisions are little known and of little interest to the general public, several stand out because of the impact they have had on American history. A few of the most significant cases are summarized here.

## **MARBURY V. MADISON (1803)**

Often called the most important decision in the history of the Supreme Court, *Marbury v. Madison* established the principle of judicial review and the power of the Court to determine the constitutionality of legislative and executive acts.

The case arose from a political dispute in the aftermath of the presidential election of 1800 in which Thomas Jefferson, a Democratic-Republican, defeated the incumbent president, John Adams, a Federalist. In the closing days of Adams’s administration, the Federalist-dominated Congress created a number of judicial positions, including 42 justices of the peace for the District of Columbia. The Senate confirmed the

appointments, the president signed them, and it was the responsibility of the secretary of state to seal the commissions and deliver them. In the rush of last-minute activities, the outgoing secretary of state failed to deliver commissions to four justices of the peace, including William Marbury.

The new secretary of state under President Jefferson, James Madison, refused to deliver the commissions because the new administration was angry that the Federalists had tried to entrench members of their party in the judiciary. Marbury brought suit in the Supreme Court to order Madison to deliver his commission.

If the Court sided with Marbury, Madison might still have refused to deliver the commission, and the Court had no way to enforce the order. If the Court ruled against Marbury, it risked surrendering judicial power to the Jeffersonians by allowing them to deny Marbury the office he was legally entitled to. Chief Justice John Marshall resolved this dilemma by ruling that the Supreme Court did not have authority to act in this case. Marshall stated that Section 13 of the Judiciary Act, which gave the Court that power, was unconstitutional because it enlarged the Court's original jurisdiction from the jurisdiction defined by the Constitution itself. By deciding not to decide in this case, the Supreme Court secured its position as the final arbiter of the law.

### **GIBBONS V. OGDEN (1824)**

The first government of the United States under the Articles of Confederation was weak partly because it lacked the power to regulate the new nation's economy, including the flow of interstate commerce. The Constitution gave the U.S. Congress the power "to regulate commerce ... among the several states. ...," but that authority was challenged frequently by states that wanted to retain control over economic matters.

In the early 1800s, the state of New York passed a law that required steamboat operators who traveled between New York and New Jersey to obtain a license from New York. Aaron Ogden possessed such a license; Thomas Gibbons did not. When Ogden learned that Gibbons was competing with him, and without permission from New York, Ogden sued to stop Gibbons.

Gibbons held a federal license to navigate coastal waters under the Coasting Act of 1793, but the New York State courts agreed with Ogden that Gibbons had violated the law because he did not have a New

York State license. When Gibbons took his case to the Supreme Court, however, the justices struck down the New York law as unconstitutional because it infringed on the U.S. Congress's power to regulate commerce. "The word 'to regulate' implies, in its nature, full power over the thing to be regulated," the Court said. Therefore, "it excludes, necessarily, the action of all others that would perform the same operation on the same thing."

### **NATIONAL LABOR RELATIONS BOARD (NLRB) V. JONES & LAUGHLIN STEEL CORP. (1937)**

While *Gibbons v. Ogden* established the supremacy of Congress in regulating interstate commerce, *NLRB v. Jones & Laughlin* extended congressional authority from regulation of commerce itself to regulation of the business practices of industries that engage in interstate commerce.

Jones & Laughlin, one of the nation's largest steel producers, violated the National Labor Relations Act of 1935 by firing 10 employees for engaging in union activities. The act prohibited a variety of unfair labor practices and protected the rights of workers to form unions and to bargain collectively. The company refused to comply with an NLRB order to reinstate the workers. A Circuit Court of Appeals declined to enforce the board's order, and the Supreme Court reviewed the case.

At issue in this case was whether or not Congress had the authority to regulate the "local" activities of companies engaged in interstate commerce—that is, activities that take place within one state. Jones & Laughlin maintained that conditions in its factory did not affect interstate commerce and therefore were not under Congress's power to regulate. The Supreme Court disagreed, stating that "the stoppage of those [manufacturing] operations by industrial strife would have a most serious effect upon interstate commerce. ... Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." By upholding the constitutionality of the National Labor Relations Act, the Supreme Court handed a victory to organized labor and set the stage for more far-reaching regulation of industry by the federal government.



Ernesto Miranda, right, with his attorney. (Copyright © Bettmann/CORBIS)

### **BROWN V. BOARD OF EDUCATION (1954)**

Prior to this historic case, many states and the District of Columbia operated racially segregated school systems under the authority of the Supreme Court's 1896 decision in *Plessy v. Ferguson*, which allowed segregation if facilities were equal. In 1951 Oliver Brown of Topeka, Kansas, challenged this "separate-but-equal" doctrine when he sued the city school board on behalf of his eight-year-old daughter. Brown wanted his daughter to attend the white school that was five blocks from their home, rather than the black school that was 21 blocks away. Finding the schools substantially equal, a federal court ruled against Brown.

Meanwhile, parents of other black children in South Carolina, Virginia, and Delaware filed similar lawsuits. Delaware's court found the black schools to be inferior to white schools and ordered black children to be transferred to white schools, but school officials appealed the decision to the Supreme Court.

The Court heard arguments from all these cases at the same time. The briefs filed by the black litigants included data and testimony from psychologists and social scientists who explained why they thought segregation was harmful to black children. In 1954 a unanimous Supreme Court found that "... in the field of education the doctrine of 'separate but equal' has no place," and ruled that segregation in public schools denies black children "the equal protection of the laws guaranteed in the Fourteenth Amendment."

### **GIDEON V. WAINWRIGHT (1963) MIRANDA V. ARIZONA (1966)**

Two Supreme Court decisions in the 1960s supported the rights of persons accused of committing crimes.

Clarence Earl Gideon was arrested for breaking into a poolroom in Florida in 1961. When he requested a court-appointed lawyer to defend him, the judge denied his plea, saying that state law required appointment of a lawyer only in capital cases—cases involving a person's death or calling for the death penalty. Gideon defended himself and was found guilty. While in prison, he spent hours in the library studying law books and handwriting a petition to the Supreme Court to hear his case. The Court decided that Gideon was denied a fair trial and ruled that every state must provide counsel for people accused of crimes who cannot afford to hire their own. When Gideon was retried with the help of a defense attorney, he was acquitted.

Just three years later the Supreme Court decided that the accused should have the right to counsel long before they get to a courtroom. Ernesto Miranda was convicted in a state court in Arizona of kidnapping and rape. His conviction was based on a confession Miranda gave to police officers after two hours of questioning, without being advised that he had the right to have an attorney present. In its ruling the Supreme Court required that police officers, when making arrests, must give what are now known as Miranda warnings—that suspects have the right to remain silent, that anything they say may be used against them, that they can have a lawyer present during questioning, and that a lawyer will be provided if they cannot afford one.

*Miranda v. Arizona* is one of the Supreme Court's best known decisions, as Miranda warnings are dramatized routinely in American movies and television programs. However, in 1999 a federal court of appeals challenged the decision in the case of *Dickerson v. United States*, in which a convicted bank robber claimed he had not been properly read his rights. In June 2000, the Supreme Court overturned *Dickerson* in a 7-to-2 ruling that strongly reaffirmed the validity of *Miranda*.

### **NEW YORK TIMES CO. v. SULLIVAN (1964)**

The First Amendment to the U.S. Constitution guarantees freedom of the press, but for years the Supreme Court refused to use the First Amendment to protect the media from libel lawsuits—lawsuits based on the publication of false information that damages a person's reputation. The Supreme Court's ruling in *New York Times Co. v. Sullivan* revolutionized libel law in the United States by deciding that public officials could not sue successfully for libel simply by proving that published information is false. The Court ruled that the complainant also must prove that reporters or editors acted with "actual malice" and published information "with reckless disregard of whether it was false or not."

The case arose from a full-page advertisement placed in the *New York Times* by the Southern Christian

Leadership Conference to raise money for the legal defense of civil rights leader Martin Luther King Jr., who had been arrested in Alabama in 1960. L.B. Sullivan, a city commissioner in Montgomery, Alabama, who was responsible for the police department, claimed that the ad libeled him by falsely describing the actions of the city police force. Sullivan sued the four clergymen who placed the ad and the *New York Times*, which had not checked the accuracy of the ad.

The advertisement did contain several inaccuracies, and a jury awarded Sullivan \$500,000. The *Times* and the civil rights leaders appealed that decision to the Supreme Court, and the Court ruled unanimously in their favor. The Court decided that libel laws cannot be used "to impose sanctions upon expression critical of the official conduct of public officials," and that requiring critics to guarantee the accuracy of their remarks would lead to self-censorship. The Court found no evidence that the *Times* or the clergymen had malicious intent in publishing the ad. ■

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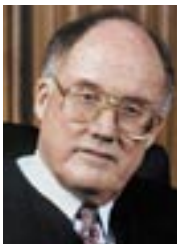


# THE SUPREME COURT JUSTICES



Photograph by Richard Strauss, Smithsonian Institution, Collection of the Supreme Court of the United States.

Official portrait of the current justices of the U.S. Supreme Court. Front row, left to right: Antonin Scalia, John Paul Stevens, Chief Justice William H. Rehnquist, Sandra Day O'Connor, and Anthony M. Kennedy. Back row, left to right: Ruth Bader Ginsburg, David Hackett Souter, Clarence Thomas, and Stephen G. Breyer. Complete biographies of the justices can be found on the Supreme Court's Web site at <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.



Chief Justice William H. Rehnquist was born in Milwaukee, Wisconsin, in 1924. He received a law degree from Stanford University in California; practiced law in Phoenix, Arizona, and served as assistant attorney general of the United States from 1969 to 1971. President Richard Nixon nominated Rehnquist to the Supreme Court, and he took his seat as an associate justice in 1972; in 1986, President Ronald Reagan nominated Rehnquist to be chief justice.



Associate Justice John Paul Stevens was born in Chicago, Illinois, in 1920. He received a law degree from Northwestern University in Chicago, practiced law in Illinois, and served as a judge of the U.S. Court of Appeals for the Seventh Circuit from 1970 to 1975. President Gerald Ford nominated Stevens as an associate justice of the U.S. Supreme Court, and he took his seat in 1975.



Associate Justice Sandra Day O'Connor was born in El Paso, Texas, in 1930. She received a law degree from Stanford University in California and practiced law in Arizona, where she served as assistant attorney general, a state senator, and a judge of the Maricopa County Superior Court and the Arizona Court of Appeals. President Ronald Reagan nominated O'Connor, the first woman to serve on the Supreme Court, as an associate justice, and she took her seat in 1981.



Associate Justice Antonin Scalia was born in Trenton, New Jersey, in 1936. He received a law degree from Harvard University in Cambridge, Massachusetts, and was a lawyer, a professor of law, and a government official before being appointed a judge of the U.S. Court of Appeals for the District of Columbia Circuit in 1982. President Ronald Reagan nominated Scalia, and he took his seat on the U.S. Supreme Court in 1986.



Associate Justice Anthony M. Kennedy was born in Sacramento, California, in 1936. He received a law degree from Harvard University in Cambridge, Massachusetts; practiced law in San Francisco and Sacramento, California; and was appointed as a judge of the U.S. Court of Appeals for the Ninth

Circuit in 1975. President Ronald Reagan nominated Kennedy to the U.S. Supreme Court, and he took his seat as an associate justice in 1988.



Associate Justice David Hackett Souter was born in Melrose, Massachusetts, in 1939. He received a law degree from Harvard University in Cambridge, Massachusetts; served as an assistant attorney general, deputy attorney general, and the attorney general of the

state of New Hampshire; and was an associate justice of the Superior Court of New Hampshire and of the Supreme Court of New Hampshire. President George H.W. Bush nominated Souter to be an associate justice of the U.S. Supreme Court, and he took his seat in 1990.



Associate Justice Clarence Thomas was born near Savannah, Georgia, in 1948. He received a law degree from Yale University in New Haven, Connecticut; worked as a private attorney and in government positions, including chairman of the U.S. Equal

Employment Opportunity Commission; and became a judge of the U.S. Court of Appeals for the District of Columbia Circuit in 1990. President George H.W. Bush nominated Thomas to the U.S. Supreme Court, and he took his seat as an associate justice in 1991.



Associate Justice Ruth Bader Ginsburg was born in Brooklyn, New York, in 1933. She received a law degree from Columbia University in New York City, was a professor of law and the general counsel of the American Civil Liberties Union, and was appointed a judge of the U.S. Court of Appeals for

the District of Columbia Circuit in 1980. President Bill Clinton nominated Ginsburg to be an associate justice of the U.S. Supreme Court, and she took her seat in 1993.



Associate Justice Stephen G. Breyer was born in San Francisco, California, in 1938. He received a law degree from Harvard University in Cambridge, Massachusetts; worked in government and academia; and served as a judge of the U.S. Court of Appeals for the First

Circuit from 1980 to 1990, and as its chief judge from 1990 to 1994. President Bill Clinton nominated Breyer to the U.S. Supreme Court, and he took his seat as an associate justice in 1994. ■

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# WORKING BEHIND THE SCENES

The U.S. Supreme Court employs 10 officers who assist the Court in the performance of its functions. Here we present first-person accounts by four of the officers currently serving the Court: the clerk, the marshal, the reporter of decisions, and the public information officer. The officers discuss their roles in the administration of the Court and their feelings about their jobs. The other court officers are the administrative assistant to the chief justice, the librarian, the director of budget and personnel, the court counsel, the curator, and the director of data systems.



**William K. Suter**  
Clerk

William K. Suter became the 19<sup>th</sup> clerk of the U.S. Supreme Court in 1991. Previously, he was a career officer and a lawyer in the U.S. Army; he retired with the rank of major general. He is a graduate of Trinity University in San Antonio, Texas, and the Tulane University School of Law in New Orleans, Louisiana.

**A**s I was completing a career in the Army as a judge advocate and nearing the end of my term of service, I learned that the clerk's position was coming open at the U.S. Supreme Court. I applied and was offered the job two days after my interview. That was 14 years ago, and every day has been a wonderful day since I was appointed the 19th clerk of the Court.

The job of a clerk essentially is to be the conduit between lawyers, litigants, the people, and the Court.

Every court that I know of in the world has a clerk. In Canada, she's called the registrar. In Brazil, he's called the secretary general. All over Europe and Asia, every court has a clerk.

Here at the U.S. Supreme Court, when you come to file a suit, an appeal, or a petition, you don't go to see someone wearing a robe; you see the clerk or one of his or her designees, and they handle the legal paperwork. Here at the Court there are 32 of us, including highly trained paralegals, non-paralegals, and attorneys, who do the work of gathering documents and ensuring that cases are eligible to be heard by the Court and are filed in a timely manner. We prepare the documents so that the justices are able to use them to make decisions regarding the parties.

I also have other ceremonial roles in the court. For example, I attend all full argument sessions of the Court; I'm seated at one end of the bench, and the marshal of the Court is seated on the other end. We're there to provide any assistance the justices might need. Also, when motions are made for lawyers to be admitted to the Supreme Court—to do any business with this Court, you must be a member of our bar—the chief justice entertains and grants the motion, and then I administer the oath of office to new members of the bar.

I've listened to more than 1,000 oral arguments during my time here, and even though lawyers who appear before the Supreme Court have studied and practiced their arguments for hundreds of hours, they're still very nervous because they're facing nine exceptionally bright justices who have read the briefs thoroughly and have prepared dozens of questions.

We try to assist the lawyers so that they're not any more nervous than they are naturally, arguing in front of the Supreme Court, and I've written a booklet to advise counsel on the things I recommend they do—and things I recommend they not do. In any event, the oral argument is lawyering at its best.

The current Supreme Court justices are in their 11th term together, and this Court continues to be driven by

two things: tradition and discipline. An example of the tradition of the Court is the morning suit, comprised of tails and striped pants, that the marshal of the Court and I wear whenever we're in Court, and that all clerks and marshals have worn before us. In terms of discipline, there is no such thing as a big case or a small case at the Supreme Court; all cases are important, and no one gets emotionally involved in a case. You do your job.

Being a student of the law for many years, a lawyer, and an American, and always having had great respect for our legal system and for the Supreme Court, just entering this building every morning makes me feel worthwhile. I think we all share a sense of mission that we're here to do the work for the Court to fulfill its constitutional mission for the people.



**Pamela Talkin**  
Marshal

Pamela Talkin is the 10<sup>th</sup> marshal of the U.S. Supreme Court and the first woman to hold the position. She earned bachelor's and master's degrees in Spanish from the City University of New York at Brooklyn College and previously served as the deputy executive director of the U.S. Office of Compliance, a regulatory agency.

**I**oversee the security, operations, and maintenance of the Supreme Court building. My most visible role is to attend all sessions of the Court to fulfill the responsibility of “crying” the Court when it is in session from October through June. Before court begins, I bang the gavel—I’m the only person in the courtroom with a gavel—introduce the nine justices and open the Court with the official opening cry of the Court, part of which is “Oyez! Oyez! Oyez!”

I am the first woman marshal and only the 10th marshal that the Court has ever had. All of my predecessors have worn formal attire, and when I became marshal, there was no doubt that I would wear the same

thing that all the men had always worn when attending sessions of the Court: a formal morning suit with tails, pinstriped slacks, and a vest.

One of my most important jobs is ensuring the security of the Court. I manage the Court’s independent police force as they protect the building and provide security for the justices, other court employees, and visitors. About eight weeks after I took the job as marshal, the September 11, 2001, terrorist attacks on the United States occurred. In terms of the safety and security of the Court, that event changed the way we all looked at security and access to public places.

Another one of my main functions is to “attend the Court,” which means that I am responsible for escorting the justices to Congress for the State of the Union address, to presidential inaugurations and state funerals, and to other official functions, as well as for ensuring their security at those events. Further, my office coordinates most of the approximately 1,000 lectures, receptions, dinners, and other events that take place annually at the Supreme Court.

Because of the importance of the Supreme Court in this country, and in our constitutional framework, this is a wonderful place to work day-to-day. All the people here are extraordinarily professional, confident, and smart. Each day brings something new, and the Court and the justices are doing something wonderful as part of a long tradition. Every day, tourists visit the court building, which is not only a wonderful physical structure but also an extraordinary symbol of its philosophical and political role.

One of the big surprises to me is that, despite the importance of the justices and some of the other people who work here, the Supreme Court is not a rigidly hierarchical institution. We all have respect for the institution and the institutional positions people occupy, and everyone is quite warm and egalitarian in dealing with one another.



**Frank Wagner**  
Reporter of Decisions

Frank Wagner became the 15<sup>th</sup> reporter of decisions at the U.S. Supreme Court in 1987. He is a graduate of Cornell University in Ithaca, New York, and Dickinson School of Law in Carlisle, Pennsylvania. Previously, he worked as an attorney and legal editor:

**M**y primary job is to publish all of the legal opinions that the Court hands down in a volume of books called the *United States Reports*. These volumes are an official publication of the Court.

Before the court issues an opinion, my staff and I carefully examine each opinion for accurate citations and quotations, and for typographical and grammatical errors. We also produce short analytical summaries of the opinions. An attorney and a paralegal in this office read every draft of every opinion in all cases prior to their release.

I'm the 15<sup>th</sup> reporter of decisions of the Supreme Court since 1789. Alexander Dallas was the first, and he reported from the first moments that the Court conducted business in 1789. He was not a Court employee but an entrepreneur who took careful notes and then sold his notes of what happened at the Court to the public. Today, my position is one of five positions at the Court that has been created by the law.

Any attorney who comes to the Supreme Court to argue a case uses our reports to accurately study what the Court has decided in all cases over the years. Much of the interplay during the oral argument involves the justices asking attorneys to distinguish their argument from what the Court decided in other cases. The difference in the placement of a comma can change the legal meaning of a ruling. If you are arguing a case at the Supreme Court, you must know exactly what the Court has said. Attorneys, judges, and law professors use our reports.

A foreign visitor a few years ago asked me how the Court keeps the press and others from misrepresenting decisions by the Court. The answer is that we prepare official reports of the decisions and disseminate them as quickly as possible in print and on the Internet.

The computerization of Court records has changed my job significantly over the years. Before, people would have to wait at least three or four days to get a paper copy of each individual Court opinion. Today, we take the electronic image of the Court's decision and put it up on our own Web site within a couple of hours of its issuance so that anybody anywhere in the world interested in the case can read for themselves what the Court has said.

Before coming to the Supreme Court, I was a legal editor at a publishing company and edited various sets of law books, including the commercial version of the Supreme Court reports that I produce today. I studied English in college and then attended law school. When I left law school, I wanted a job that would allow to me use both my English studies and my law degree. When this job became available, I applied and was offered what I consider the ultimate legal-editing job. I have been here for 18 years and hope to be here until I retire.



**Kathleen Landin Arberg**  
Public Information Officer

Kathleen Landin Arberg became the fifth public information officer of the U.S. Supreme Court in 1999. She is a graduate of the University of Virginia and previously worked as a motions clerk at the U.S. Court of Appeals for the Fourth Circuit, a paralegal in U.S. Tax Court, and a case manager at the U.S. Bankruptcy Court.

**I** am the public information officer at the U.S. Supreme Court and the fifth person to hold the position, which was created in 1935. The chief justice at the time realized that the Court opinions were being reported inaccurately by the media, or not reported at all.

To correct the problem, the Public Information Office was established to be the source for information about the Court and a point of contact for reporters and the public.

I serve as the Court's spokeswoman. My primary responsibilities are to educate the public about the history and function of the Court, to release the Court's orders and opinions from my office at the same time that they are announced by the justices in the courtroom, and to facilitate accurate and informed media coverage.

The Supreme Court press corps is comprised of approximately 35 people from 18 news organizations who are assigned to cover the Court on a full-time basis. But for high-profile cases, more than 100 reporters might come to the Court. The Court provides a pressroom for reporters to use. Journalists who cover the Court on a regular basis are given assigned spaces to work. The Court provides broadcast booths suitable for television and radio reporters to use.

Because there are no cameras allowed in the courtroom, artists' sketches are used to illustrate oral arguments. But, after oral arguments, reporters and camera crews gather on the marble plaza in front of the court building to interview the attorneys associated with the case.

Until the opinions are announced by the justices at 10 a.m., no one knows in advance what they will be, so there's an element of suspense. This is especially true near the end of the term when it is typical for the more highly anticipated cases of the term to be decided.

My office organizes the opinions in the order that they will be announced in the courtroom. They are announced in order of the seniority of the justice who wrote the opinion.

We listen to the announcements of the Court on speakers in my office and hand out the opinions one at a time as they are announced in the courtroom. The justice who wrote the opinion briefly summarizes the facts of the case and the Court's decision. Some reporters listen in my office so they can obtain copies of the opinions immediately and start writing stories. Other reporters choose to hear the announcements in the courtroom, where they sit in a section of seats reserved for members of the press.

The Public Information Office never comments on an opinion or attempts to explain an opinion, because the opinions of the Court speak for themselves. We will, however, provide guidance to journalists by pointing them in the direction of resources or people outside the Court who might be helpful, such as the attorneys who argued the case or constitutional law experts. ■

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*The opinions expressed are those of the authors.*

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# INTERNET RESOURCES

## Online resources for information about the U.S. Supreme Court

CNN Supreme Court Information

<http://www.cnn.com/LAW/scotus/archive/>

The Curiae Project

<http://curiae.law.yale.edu/>

Landmark Supreme Court Cases

<http://www.landmarkcases.org/>

National Constitution Center

<http://www.constitutioncenter.org/>

On the Docket

<http://docket.medill.northwestern.edu/>

Oyez: U.S. Supreme Court Multimedia

<http://www.oyez.org/oyez/frontpage>

The Supreme Court: A Journey Through Time

<http://www.courtstv.com/archive/multimedia/supremecourt/>

Supreme Court Collection

<http://supct.law.cornell.edu/supct/>

Supreme Court Fellows Program

<http://www.fellows.supremecourtus.gov/index.html>

Supreme Court Historical Society

<http://www.supremecourthistory.org/>

Supreme Court Preview (ABA)

<http://www.abanet.org/publiced/preview/home.html>

Supreme Court Primer (ABA)

<http://www.abanet.org/publiced/preview/scprimer.pdf>

Supreme Court Web Site

<http://www.supremecourtus.gov/>

United States Supreme Court Monitor

<http://www.law.com/jsp/scm/index.jsp>

Washington Post Supreme Court Page

<http://www.washingtonpost.com/wp-dyn/nation/courts/supremecourt/>

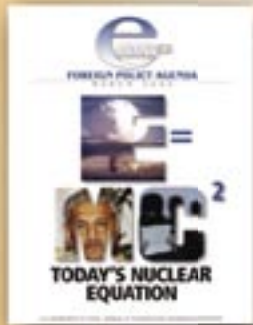
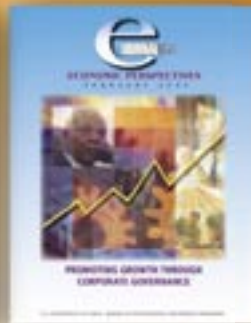
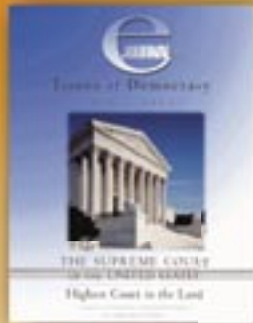
Web Guide to U.S. Supreme Court Research

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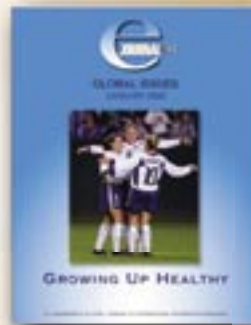
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