



The Courts and The Judiciary

Part IV

The interpretation of the law is the proper and peculiar province of the courts. A constitution is, and must be regarded by judges as, fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Alexander Hamilton
Federalist Papers No. 78

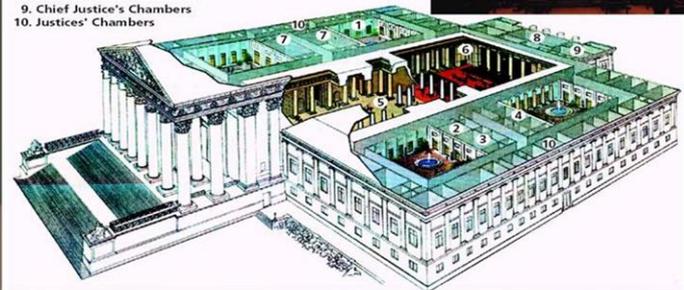
Supreme Court Duties: Briefs and Oral Arguments



- Cases that are granted *cert* are scheduled for oral argument.
- Oral argument occurs about 3 months after a case has been chosen for review although sometimes, this time limit is cut in half.
- When in session, the Court alternates between 2 weeks of oral argument Monday to Thursday, then 2 weeks of recess for opinion writing and study of petitions for *certiorari*. During the former, the Court generally hears two one-hour oral arguments a day.
- Weeks before the case is heard, attorneys for each side submit briefs to justices, who read briefs prior to argument and become familiar with the case, its facts and the legal positions each side is advocating.

Inside The Supreme Court Building

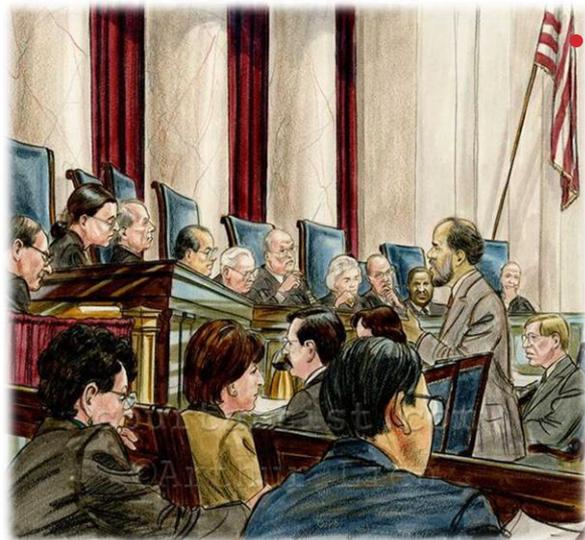
1. Courtyards
2. Solicitor General's Office
3. Lawyers' Lounge
4. Marshall's Office
5. Main Hall
6. Court Room
7. Conference and Reception Rooms
8. Justices' Conference Room
9. Chief Justice's Chambers
10. Justices' Chambers



Supreme Court Duties: Briefs and Oral Arguments



- **brief**: written legal document presented to the Court arguing why one party to a particular case should prevail
- Attorneys on both sides of case submit briefs but, in addition, ***amicus curiae* briefs** are presented by any group with an interest in the case.
- An *amicus curiae* (literally, friend of the court) is someone who is not a party to a case, offers information that bears on the case and has not been asked by any of the parties to assist.



- A bench memorandum is usually prepared to highlight background info and questions to ask of attorneys in the case.

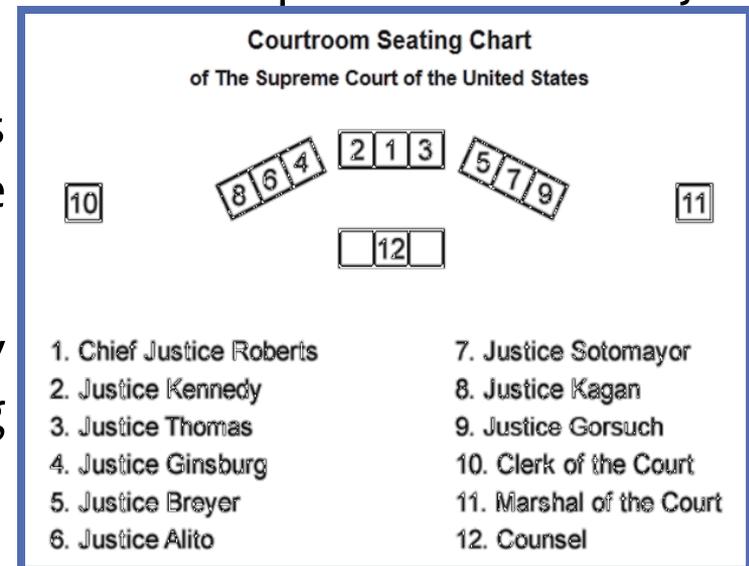
- **bench memo**: short, neutral memo written by law clerk which summarizes the facts, issues and arguments of a court case

civil rights attorney NAACP Legal Defense Fund president
John Payton arguing before the Supreme Court in *Gratz v.
Bollinger*, April 1, 2003

Supreme Court Duties: Briefs and Oral Arguments



- Justices listen to oral arguments in **plenary session** (all justices attending).
 - Attorneys for each side (counsel) have a half hour to make their best legal case directly to the justices. Most of this time, however, is usually spent **answering justices' questions**. Justices tend to view oral arguments as a forum for answering any questions that the justices may have developed while reading the briefs.
 - A presenting attorney must be prepared to handle questions from any of the nine justices.
 - Audio recordings of all oral arguments heard by the Court are available to the public [here](#).
- Justices also have the option to summarily reverse (overturn) a lower court ruling without hearing any oral arguments.



Supreme Court Duties: Deciding Cases

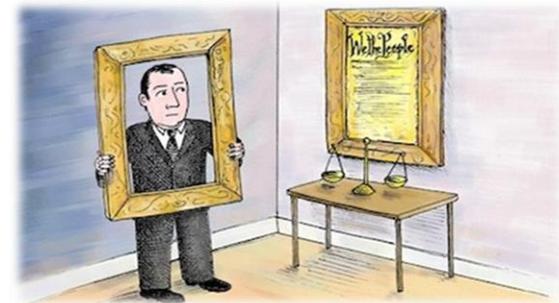


- When oral arguments are concluded, justices have to decide the case. They reach *preliminary decisions* in private conference after oral arguments.
- Before going into conference, justices frequently discuss relevant cases with their *law clerks*, seeking to get different perspectives on the case. At the end of these discussions, justices sometimes have a good idea how they will vote.
 - Justices discuss cases heard on Mondays and Tuesdays at their Wednesday afternoon conference.
 - Justices discuss cases heard on Wednesday at their Friday afternoon conference.
 - When Court is not in session, usually only a Friday conference is held.

Supreme Court Duties: Deciding Cases



- In conference, after their cert writ discussion, justices share views and preliminary votes on argued cases in order of seniority.
- According to Supreme Court protocol, all justices have an opportunity to state their views on the case and raise any questions or concerns they may have. Each Justice speaks without interruption by the others.
- Some cases may take two or more conferences to reach a decision.
- This discussion of the case now constitutes the **preliminary non-binding vote** on the case. The purpose of the conference vote and discussion is to determine the view of the majority of the Court.



Supreme Court Duties: Deciding Cases



- written **opinion**: statement of the legal reasoning that supports the decision of the Court
- see [Anatomy of a Supreme Court Opinion \(PDF\)](#)
- **purpose of opinions**
 - **communicate** the Court's reasoning to the public
 - establish **precedents** for future cases ... importance of *stare decisis*
 - drop **hints** that Congress, the states and/or the president should take certain actions

(Slip Opinion)

OCTOBER TERM, 2009

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**MCDONALD ET AL. v. CITY OF CHICAGO, ILLINOIS,
ET AL.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

No. 08–1521. Argued March 2, 2010—Decided June 28, 2010

Two years ago, in *District of Columbia v. Heller*, 554 U. S. ___, this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by

Supreme Court Duties: Deciding Cases



- If voting with majority, the Chief Justice **assigns the writing of the opinion**. If not, the senior justice voting with the majority makes the assignment. Dissenters choose who will write their opinions ... each justice can always include his/her argument.
- Writing takes weeks, maybe months, because of additional research (laws, history, economics, social sciences, etc) and input.
 - Opinion drafts are **circulated** and **revisions** made.
 - Justices review the printed opinions and make comments. The Court waits until all sides finish their written opinions.
- Sometimes, a justice **changes his/her vote**. Such changes can change the majority and the final opinion but this is generally not known by the public.
- There is, over time, a tendency for the justices to form relatively **stable voting blocs**.

Supreme Court Duties: Deciding Cases



How the Supreme Court Decides

Attorneys for the litigants submit briefs.

Other parties submit *amicus curiae* briefs.

Attorneys for the litigants present oral arguments.

Justices meet in closed conference to discuss and vote.

Designated justice drafts majority opinion.

Other justices in the majority may draft concurring opinions.

Justices in the minority may draft dissenting opinions.

Decision announced in open court.

types of opinions that may be written

- **opinion of the Court:** written opinion presenting the legal reasoning of the majority (hence, *opinion of the Court*), sometimes called majority opinion
- **concurring opinion:** written opinion prepared by justices who voted with the majority but who wish either to disagree with or to elaborate on some aspect of the legal reasoning of the majority's opinion
- **dissenting opinion:** written opinion presenting the legal reasoning of justices who voted against the majority, any/several justices may write
- **unanimous opinion:** written opinion presenting the legal reasoning of the entire Court, seldom happens any more

Supreme Court Duties: Deciding Cases



While every case has a justice assigned to write the majority opinion, in reality, writing opinions is very much a **group process**.

When a justice assigned to write an opinion is satisfied with the draft, he/she circulates it to the other justices.

Court custom is for **all other justices to respond to the opinion draft** by joining the opinion, expressing reservations with the opinion draft, indicating that they plan to write a separate opinion and so on. This interaction occurs in **memos written to the author** with copies sent to the other justices. Each round of drafts builds on the previous rounds, and every justice writing has as long as he/she chooses to work on each draft.

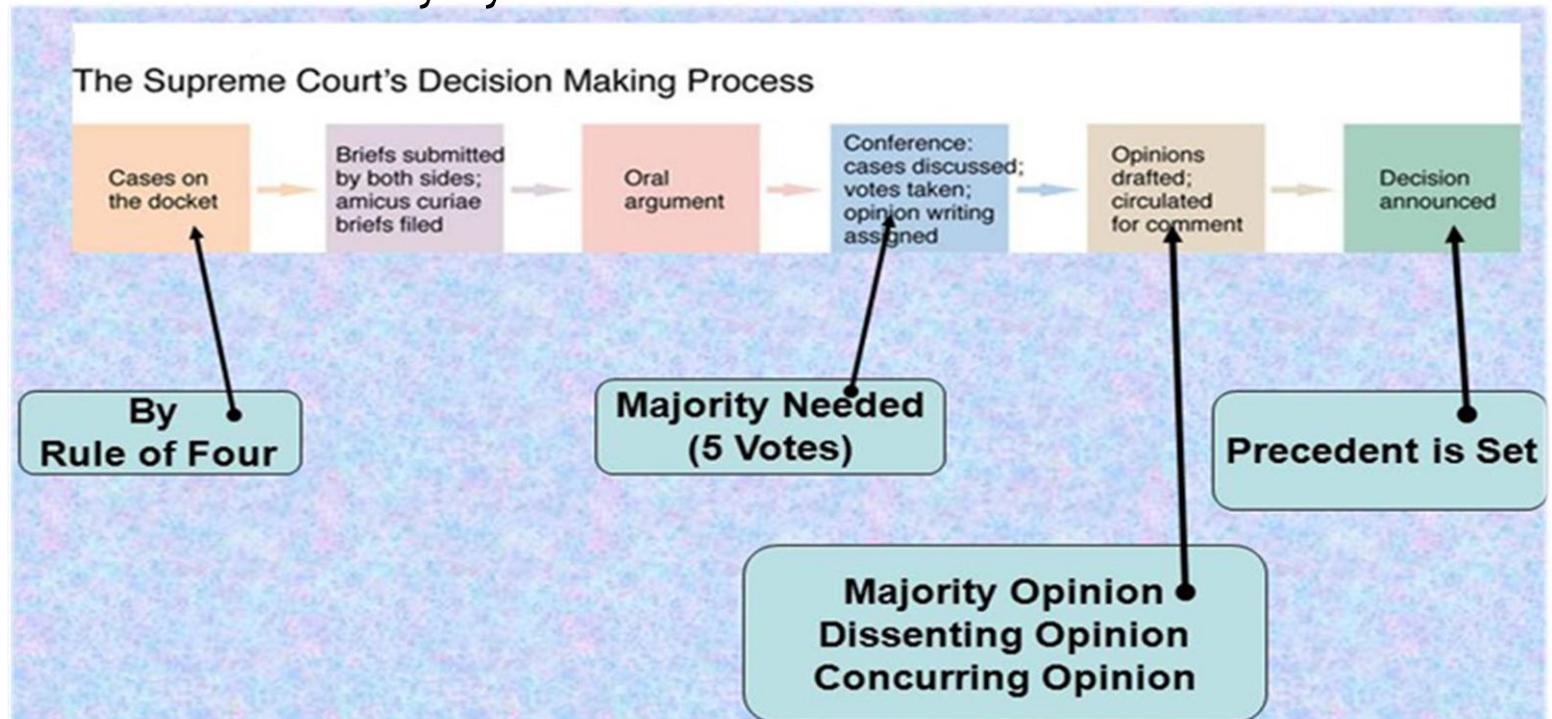
By the end of this process, each justice will have either written or joined an opinion for that case. When **every justice has joined or written an opinion**, the Court announces its decision to the public.

At any given time there are multiple cases going through the process and every justice is writing at least one majority opinion and perhaps several non-majority opinions, while responding to everyone else's comments and opinions.

Supreme Court Duties: Deciding Cases



No one knows exactly when an opinion on an argued case will be handed down by the Court, nor is there a set time period in which the justices must reach a decision. However, all cases argued during a term of the Court are decided **before the summer recess** begins, usually by the end of June.



Supreme Court Duties: Deciding Cases



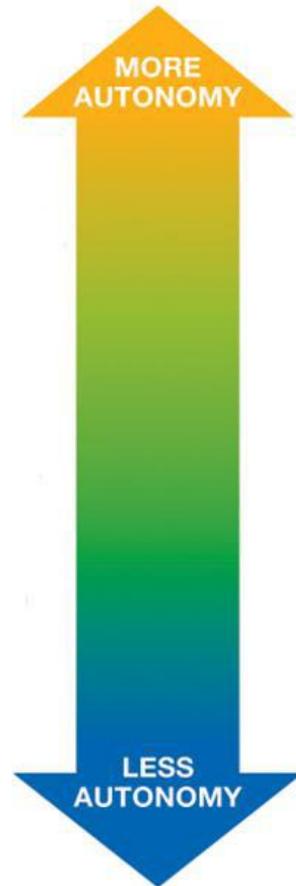
Models of Individual Judicial Decision-Making

- **behavioral / social model**
 - Justices' judicial decision-making is affected by personal characteristics such as childhood experiences, religious values, education, political and legal careers, political party loyalties, etc.
 - example: Justice Blackman worked at Mayo Clinic. Did that influence his vote on *Roe*? Potter Stewart defended the free press. Is that because he was a journalist earlier?
- **attitudinal model**
 - Justices' behavior is due largely to his/her policy attitudes. Justices are motivated by policy goals and unconstrained by law, deciding cases based on ideological preference, issues of public policy that are personally important, etc.

Supreme Court Duties: Deciding Cases



Models of Individual Judicial Decision-Making

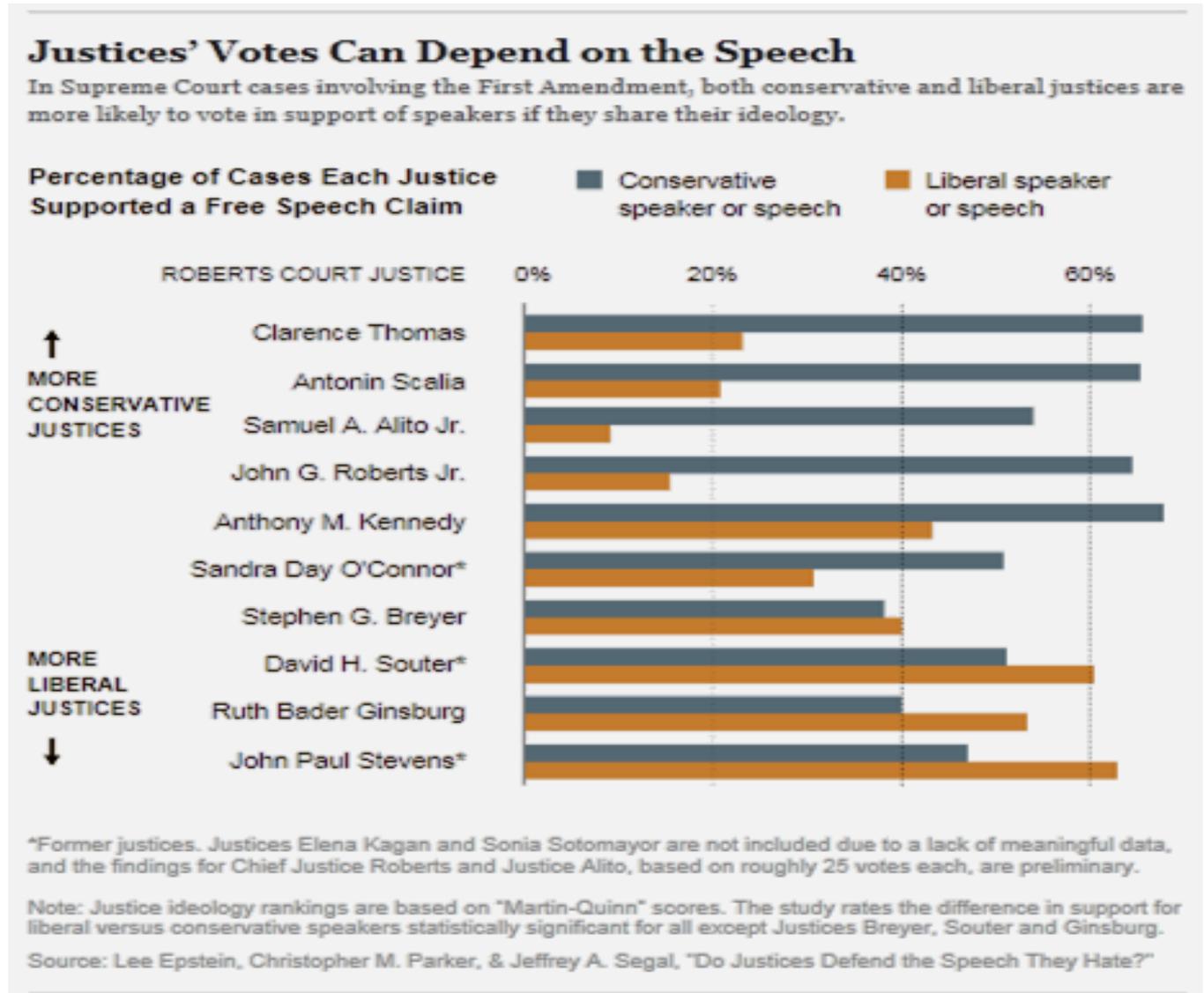


- **attitudinal model** (cont)
 - example: In *Citizens United* case, Supreme Court majority's ideological hostility to campaign finance reform as representing *nothing more than incumbent self-dealing* led to ruling that *independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption* despite the absence of a developed record of facts on which to base the decision.
- **strategic model**
 - Justices seek to achieve policy goals but are subject to certain constraints. Since they can't act simply according to preference, they act strategically to achieve goals given the constraints.

Supreme Court Duties: Deciding Cases



Epstein study on in-group bias: Both liberal and conservative justices take into account whether they're sympathetic to the plaintiff, not just what the Constitution demands. But study shows in-group bias much more in evidence among conservatives.



Supreme Court Duties: Deciding Cases



Models of Individual Judicial Decision-Making

- **legal model**
 - Justices submit to law when making decisions. Personal preferences set aside in deference to facts of case, meaning of Constitution, etc.
- **public opinion**
 - Justices often have knowledge of public opinion, especially on controversial issues, and make decisions based on it. Activist periods of Court have corresponded to periods of social or economic crisis.
 - examples: Marshall Court and power of national government leading up to Civil War, Court blocked many of FDR's New Deal programs designed to end Great Depression



The Chase court presided over many important decisions during Radical Reconstruction following the Civil War.

Supreme Court Duties: Making Opinions Public



- Justices in the majority must agree to all contents of Court's opinion before it is publicly delivered. They do this by **signing onto the opinion**.
- Justice writing opinion must take into consideration comments and concerns of the rest of majority.
- No opinion is considered the official opinion of Court until it is delivered in open Court (or at least made available to public).
- [Browse US Supreme Court Cases](#)



Supreme Court Duties: Making Opinions Public



- no rules concerning when decisions must be released
 - **Unanimous decisions** are often released sooner, even as early as December.
 - **Controversial opinions**, even if heard in October, may not be handed down until last day of term.
 - On days when Court is hearing oral arguments, opinions may be handed down before arguments are begun.
 - **opinion days**: release opinions on Monday mornings during May and June, may add additional days during last week of term

UNITED STATES REPORTS	UNITED STATES REPORTS	UNITED STATES REPORTS	UNITED STATES REPORTS
512	513	514	515
OCT. TERM 1993	OCT. TERM 1994	OCT. TERM 1994	OCT. TERM 1994 AMENDMENT OF RULES

Supreme Court Duties: Making Opinions Public



- The court tends to issue only one **landmark ruling** per day, and often issues opinions on consecutive days at the end of a term to space out major cases.
- On an opinion day the justices **announce their opinions in order of reverse seniority**, with the Chief Justice going last. If the most junior justice has an opinion to announce, he/she goes first, followed by the next most junior up to the Chief justice.
- The justice who is announcing a decision will read a summary of the opinion out loud in the courtroom. Some of the justices make these **bench statements** available to the public through the Court's Public Information Office.
- A justice who dissents also has the option to **read a summary of the dissent from the bench**, but this is usually done only when the dissenting justice feels especially strongly about the case. The decision to read a dissent from the bench is generally regarded as a statement by the dissenting justice.

Supreme Court Duties: National Policy-Maker



- **policy-making**: creating laws or setting standards
 - Over 100 national laws have been declared unconstitutional
 - ability to overrule itself
- People often say that the Court should not make policy but should only settle disputes.
- The Court can't help but make policy because (1) the disputes it settles involve **contentious public issues** and **fundamental questions** about the meaning of our constitutional rules, and (2) in a dispute **one side must always lose**.
- However, to say the Court makes policy may be an oversimplification of the Court's **impact**, the **kind of change** made and the **origin of the change**.



Supreme Court Duties: National Policy-Maker



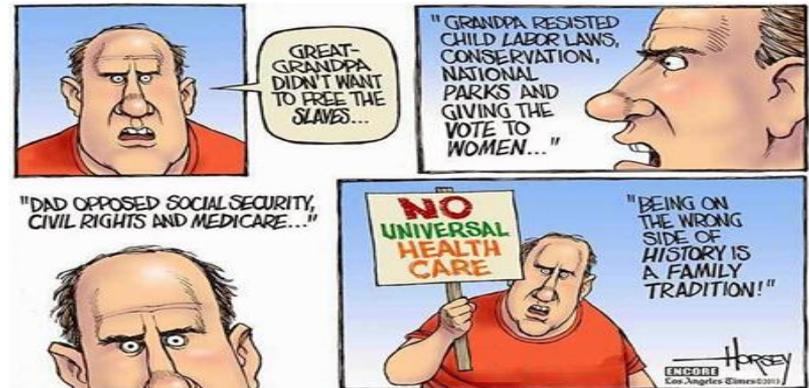
- Garrett Epps, constitutional law professor at the University of Baltimore School of Law: *Forget any notion of looking to the Supreme Court for boldness. The Court has **defended the status quo** throughout much of its history, usually ruling in favor of wealth, power and privilege. The dominant historical role for the Court for all but a very brief period has been to be a **conservative force**.*
- Those who say the Court has tended to block change point to its makeup. Judicial radicals don't survive the lengthy vetting process that leads to a Supreme Court appointment. And, until recently, virtually all of the Court's members have been white judges from privileged backgrounds.



Supreme Court Duties: National Policy-Maker



- Alexis de Tocqueville, 19th-century French political scientist: Leaders in America's legal profession are *instinctively suspicious of dramatic political change*. Attorneys are secretly opposed to the instincts of democracy. Their superstitious respect for what is old is in opposition to democracy's love of novelty; their narrow views, to its grandiose plans; their taste for formality, to its scorn for rules; their habit of proceeding slowly, to its impetuosity.
- Ian Millhiser, author of “Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted”: This *suspicion of democratic change* has caused the Court to be on the wrong side of history numerous times.



Supreme Court Duties: National Policy-Maker



- Gerald Rosenberg, University of Chicago law professor: People should be wary of looking to the Court for change because even in those rare moments when it tries to create change, it fails because it has *no power to enforce its decisions*. Look at *Brown v. Board of Education*.
- Barry Friedman, constitutional law professor at New York University School of Law: *The Supreme Court doesn't block popular will; it actually confirms it*. The Court may block social or political change for a short time, but ultimately it changes with the times because it *answers to a higher power*: the American people.



Supreme Court Duties: National Policy-Maker



- Congress often uses **very general language in writing laws**. Forces Court to apply laws to specific situations.
- Americans with Disabilities Act (1990): uses general language to prohibit discrimination on the basis of disability in places of public accommodation
- Under the ADA, the PGA has to provide accommodations for disabled spectators. Does PGA also have to provide accommodations for disabled players?

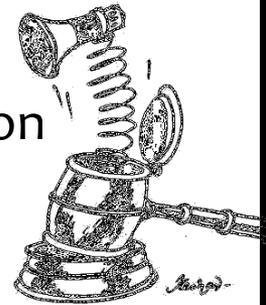


- *PGA Tour, Inc. v. Martin* (2001): Court ruled PGA must accommodate Casey Martin by allowing him to ride in a golf cart during the tournament, a ruling that could affect players in many different kinds of sports.
- In the end, Court decided what Congress meant when it passed the law and, in that sense, made policy. But **Court's involvement possible only because of a poorly written statute leading to a lawsuit.**

The Supreme Court: Implementation



- Decisions of courts of appeals are binding on only the district courts within the geographic confines of each circuit.
- Decisions of the Supreme Court are binding throughout the nation and establish national precedents.
 - allows for **continuity** and **predictability**
- **judicial implementation**: refers to how and whether judicial decisions are translated into actual public policies affecting more than the immediate parties to a lawsuit
 - Often requires the **cooperation** of other branches of government.
 - **judicial remedy**: means with which a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes a penalty or makes another court order to impose its will



The Supreme Court: Implementation



- **judicial implementation**
 - *Brown v. Board of Education* (1954): not popular in the South, lacked precise guidelines, needed the support of other branches
 - Andrew Jackson: *John Marshall has made a decision, now let him enforce it.*
- **after the Court decides...**
 - sometimes *remands* the case (sends case back to the lower court for implementation) ... lower court then applies law accordingly
 - uncertain effect on individuals who are not immediate parties to the suit
 - Decisions are sometimes ignored.
 - It's difficult to implement decisions requiring the cooperation of large numbers of officials.



The Supreme Court: Implementation



- for effective implementation
 - Those responsible for carrying out the decision must act to show that they understand the original decision.
 - Implementation must actually follow Court decision.
 - Responsibility for implementation is concentrated in the hands of a few highly visible public officials ... president, governor, etc.
 - Those who are directly affected by a decision must be aware of the rights the decision grants or denies them.



Influences on the Supreme Court



- The Court **must coexist with other actors and institutions** that have their own powers, interests, constituencies and perceptions of the public good ... especially since the Court doesn't have any independent means of enforcing its decisions.
- **legal influences**
 - **constraints of the facts:** the relevant circumstances of a legal dispute or offense ... Court cannot make a ruling unless it has an actual case brought before it. The Court must respond to the facts of a dispute.
 - **constraints of the law:** Among the legal constraints in deciding cases, the Court must determine which laws are relevant. These include: interpretation of the Constitution, interpretation of statutes and interpretation of precedent.



Influences on the Supreme Court



political influences

- **inside influences:** (as discussed previously) justices' personal beliefs, family and friends, political attitudes, the relationship between justices, etc
- [Chief Justice's Partisanship Weakens US Supreme Court](#)
- [Supreme Court Justice's Wife Embraces Tea Party](#)
- **outside influences:** leverage of public officials, pressure from interest groups, force of public opinion, etc



Influences on the Supreme Court: Executive and Legislative Branches



- president and bureaucracy
 - non-implementation
 - receiver: official who has the authority to see that judicial orders are carried out
- Congress
 - Constitutional amendment
 - statutory revision
- individual national leaders, especially leaders of broad-based movements (civil rights, civil liberties, etc)
- Justice Byron White: *The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no recognizable roots in the language or design of the Constitution.*

Influences on the Supreme Court: Interest Groups



- political linkage influences
- Courts used by interest groups and movements to place issues on the **political agenda** ...
civil rights groups, veterans, etc.
- **test cases** (often class action suits: suit brought on behalf of all individuals in a particular category whether or not they are actually participating in the suit)
- **amicus curiae** briefs



IN THE
Supreme Court of the United States
October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON,
MRS. SADIE EMMANUEL, ET AL.,
Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, ET AL.,
Appellees.

BRIEF ON BEHALF OF
AMERICAN CIVIL LIBERTIES UNION
AMERICAN JEWISH COMMITTEE
AND
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
AS AMICI CURIAE

Influences on the Supreme Court: Interest Groups



For the Petitioners

Asian American Legal Foundation
Cato Institute
Center for Equal Opportunity et al.
Center for Individual Freedom
Center for the Advancement of Capitalism
Center for New Black Leadership

Claremont Institute Center for Constitutional
Jurisprudence
Law Professors
Massachusetts School of Law
Michigan Association of Scholars
National Association of Scholars

Pacific Legal Foundation
Reason Foundation
State of Florida and Governor Jeb Bush
United States
Ward Connerly

For the Respondents:

65 Leading American Businesses
AFL-CIO
American Bar Association
American Council on Education et al.
American Educational Research Association et al.
American Jewish Committee et al.
American Law Deans Association
American Media Companies
American Psychological Association
American Sociological Association
Amherst College et al.
Arizona State University College of Law
Association of American Law Schools
Association of American Medical Colleges
Authors of the Texas Ten Percent Plan
Bay Mills Indian Community et al.
Black Women Lawyers Association of Greater
Chicago
Boston Bar Association et al.
Carnegie Mellon University et al.
City of Philadelphia et al.
Clinical Legal Educational Association
Coalition for Economic Equity et al.
Columbia University et al.
Committee of Concerned Black Graduates of
ABA Accredited Law Schools
Current Law Students at Accredited Law
Schools

Deans of Law Schools
General Motors Corporation
Graduate Management Admission Council et al.
Harvard Black Law Students Association et al.
Harvard University et al.
Hayden Family
Hispanic National Bar Association
Howard University
Human Rights Advocates et al.
Indiana University
King County Bar Association
Latino Organizations
Lawyers Committee for Civil Rights Under Law
et al.
Leadership Conference on Civil Rights et al.
Massachusetts Institute of Technology et al.
Members of Congress (3 briefs)
Members of the Pennsylvania General
Assembly et al.
Michigan Black Law Alumni Association
Michigan Governor Jennifer Granholm
Military Leaders
MTV Networks
NAACP Legal Defense and Education Fund et al.
National Asian Pacific American Legal Consor-
tium et al.
National Center for Fair and Open Testing

National Coalition of Blacks for Reparations in
America et al.
National Education Association
National School Boards Association
National Urban League et al.
New America Alliance
New Mexico Hispanic Bar Association et al.
New York City Council Members
New York State Black and Puerto Rican
Legislative Caucus
Northeastern University
NOW Legal Defense and Education Fund et al.
School of Law of the University of North Carolina
Social Scientists
Society of American Law Teachers
State of New Jersey
State of Maryland et al.
Students of Howard University Law School
UCLA School of Law Students of Color
United Negro College Fund et al.
University of Michigan Asian Pacific
American Law Students Association
University of Pittsburgh et al.
Veterans of the Southern Civil Rights
Movement et al.

For Neither Party

Anti-Defamation League
BP America
Criminal Justice Legal Foundation

Equal Employment Opportunity Council
Exxon Mobil Corporation

amicus curiae
briefs in
affirmative
action cases:
Grutter v.
Bolinger and
Gratz v. Bolinger
(2003)

Influences on the Supreme Court: Public Opinion



- Court is always the **target of public opinion** to some extent. People often demonstrate during controversial cases.
 - *Webster v. Reproduction Health Services* (1989): former justices commented publicly, 300,000 people marched, full-page ads
- Court can sway public opinion, too. Court rulings on controversial issues (abortion, death penalty, for example) can cause public opinion to ebb and flow.
 - *Nixon v. US* (1974) was followed by very high confidence from public.

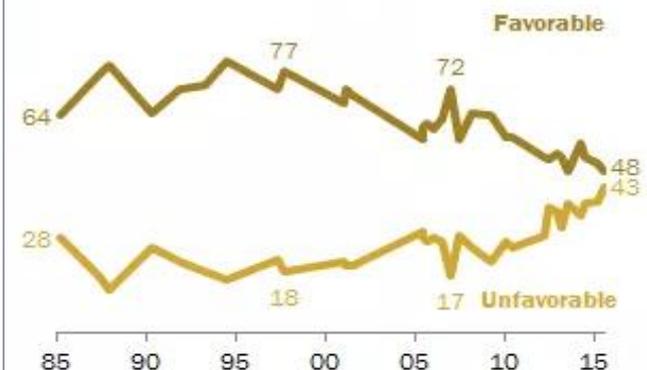
When the Supreme Court Decides a Case, it Should Consider...

	Now	3/2013	7/2005	9/1987
Only legal issues	52%	46%	49%	32%
Public opinion	40%	45%	42%	60%

SOURCE: CBS News

Supreme Court's Image Declines

Overall opinion of the Supreme Court is ... (%)



Survey conducted July 14-20, 2015.

PEW RESEARCH CENTER

Influences on the Supreme Court: Public Opinion



Why would the Court respond to public opinion?

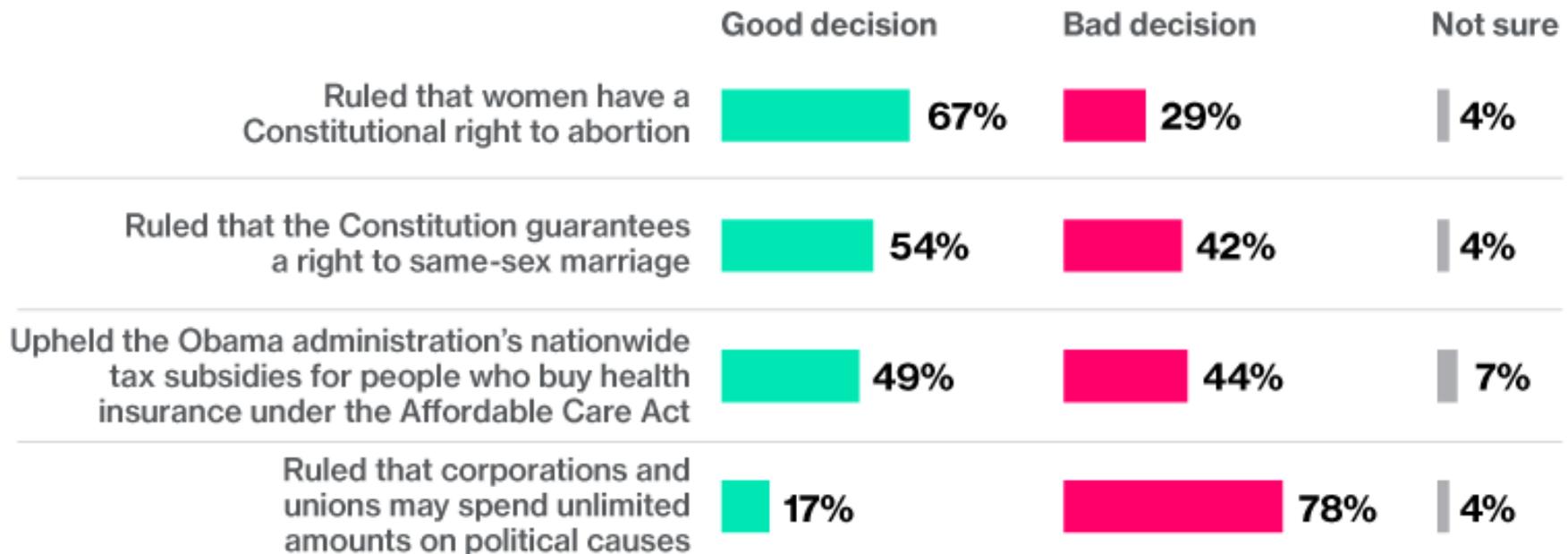
- Public opinion may influence **which judges are nominated and confirmed**.
- Justices may care about public opinion for a host of reasons that can be labeled **institutional legitimacy**. Court may not depend on public opinion for their survival but other actors do and they may pay a higher political price for undermining the Court when public acceptance of the Court is high.
- People with more moderate ideological views are more likely to change their views in response to information about what others think. Impact of changing societal beliefs and their expression in the democratic process is **greatest among moderate justices** who are likely to hold critical swing positions on the Court.

Influences on the Supreme Court: Public Opinion



Americans' View of Supreme Court

Do you think the following Supreme Court rulings were good decisions or should be overturned?



Bloomberg Politics national poll of 1,001 U.S. adults, September 18–21, 2015
Margin of error: +/- 3.1 pct pts. May not equal 100% due to rounding.

Supreme Court Resources



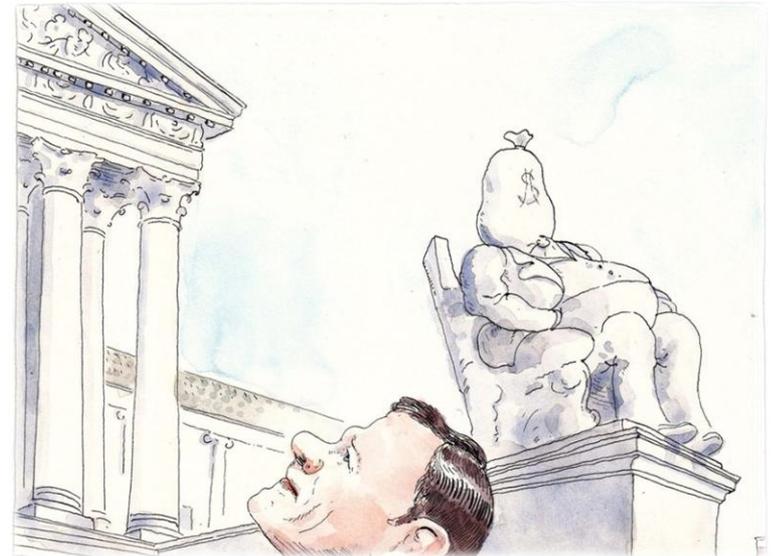
If you're interested, try some of the links below.

- [Official Site of the Supreme Court](#)
- [The Supreme Court and the American System of Government](#)
- [Brief Overview of Court](#)
- [Current Justices](#) (Biographical Data)
- [Past Justices](#) (Biographical Data)
- [Virtual Tour of Supreme Court Building](#) (Oyez Project, Northwestern Univ)
- [Supreme Court Oral Arguments](#) (downloadable)
- [Supreme Court News and Information](#) from JURIST
- [The OYEZ Project](#) at IIT Chicago-Kent College of Law
- [Current Term Calendar](#) (Legal Information Institute)
- [Topical List of Supreme Court Decisions](#) (Legal Information Institute)
- [PBS's Supreme Court](#)
- [Landmark Cases](#)
- [National Constitution Center](#)

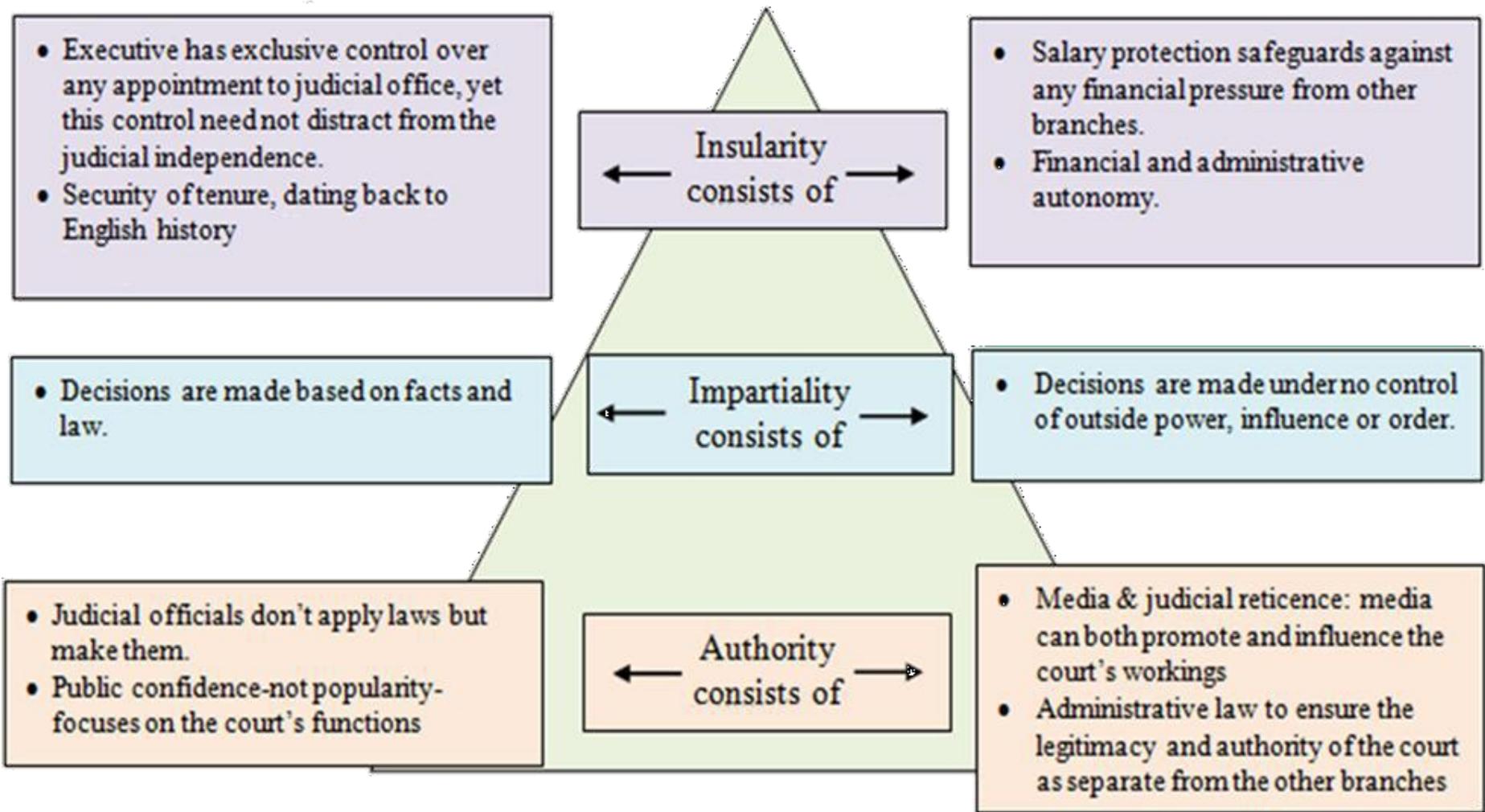
An Independent and Powerful National Judiciary



- The Court is able to be decisive because of the judiciary's independence from other political institutions.
- Court has the singular and long-established power to say what the Constitution means.
- independence comes from:
 - life tenure
 - stable salaries
- independent but still affected by politics



Components of Judicial Independence



The End

