



The Courts and The Judiciary

Part III

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

Judicial Philosophy: Judicial Activism vs. Judicial Restraint



- **judicial activism**: the principle of *stare decisis* should sometimes be sacrificed in order to adapt the Constitution to changing conditions
 - Judges should use their power broadly to further justice, especially in the areas of equality and personal liberty, use the bench to enact social and political change.
 - Does not mean simply a judge who disregards the law and issues a decision based on his/her own political or personal beliefs.
 - The modern Court is more activist than it was in the past ... example: Warren Court (1953–1969)
 - Advancement of civil rights and the rights of the accused occurred through judicial activism.
 - Tend to be liberal but there have been many instances of judicial activism in which conservative judges utilized the courts to further their own philosophy on morality.



Judicial Philosophy: Judicial Activism vs. Judicial Restraint



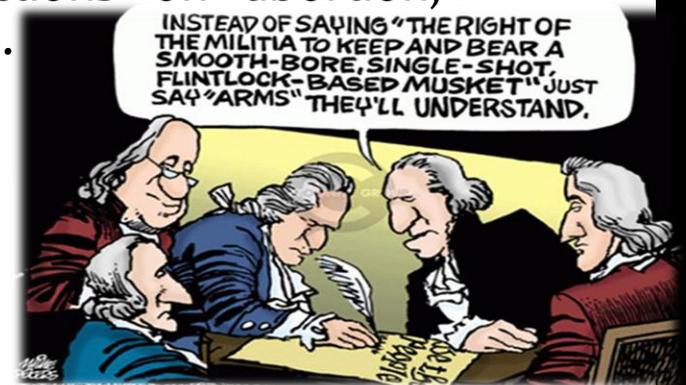
- **judicial restraint**: courts should, if at all possible, avoid overturning a prior court decision
 - Courts should allow the decisions of other branches of government to stand, even when they offend a judge's own sense of principles.
 - Restraint courts interpret the law strictly rather than seek to make new laws.
 - limits on expansion of national power ... example: Rehnquist Court (1986–2005)
 - Many advocates of judicial restraint also follow the doctrine of original intent.
 - tend to be conservative



Judicial Philosophy: Loose vs. Strict Constructionism



- **loose constructionism**: courts should read Constitution expansively and not limit themselves to what is explicitly stated
 - example: exclusionary rule (evidence collected or analyzed in violation of defendant's constitutional rights is inadmissible in a court of law), right to government-funded attorney for the poor
 - tend to be liberal
- **strict constructionism**: courts should not reinterpret Constitution but should limit themselves to what is explicitly stated
 - Interprets the law in light of what the words of the Constitution obviously seem to say ... examples: restrictions on abortion, eliminating national rules for state governments.
 - Most strict constructionists are advocates of judicial restraint.
 - tend to be conservative



Judicial Philosophy: Living Document vs. Original Intent



- **living document**: places the meaning of the Constitution in the context of the total history of the US
 - The Constitution must grow and adapt to new circumstances ... example: expansion of use of interstate commerce clause.
 - tend to be liberal
- **original intent**: determines the constitutionality of a law by ascertaining the intentions of those who wrote the Constitution
 - Courts should interpret the Constitution as the framers intended ... example: restrictions on privacy rights.
 - tend to be conservative
 - restorationist: judge who thinks that the only way the original meaning of the Constitution can be restored is by ignoring the doctrine of *stare decisis*



Judicial Philosophy



If you'd like to know more about judicial philosophy, try the following.

- [Hamilton, 'Hamilton' and the original intent of the Framers](#)
- [Constitutional Footsie](#)
- [The Constitution: Dead or Alive](#)
- [Theories of Constitutional Interpretation](#)
- [A Definition of Judicial Restraint](#)
- [Judicial Philosophy: Does It Make a Difference?](#)
- [John G. Roberts](#) (and try some of the links in the right column)
- [Originalism: A Primer On Scalia's Constitutional Philosophy](#)
- [Justice Clarence Thomas relaxes](#)



The Supreme Court



Supreme Court sits at the top of a pyramid of judicial activity.

- over 27 million criminal trials and civil suits annually
- The Supreme Court receives approximately 7,000-8,000 petitions for a writ of certiorari each year.
- The Court grants and hears oral argument in about 75-80 cases.

Justice Gorsuch (far right) took his seat on the Supreme Court bench for the first time April 17, 2017, actively questioning attorneys presenting oral arguments.
print by Art Lien



The Supreme Court



- The size of the Court is determined by Congress; the number has been **set at nine since 1869** ... 8 associate justices and the Chief Justice (not called judges).
- Congress has the power to determine Court's scope.
- **The Court has both original jurisdiction and appellate jurisdiction.**
 - original jurisdiction: cases involving ambassadors of foreign nations and when a state is party to a dispute ... few cases
 - appellate jurisdiction: appealed from lower courts ... almost all of the cases the Court hears



- Because the Supreme Court is the highest court of appeal, its decisions/opinions become major precedents.

The Supreme Court



The following are the types of cases the Supreme Court was given the jurisdiction to hear as initially specified in the Constitution:

- all cases arising under the Constitution and laws or treaties of the US
- all cases of admiralty or maritime jurisdiction
- cases in which the US is a party
- controversies between a state and citizens of another state or between two or more states or between citizens of different states or between citizens of the same state claiming lands under grants in different states
- controversies between a state, or the citizens thereof, and foreign states or citizens thereof
- all cases affecting ambassadors or other public ministers

The Supreme Court: The Appointment Process



nomination criteria

- competence
- judicial and legal experience and record
- judicial philosophy
- ideology or policy preference
 - **litmus test**: questions about positions on major issues
- party affiliation
- pursuit of political support from various groups
- political favors
- diversity: race, gender, religion, region
- political acceptability: legal organizations (ABA), interest groups, Senate, other justices

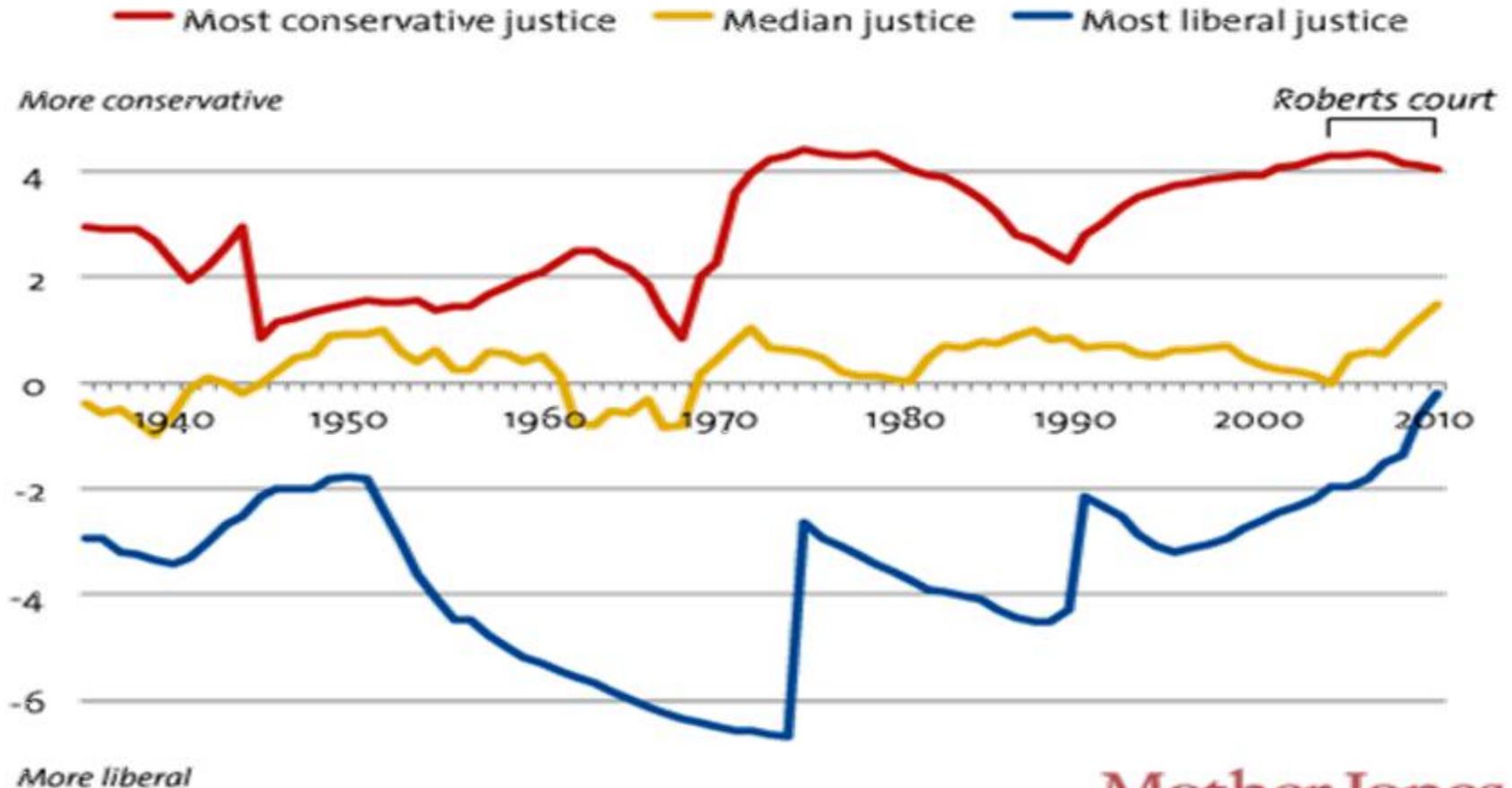
Sizing up Elena Kagan



The Supreme Court: The Appointment Process



Ideological spectrum of Supreme Court justices, 1937-2010



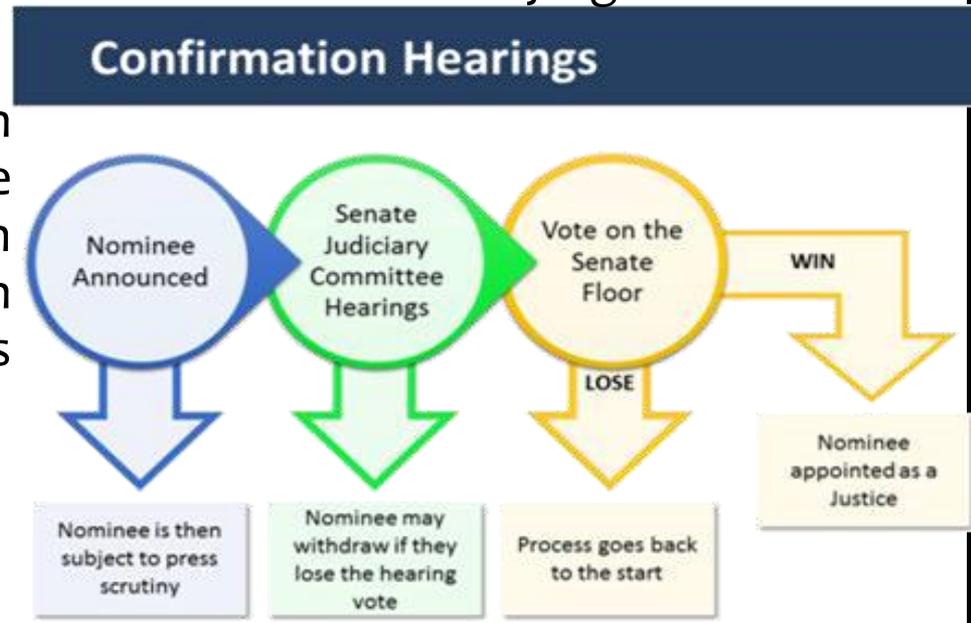
Mother Jones

Justices' ideological ratings measured as Martin-Quinn scores. 1937, 1938, 1956, and 2005 counted twice due to justices being replaced mid-term. Source: Andrew D. Martin (Washington University School of Law) and Kevin M. Quinn (UC Berkeley School of Law)

The Supreme Court: The Appointment Process



- appointment process is political
- process begins with **announcement** of president's nominee
 - **investigation by Senate Judiciary Committee**: conducts investigation through groups such as American Bar Association
 - **lobbying by interest groups**: influence of groups on the process varies but spending on television ads and other lobbying tools can have a large impact
 - Robert Bork created term **borking**: politicizing the nomination process through an organized public campaign that portrays the nominee as a dangerous extremist



The Supreme Court: The Appointment Process



- **Senate Judiciary Committee hearings:** chair of Judiciary Committee, in consultation with the ranking member, schedules hearing where members question nominee ... nominee must receive favorable committee vote
 - Since 1955, every nominee has appeared before the Judiciary Committee.
- **Senate vote:** Senate majority leader schedules floor vote on nominee but only with unanimous consent. Once scheduled, nominee must receive majority vote.
 - Since 1968, the Senate's likelihood of rejecting presidential nominees has increased.
- First half of the 20th century, presidential nominations to the Court were confirmed by the Senate as matter of course but that's changed.

*It seemed to me that I had barely reached the Court
when people were trying to get me off.*

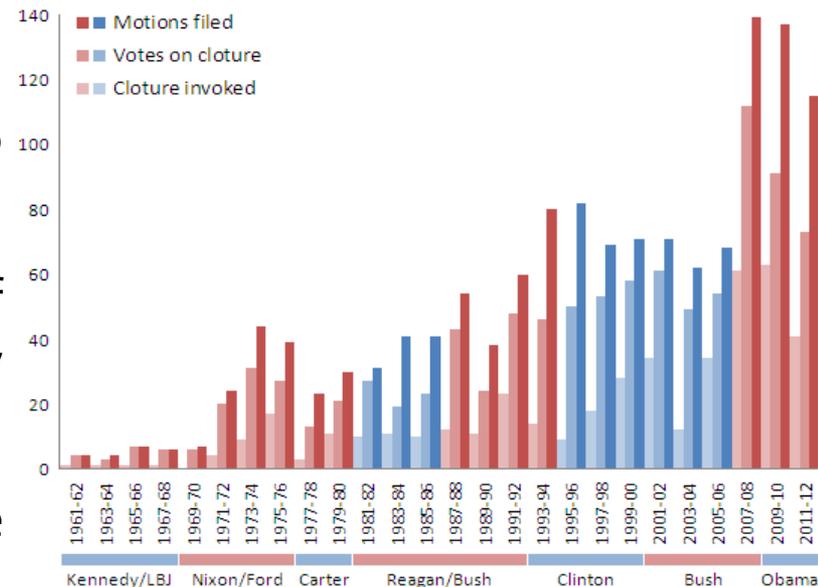
William O. Douglas

The Supreme Court: The Appointment Process



- President Bush's nomination of Samuel Alito to the Supreme Court sparked partisan conflict.
- An array of highly contentious issues were in front of the Court.
- questions over use of the [judicial filibuster](#)
- Republicans: filibuster inappropriate for judicial nominees
- Democrats: filibuster needed to prevent harmful justices
- Bipartisan [Gang of 14](#) agreed to use of judicial filibuster only in *extraordinary circumstances*.
- Ultimately, Democrats did not use the filibuster and Alito was confirmed.

Filibuster use over the last fifty years
By Senate minority party and Presidential party



Note: Republicans were the minority party of the 107th Congress for the first six months of 2001
Source: US Senate statistics

The Supreme Court: The Appointment Process



Presidential Nominees to Supreme Court Not Confirmed by the Senate, 1900-2017

| Nominee | Year | President | Main reason for rejection/withdrawal |
|--|------|-----------|--|
| John Parker | 1930 | Hoover | anti-labor |
| Abraham Fortas (sitting justice to chief justice) | 1968 | L Johnson | liberal, backlash against retiring Warren, relationship with LBJ |
| Homer Thornberry | 1968 | L Johnson | no vacancy when Fortas not confirmed for chief |
| Clement Haynesworth | 1970 | Nixon | pro-segregation and anti-labor record |
| G Harrold Carswell | 1970 | Nixon | pro-segregation and anti-women's rights record, high reversal rate as District judge |
| Robert Bork | 1987 | Reagan | extreme conservative opinions on constitutional issues, Watergate aftermath |
| Douglas Ginsburg | 1987 | Reagan | smoked marijuana with students |
| Harriet Miers | 2005 | GW Bush | corporate and private attorney considered unqualified |
| Merrick Garland | 2016 | Obama | Senate refused to hold hearings and nomination expired with end of 114th Congress, only 2nd SC vacancy to remain unfilled for more than 1 year |

The Supreme Court, 2017



Seated, from left are Associate Justice Ruth Bader Ginsburg, Associate Justice Anthony Kennedy, Chief Justice John Roberts, Associate Justice Clarence Thomas, and Associate Justice Stephen Breyer. Standing, from left: Associate Justice Elena Kagan, Associate Justice Samuel Alito Jr., Associate Justice Sonia Sotomayor and Associate Justice Neil Gorsuch.



The Supreme Court, 2017

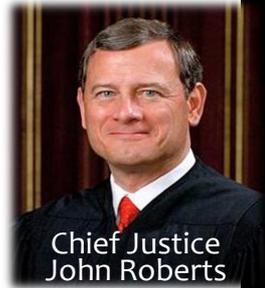


| Justice (birth) party | state | law school | replaced | confirmed (vote) | religion | tenure length | appointed by |
|---------------------------------|-------|------------|-------------|-----------------------|-----------|------------------|-----------------|
| Anthony Kennedy (1936) R | CA | Harvard | Powell | 2/3/1988 (97-0) | Catholic | 29 years | Reagan |
| Clarence Thomas (1948) R | GA | Yale | T. Marshall | 10/15/1991 (52-48) | Catholic | 26 years | GHW Bush |
| Ruth Bader Ginsburg (1933) D | NY | Columbia | B. White | 8/3/1993 (96-3) | Jewish | 24 years | Clinton |
| Stephen Breyer (1938) D | CA | Harvard | Blackmun | 7/29/1994 (87-9) | Jewish | 23 years | |
| John Roberts, Chief (1955) R | NY | Harvard | Rehnquist | 9/29/2005 (78-22) | Catholic | 12 years | GW Bush |
| Samuel Alito (1950) R | NJ | Yale | O'Connor | 1/31/2006 (58-42) | Catholic | 11 years | |
| Sonia Sotomayor (1954) D | NY | Yale | Souter | 8/6/2009 (68-31) | Catholic | 8 years | Obama |
| Elena Kagan (1960) D | NY | Harvard | Stevens | 8/5/2010 (63-37) | Jewish | 7 years | |
| Neil Gorsuch (1967) R | CO | Harvard | Scalia | 4/7/2017 (54-45) | Episcopal | <1 year | Trump |

The Supreme Court: The Role of the Chief Justice



- official title: **Chief Justice of the United States**
- The modern chief justiceship is a mix of custom, practice and statute ... a role that has developed over the 20th century, as the national judiciary has developed into a kind of administrative agency.
- Except for his constitutionally-specified role in presidential impeachment, the authority of the Chief Justice is established entirely by statute or custom.
- **judicial duties**
 - **ranking member** of Court but still has only one vote ... first among equals
 - enters courtroom first, presides over public sessions of Court, leads oral arguments from center chair on the bench
 - **scheduling**: decides when opinions will be released to the public ... can use that to put pressure on justices to complete opinions



Chief Justice
John Roberts

The Supreme Court: The Role of the Chief Justice



- **judicial duties**
 - Presides over Court's private **conferences**, where justices decide what cases to hear and how to vote on argued cases, and usually summarizes each case at start of meetings.
 - **assignment power**: assigns formal writing of opinions in cases in which he voted with majority
 - Brings individual **style of leadership** that influences the way Court operates, deliberates and conducts its work ... can be as important as judicial philosophy.
 - has considerable influence on interactions that occur among justices
 - some have left indelible mark on Court through their vision and leadership

The Supreme Court: The Role of the Chief Justice



- judicial duties
 - individual *style of leadership*
 - most successful help colleagues speak with one voice



- Unanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court.
- Closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.
- can help move Court toward a certain ideology through personal leadership and coalition-building but that's completely dependent on personal characteristics (Legal scholars note that Earl Warren helped move Court to the left, William Rehnquist to the right.)

The Supreme Court: The Role of the Chief Justice



- administrative duties
 - Oversees administrative duties of Court, including scheduling cases and setting deadlines for appeals and opinions.
 - manager of Court's building and grounds, now including technological advances in Court operations and security requirements
 - administrative head of the entire national judiciary, including over 2,000 national judges and about 30,000 staff
 - Picks most important central administrators.
 - Runs an annual budget in the billions.

The Secret Court
FISA



- Picks members of important policy-making judicial committees and specialized courts, including 11-member Foreign Intelligence Surveillance Act (FISA) Court, which issues special national security surveillance warrants.

The Supreme Court: The Role of the Chief Justice



- administrative duties
 - administrative head of the entire national judiciary
 - Leads **Judicial Conference of US**, group of judges who make policy for national courts, promulgate rules to ensure smooth operation of national courts and present judiciary's views to Congress (an annual state of the judiciary report).
 - Issues a year-end report to national judiciary that sets priorities and highlights accomplishments of and problems in national courts.
 - Serves as chief **advocate and spokesperson** over legislation affecting national courts.
- special duties
 - administers presidential oath of office
 - presides over Senate during any impeachment trial of president (Article I of Constitution)
 - serves as Chancellor of Smithsonian Institution and sits on boards of National Gallery of Art and Hirshhorn Museum

The Supreme Court: The Role of the Solicitor General



- employed by and third-highest-ranking official in Justice Department ... **reports to AG**
- chosen for **legal skills** ... appointed by president, confirmed by Senate
- person appointed to **represent US government before Supreme Court** ... involvement of Solicitor General signals that president and attorney general have strong views on the subject



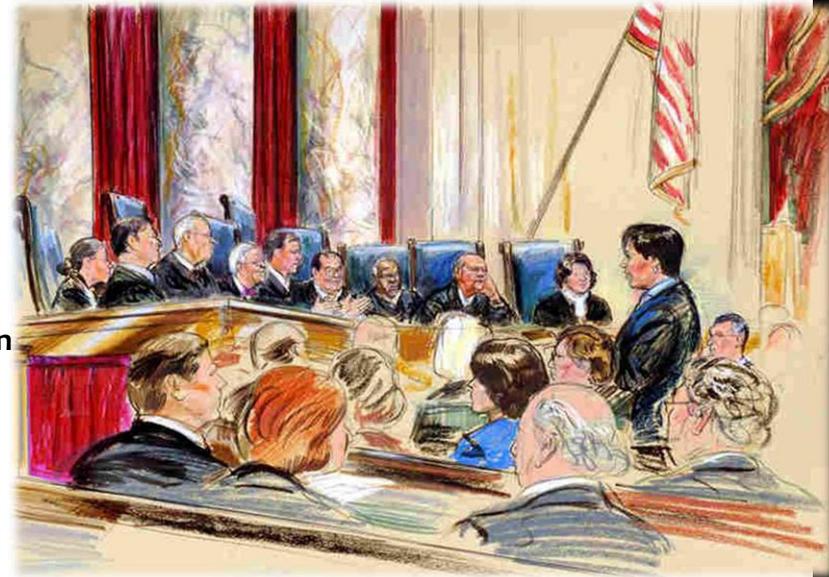
- determines the **legal position** US will take in Court
- supervises and conducts **cases** in which government is a party

The Supreme Court: The Role of the Solicitor General



- files *amicus curiae* (friend of the court) **briefs** in cases in which national government has a significant interest in the legal issue
- **reviews cases** decided against US and determines whether government will seek review in Supreme Court
- **approves** every district court case in which government files an appeal

former Solicitor General Elena Kagan
(right) arguing a campaign finance
reform case before the Court on
which she now sits



The Supreme Court: The Role of the Law Clerks



- among best and brightest recent law school grads ... almost all clerk in a circuit court first
- 2-4 clerks per justice
- tasks of clerks
 - perform much of the day-to-day work
 - initial cert review: perform initial screening of petitions that come to Court each term



Justice Ruth Bader Ginsburg sits in her chambers at the Supreme Court with her clerks.

The Supreme Court: The Role of the Law Clerks

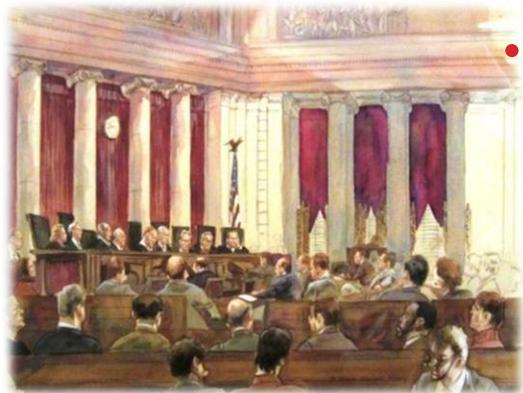


- tasks of clerks
 - draft memos to summarize facts and issues in each case, recommending whether case should be accepted by Court for full review
 - write bench memos summarizing accepted cases and suggesting questions for oral argument
 - write first draft of opinions
 - informal conduits for communicating and negotiating between justices' chambers as to final wording of opinions
- Former clerks are in high demand, with firms paying signing bonuses of up to \$80,000 and offering earnings over \$130,000 the first year in private practice.

The Supreme Court: Behavioral Norms



- ...set of unwritten but clearly understood rules of behavior that shapes how the Court does things ... Listed below are several of the norms of the Court with examples.
- Keep in mind the Court's norms are not empty custom. They are vital to colleagues compelled to disagree publicly, expressing their deepest convictions, but always respecting the equally deep convictions of their fellow Justices.
- **secrecy**: Most of Court's decision-making between oral argument and final decision occurs out of public view. Justices discuss and vote on cases in closed-door **conferences** with no one but the justices allowed and no transcripts of their remarks kept.



- **courtesy**: When justices assemble to go on the bench each day and at the beginning of each conference, each justice shakes hands with each of the other eight. Chief Justice Fuller (1888-1910) instituted the practice as a reminder that differences of opinion on the Court do not preclude overall harmony of purpose.

The Supreme Court: Behavioral Norms



- **seniority**: refers to how long associate justices have served on the Court ... Seniority affects everything from seating and voting to who handles mundane tasks. Note: Chief Justice is always most senior regardless of his years of service.

Grunt jobs will come Justice Gorsuch's way at high court.

- **collegiality**: In conference, no one speaks twice before all have been heard. Justices eat lunch together and business talk is taboo while eating. Reaffirms that the Court is a collegial one.
- **majority rule**: Opinions of the Court are always based on the majority vote. If there is no majority (tie vote), the lower court's ruling in the case being considered is upheld without comment in a *per curiam* (by the court acting collectively and unanimously) decision, which sets no precedent and is issued under the Court's name rather than the names of justices in the majority or minority.

Obergefell v. Hodges, 2015
(5-4 decision)
Same-sex marriage is legalized
across all 50 states.



The Supreme Court: Behavioral Norms



- **adherence to *stare decisis***: A **precedent** is a principle or rule established in a previous case that is either binding on or persuasive for courts when deciding subsequent cases with similar issues or facts. There are two types of *stare decisis*.
- **obligation trial courts have to honor the precedents of higher courts** (vertical *stare decisis*): A local trial court in Mississippi can't legally convict a person for flag desecration because a higher court, the US Supreme Court, ruled in *Texas v. Johnson* (1989) that flag desecration is a form of constitutionally protected speech.
- **obligation of Supreme Court to honor its own past precedents** (horizontal *stare decisis*): Chief Justice Roberts implied that he would uphold *Roe v. Wade* (1973), despite any personal reservations, due to his commitment to *stare decisis*. Conversely, the *Brown v. Board of Education of Topeka* (1954) decision overturned *Plessy v. Ferguson* (1896), which had been a precedent. (See discussion of *stare decisis* in Part I.)

The Supreme Court: Behavioral Norms



[Despite a verbal commitment to stare decisis, some studies show that when justices disagree with the establishment of a precedent, they rarely shift from their previously stated views in subsequent cases. In other words, they are hardly ever influenced by precedent.]

- **super stare decisis**: landmark ruling that has achieved super status in constitutional law because of its repeated re-affirmation by the Court ... important precedent that is resistant to being overturned without regard to whether correctly decided in the first place ... begins as a single decision and becomes the decisional foundation for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law)
- **ceremony and tradition**: As should be apparent from the norms listed above, many of which have been practiced since the Court's beginning, ceremony and tradition are very much a part of the Court, and for very practical reasons.

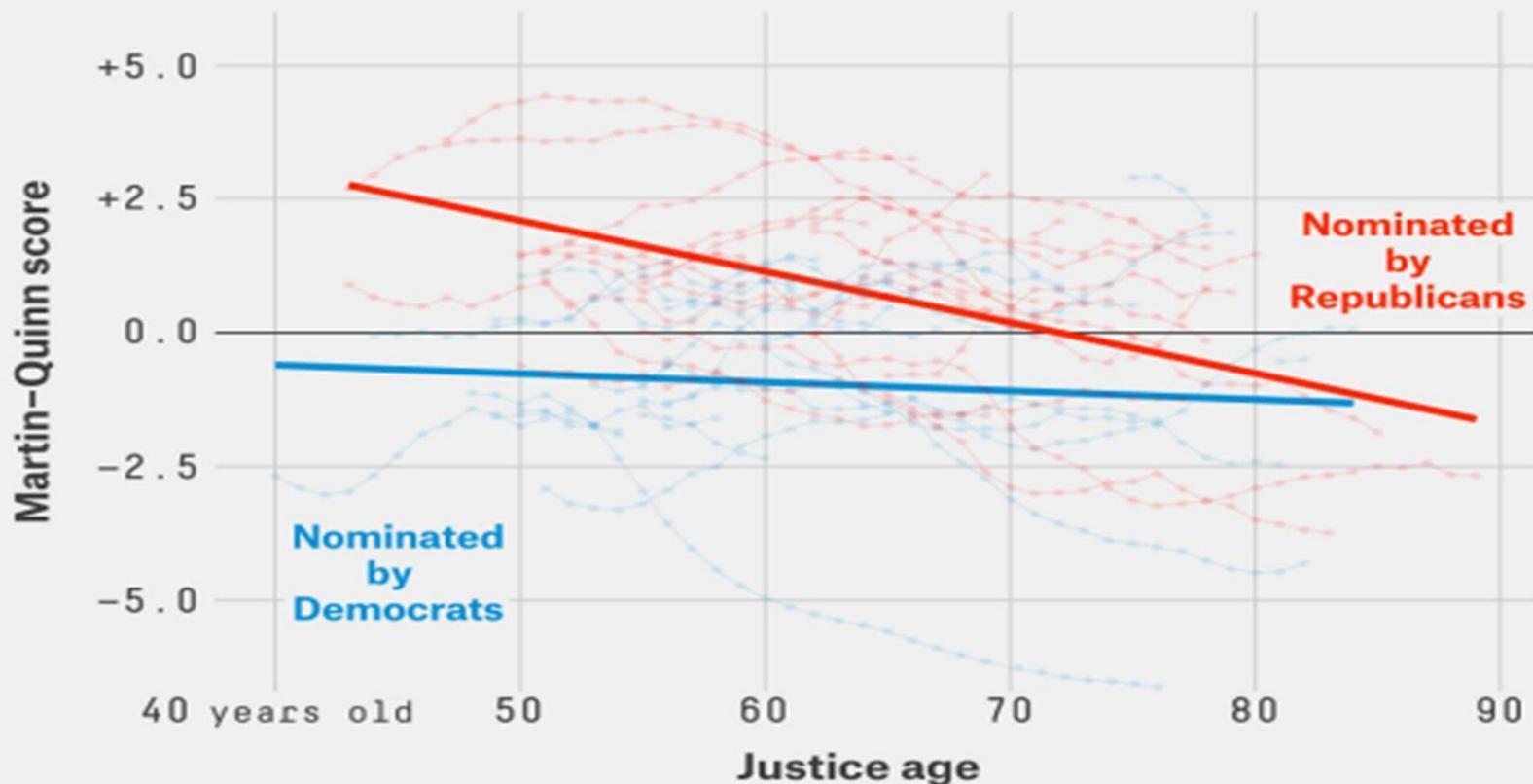


The Supreme Court: Behavioral Norms



Justices Become More Liberal With Time

Ideological ratings of Supreme Court justices as they age, since 1937



You have to wonder if, over time, the Court's norms lead to an unanticipated narrowing of differences between justices, perhaps a [judicial groupthink](#).

Duties of the Supreme Court



- interpret the Constitution
- judicial review
- rule on cases of national significance: involving Constitution, national laws, treaties, disputes between states
- select cases
- **sitting**: justices hear cases and deliver opinions and verdicts
 - **term**: time Court is in session ... Each term begins the first Monday in October, final opinions are issued usually by late June.
 - briefs and oral arguments
 - decide cases
- **recessing**: justices write opinions (lengthy document stating a position on a case and the reasoning for such position)
- national policy-maker



Supreme Court Duties: Selecting Cases



- As president, Taft lobbied successfully for legislation to give the Court discretion in **choosing which cases to hear**.
- The most important tool that the Court has for controlling its agenda is the power to grant or not grant a **writ of certiorari** (document issued by the Supreme Court indicating that the Court will review a decision made by a lower court).
- annually, app. 7,000-8,000 petitions for a writ of certiorari (cert writ)
- many cases involve Bill of Rights issues
- Court rejects most cert petitions.
- number of cert writs granted by Court has fallen in recent decades
- 1970s: as many as 400 cases annually
- recent years: Court only hears 75-80



Supreme Court Duties: Selecting Cases



- All petitions for a writ of *certiorari* must meet **two criteria**:
 - The case must come either from a US court of appeals, a special three-judge district court or a state court of last resort.
 - Case must involve a national question ... must present questions of interpretation of national constitutional law or involve a national statute, action or treaty.
- **cert pool**: internal case management tool ... Currently, all justices except Alito and Gorsuch participate.
 - While it is the prerogative of every justice to read every petition for *cert* him/herself, most participate in the *cert* pool.
 - Petitions for *certiorari* are divided among the participating justices, who further divide them among their law clerks.
 - Clerks read petitions assigned to them and write a brief memo about each case, with a recommendation on whether to grant *cert*. Memos go to participating justices, who use them to select cases.

Supreme Court Duties: Selecting Cases



private conference: every Wednesday and Friday

- Only the justices are allowed in the conference room at this time and details of discussion are never disclosed.
- Five minutes before conference time the justices are summoned.
- Exchange ritual handshakes and take seats. Chief Justice sits at east end; other justices sit where they wish in order of seniority. Each justice has copy of day's agenda, including the discuss list.
- The Chief Justice opens the discussion, summarizing each case on the discuss list. The senior associate justice speaks next, and comment passes down the line.



conference room

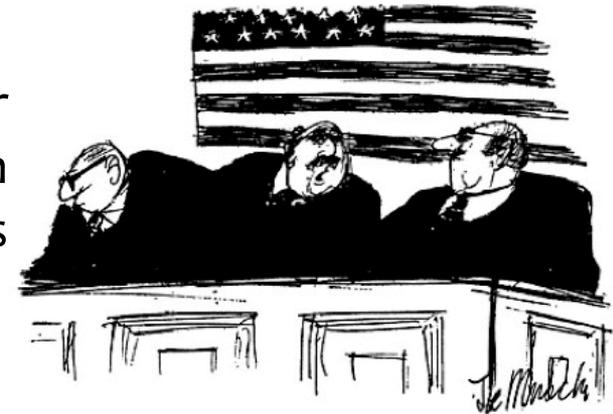
- The most junior justice speaks last, takes notes, answers the closed door and sends clerks on errands.
- To be accepted for review, a case needs only four votes.

Supreme Court Duties: Selecting Cases



How does the Court decide which cases to grant cert? It has a number of screening criteria to control its docket:

- **parties in case must have standing:** ability of a party to demonstrate to Court sufficient connection to and harm from law or action challenged to support that party's participation in the case
- **does not involve a political question:** an issue which Congress or president should handle
- **case must be ripe:** readiness of a case for litigation, a claim is not ripe if it rests upon contingent future events that may not occur as anticipated or may not occur at all



"Do you ever have one of those days when everything seems un-Constitutional?"

Supreme Court Duties: Selecting Cases



screening criteria:

- **case is not moot**: the controversy is still relevant when the Court hears the case, has not already been settled
- Appeals must be filed within a specified **time limit**, with proper and complete **paperwork** and the **filing fee** paid.
 - Requirements may be waived if a petitioner is indigent and files an affidavit in forma pauperis (in the form of a pauper, without funds to pursue costs of a lawsuit or criminal defense).
- **discuss list**: Before each conference, Chief Justice prepares list of petitions he believes have sufficient merit to warrant discussion. Any justice may add cases. Cases not on list (not designated for discussion by any justice) automatically denied review. Justice may decide that a case be re-listed for discussion at a later time.
- **rule of four**: at least four justices must vote to hear a case

Supreme Court Duties: Selecting Cases



Court more likely to grant cert to cases with certain characteristics.

- **National government** is the party asking for review.
 - Solicitor General
- Case involves **conflict among circuit courts**.
- Case presents a **civil rights or civil liberties** question.
- Case involves **ideological and/or policy preferences** of the justices.
- Case has **significant social or political interest**, as evidenced by the presence of interest group *amicus curiae* briefs filed with the Court.
- Case involves a **circuit split**: two lower courts have reached opposite conclusions on cases in which the facts seem virtually identical.



Supreme Court Duties: Selecting Cases



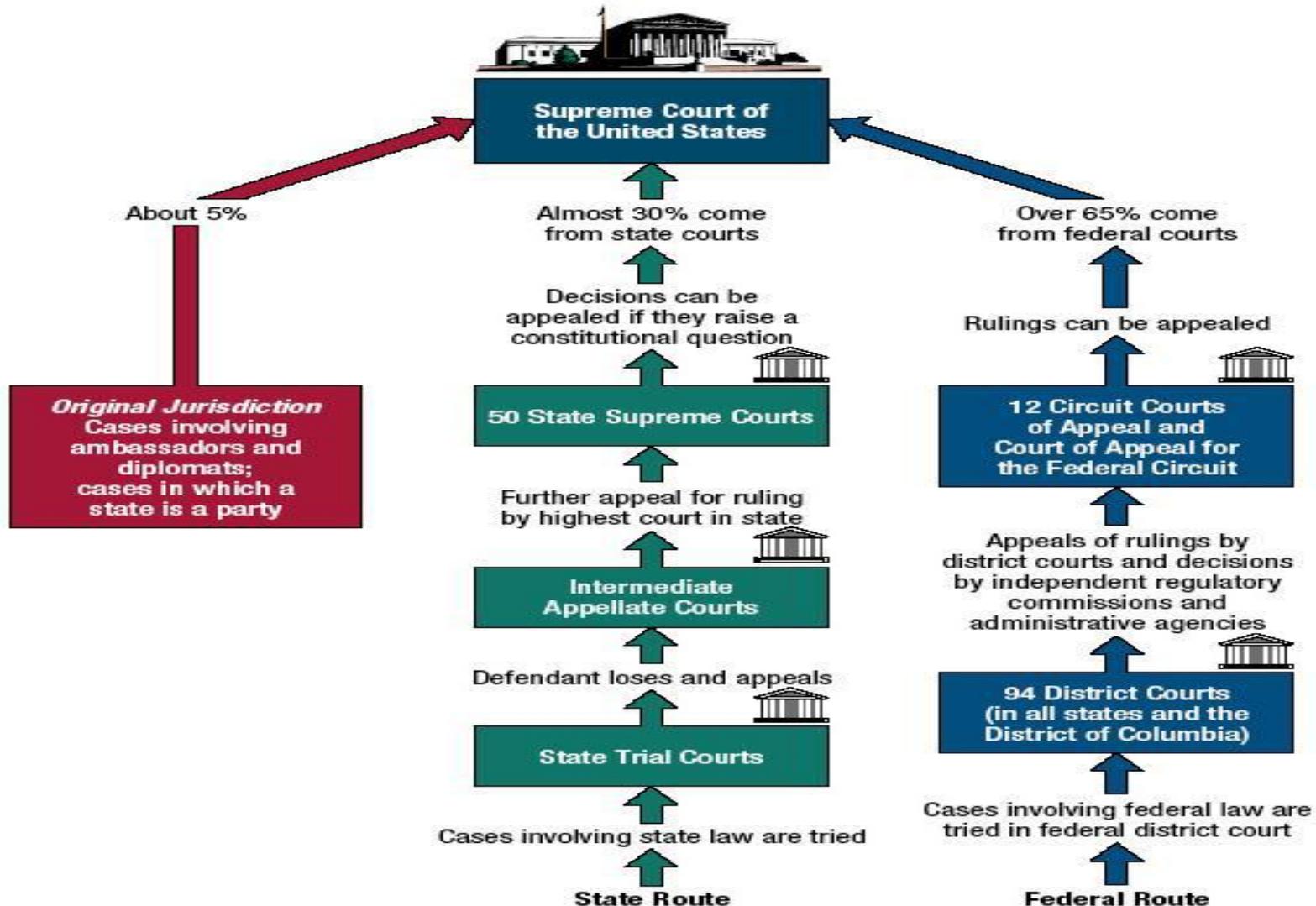
- For all cases granted *cert*, the attorneys are directed to submit their printed briefs so that justices have several weeks before argument.
- The grant or denial of *certiorari* petitions by the Court are usually issued as one-sentence orders without explanation.
- Granting *cert* means *only* that at least 4 justices believe the circumstances described in the petition are sufficient to warrant review by the Court.
 - It does *not* mean the Court disagrees with the lower court decision.
 - Conversely, *not* granting a writ does *not* mean the Court approves the lower court decision and certainly does not create a precedent.

CERTIORARI GRANTED

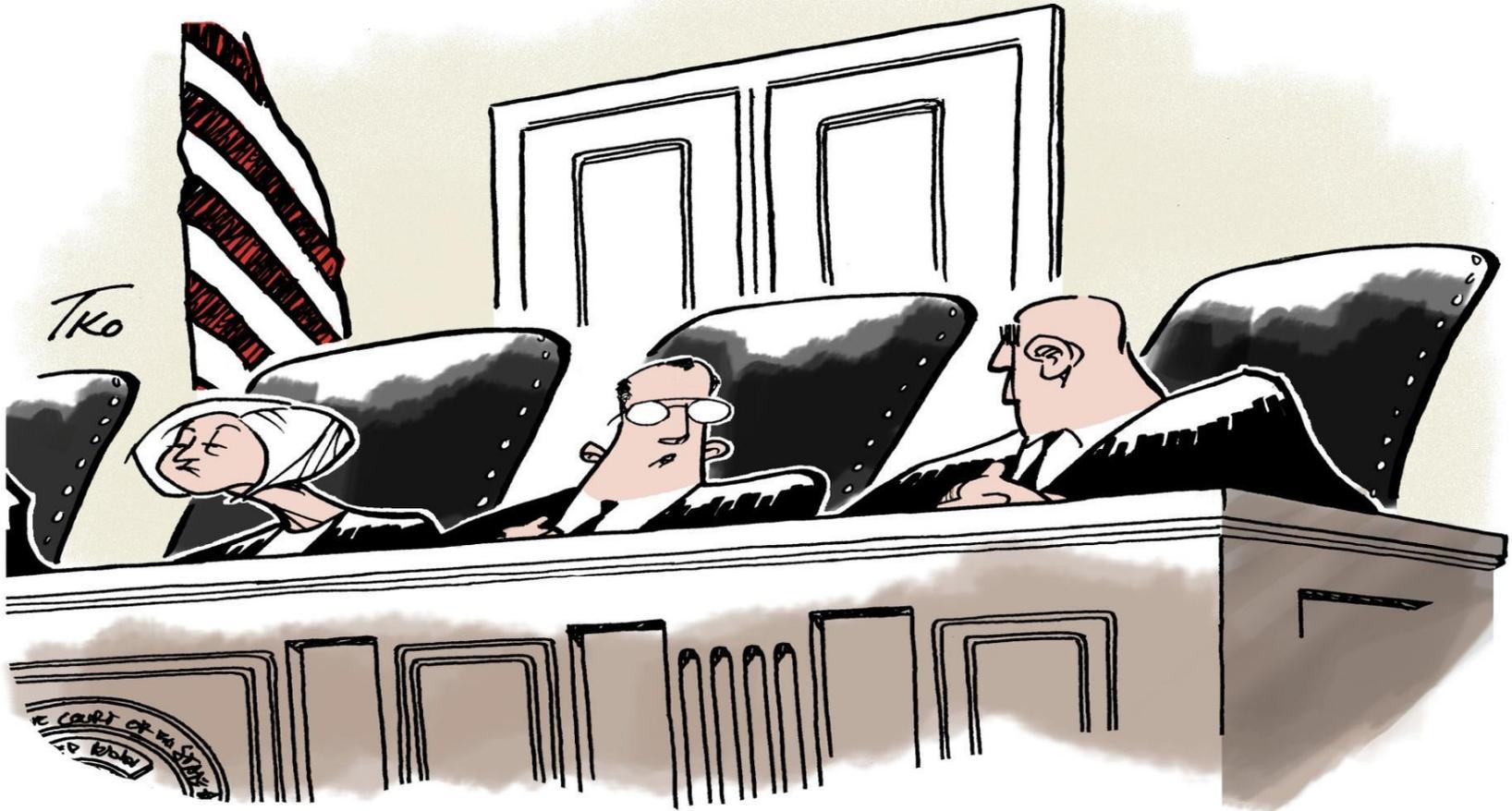
04-607 LABORATORY CORP. OF AMERICA V. METABOLITE LABORATORIES, ET AL.

The petition for a writ of certiorari is granted limited to
Question 3 presented by the petition.

Supreme Court Duties: Selecting Cases



continued in The Courts and The Judiciary Part IV



*“Don’t spread it around, but on the really tough ones,
I just go with ‘eenie, meenie, minie, moe.’”*