The U.S. Supreme Court

Equal Justice Under the Law

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This revision of "*The U.S. Supreme Court: Equal Justice Under the Law*" is a collection of essays that explains how the highest court in the United States functions. It has been updated to reflect the appointments of new justices and recent, significant decisions of the court.

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US Supreme Court: Equal Justice Under the Law
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The U.S. Supreme Court

Equal Justice Under the Law

The U.S. Supreme Court is in the foreground, with the U.S. Capitol building towering behind.
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Foreword

The Washington building that best represents the rule of law in the United States is not the U.S. Capitol building, where Congress makes the laws, but rather the Supreme Court building one block to the east. For the first century and a half of its existence, the Supreme Court met at the Capitol, a guest of the legislative branch. In 1935, the Supreme Court moved to a building of its own, a move symbolic of the stature of the judiciary as an independent branch of the United States government.

The U.S. federal government has three branches: the executive, represented by the president; the legislative, which includes both houses of Congress; and the judicial, embodied in the Supreme Court. Each branch has the power to keep in check the power of the other two. This system of "checks and balances" ensures power sharing among the three.

The historic decision that clarified the constitutionally separate executive and judicial branches of the U.S. government was *Marbury v. Madison* (1803). In that case, Chief Justice John Marshall established the Supreme Court's judicial review of U.S. law as separate from the legislative and executive branches of government. It meant the Court could rule on the constitutionality of laws.

Subsequent decisions have further strengthened the role of the Court while showing its ability to evolve. The Supreme Court thwarted President Franklin D. Roosevelt when it overturned early legislation that supported his 1930s New Deal economic recovery effort, maintaining a decadeslong stance that government regulation of commerce was unconstitutional. The Court later ruled in favor of New Deal measures as the Great Depression worsened. In *Brown v. Board of Education of Topeka* (1954), the Supreme Court ruled segregation in schools unconstitutional, a landmark decision for the civil rights movement which invalidated the *Plessy v. Ferguson* (1896) decision that allowed discriminatory laws. More recently, the Court upheld the Affordable Care Act of Congress proposed by President Obama in its *National Federation of Independent Business v. Sebelius* (2012) ruling. The case is discussed in journalist David G. Savage's article "Deciding 'What the Law Is.'" Despite controversy that may surround some decisions, the Supreme Court's role as guarantor of the rule of law is firmly enshrined in American life.

This publication focuses on how the Supreme Court functions, illustrating the vital role the Court plays in the U.S. constitutional system. It features an introduction by Chief Justice John G. Roberts Jr. and an article by Associate Justice Elena Kagan. Other contributors are legal scholars, journalists and court officials. They examine factors that determine court opinions and dissent, the role of politics and why justices may alter their views over time.

Law clerks and Court officials help the justices discharge their duties. Former Supreme Court law clerk Philippa Scarlett, now a practicing attorney, gives an insider's view as she explains the duties of the clerk. Four Court officials — the Court clerk, the marshal, the reporter of decisions and the public information officer — describe their jobs, their backgrounds and how they came to work for the Court. The Supreme Court's international outreach is described by Mira Gur-Arie. Brief biographies of the nine sitting and three retired Supreme Court justices, a bibliography and a guide to Internet resources complete this portrait of this essential American institution. ❧

The Editors

The U.S. Supreme Court: Fidelity to the Law

By John G. Roberts Jr. Chief Justice of the United States

In 1776, England's 13 American colonies declared their independence from British rule. Those new states found strength and unity in firmly held principles. Their Declaration of Independence professed that government exists to serve the people, the people have inalienable rights, and government secures those rights through adherence to the rule of law.

After the fighting ceased on the battlefields, the principles that had ignited a revolution found expression in a written constitution. The Constitution of the United States is a compact among the American people that guarantees individual liberty and fulfills that promise through the establishment of a democratic government in which those who write, enforce, and interpret the law must obey the law as well.

The Constitution prescribes a central role for the Supreme Court in the United States' system of government. It establishes the Court as an independent judicial body whose judgments are insulated from the influence of popular opinion and the coordinate branches of government. The Court instead is constrained by the principle of fidelity to the law itself. The Constitution requires the Court to adjudicate disputes, regardless of the identity of the parties, according to what the Constitution and duly enacted laws require.

Those of us who have the high privilege of serving on the Supreme Court know that the Court has earned the respect of its nation's citizens by adhering to the principles that motivated the United States' Declaration of Independence, that find expression in its Constitution, and that continue to unite the American people. I hope that those revolutionary principles, which are the foundation of the United States' enduring democracy, are a source of inspiration for nations throughout the world.

Chief Justice John G. Roberts Jr. ©*AP Images/Lauren Victoria Burke*

The Role of the Solicitor General

By Elena Kagan, Associate Justice of the Supreme Court and former Solicitor General of the United States

I am very pleased to have this opportunity to describe to a distinguished international audience the role of the Office of the Solicitor General in the United States.

The solicitor general's office represents the United States Government in cases before the Supreme Court and supervises the handling of litigation on behalf of the government in all appellate courts. Each year, the office participates in three-quarters or more of the cases that the Supreme Court considers. When the United States Government is a party, a member of the solicitor general's office argues on its behalf. The cases are quite varied and may entail defending the constitutionality of a statute passed by Congress, asserting the legality of an executive agency's policy decision, or defending a conviction in a federal criminal case.

In cases in which the United States is not a party, the solicitor general's office often participates as a "friend of the Court," or *amicus curiae*, and advises the court of the potential impact of the case on the long-term interests of the United States. Sometimes the solicitor general's office requests permission to participate as an *amicus curiae*, and sometimes the Court actually solicits the opinion of the United States Government by inviting the solicitor general to submit a brief.

By virtue of its institutional position, the Office of the Solicitor General has a special obligation to respect the Supreme Court's precedents and conduct its advocacy with complete candor. On occasion, the solicitor general will even confess error when she believes that the position taken by the government in the lower courts is inconsistent with her understanding of what the Constitution and laws require.

In addition to litigating cases in the Supreme Court, the Office of the Solicitor General supervises litigation on behalf of the government in the appellate courts. When the government receives an adverse ruling in the trial court, the solicitor general determines whether the government will appeal that ruling. Similarly, the solicitor general decides whether to seek Supreme Court review of adverse appellate court rulings. By controlling which cases the government appeals, the solicitor general's office maintains consistency in the positions that the United States Government asserts in cases throughout the nation's judicial system.

The Office of the Solicitor General is vital not only to ensuring that the interests of the United States Government are effectively represented in our courts, but also, by ensuring the fairness and integrity of the government's participation in the judicial system, to maintaining the rule of law in our democracy. ❧

Elena Kagan served as solicitor general in 2009 and 2010. She joined the Supreme Court in August 2010.

An artist's sketch of Solicitor General Donald Verrilli arguing a case before the Supreme Court. ©*AP Images*

Deciding "What the Law Is"

By David G. Savage

David G. Savage writes about the Supreme Court for the *Los Angeles Times*. He is also the author of the two-volume *Guide to the U.S. Supreme Court* published by the CQ Press in Washington. The U.S. Supreme Court opens its annual term each October facing an intriguing mix of cases and legal questions, all having bubbled up from state and federal courts across the nation. Some seem quite mundane, others are clearly momentous, but all of them call on the justices to decide the meaning of a federal law or the U.S. Constitution.

One case began when a police officer took his narcotics dog to sniff around the front door of a house in Miami. When "Franky" alerted his handler by sitting down, the police decided marijuana must be growing inside, and they were right. But the court took up the case of *Florida v. Jardines* to decide whether using a police dog at the door of a private home is an "unreasonable search" banned by the Fourth Amendment.

Search cases come in many forms. Can the police, without a search warrant, secretly attach a GPS device to a car and track its movements for weeks? No, the court said in *U.S. v. Jones* in 2012. Can a police officer who stops a suspected drunken driver in the middle of the night take him to a nearby hospital and force him to have his blood drawn? That was the question in the 2013 case of *Missouri v. McNeely*.

A national spotlight turns on the court when it takes up cases that define the powers of government and the rights of individuals. None was more dramatic than the 2012 challenge to the constitutionality of the Affordable Care Act, the health care law sponsored by President Barack Obama and Democrats in Congress and fiercely opposed by Republicans.

The case was seen as the most important since the late 1930s in defining the constitutional limits on the powers of the federal government and its relationship with the states. Small

business owners had sued to challenge the law's mandate that everyone obtain insurance coverage, while Republican state attorneys objected to the requirement that states expand their Medicaid coverage to serve more low-income residents. Medicaid is a state and federally funded program that helps qualified individuals obtain health care.

"In our federal system, the national government possesses only limited powers; the States and the people retain the remainder," began Chief Justice John G. Roberts Jr. on the morning of June 28, 2012.

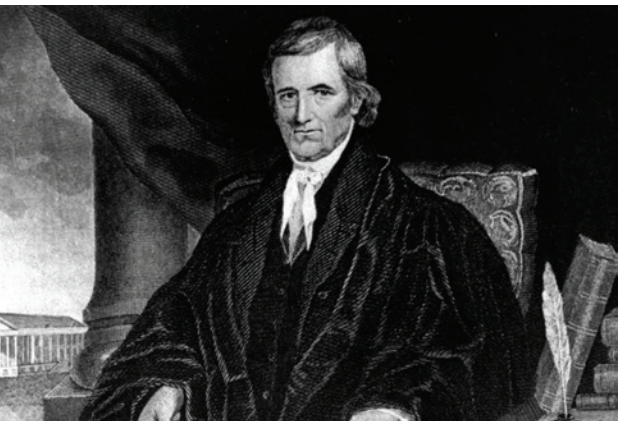
The insurance mandate could not be upheld under Congress's power to regulate commerce because the mandate "does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product," Roberts wrote in *National Federation of Independent Business v. Sebelius*. But he surprised many when he accepted the fall-back argument that the tax was a constitutional penalty for those who can afford it but choose not to buy insurance.

"It is emphatically the province of the judicial department to say what the law is." – Chief Justice John Marshall, *Marbury v. Madison*, 1803

In the second half of the opinion, Roberts said states may opt out of the Medicaid expansion. The health care law had survived, but by the narrowest of margins. "The Framers created a Federal Government of limited powers and assigned to this Court the duty of enforcing those limits. The Court does so today," Roberts said in closing. "But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people."

DECIDING "WHAT THE LAW IS"

Throughout its history, the Supreme Court's unique role has been to state the law and to define the powers of the government. "It is emphatically the province of the judicial department to say what the law is," declared Chief Justice John Marshall in 1803. His opinion in *Marbury v. Madison* set forth three principles that formed the basis of American constitutional law. First, the Constitution stood above ordinary laws,



Chief Justice John Marshall headed the Supreme Court from 1801 to 1835. His *Marbury v. Madison* decision helped define the separation of powers in U.S. government. ©*AP Images*

Basic Facts About the U.S. Supreme Court: The Cases

CASES FILED WITH THE COURT EACH TERM

about **10,000**

CASES SELECTED BY THE COURT FOR REVIEW EACH TERM

about **100**

WRITTEN OPINIONS EACH TERM

80-90

PERCENTAGE OF UNANIMOUS DECISIONS

25-33%

APPROVAL OF JUSTICES TO WIN A CASE

5 out of **9** justices

including those passed by Congress and signed by the President. Second, the Supreme Court would define the Constitution and say "what the law is." And third, the court would invalidate laws that it had decided were in conflict with the Constitution.

To those unfamiliar with U.S. democracy — as well as to many who are — it may seem peculiar to rest so much power in the hands of nine unelected judges. They can strike down laws — federal, state and local — which were enacted by the people and their representatives. A paradox it may be, but this was neither an accident nor a mistake. The framers of the Constitution placed great faith in the notion of a written plan for government which would stand as the law. It gave specific powers to three branches of government and divided authority among them. The Bill of Rights, ratified in 1791, set out the rights reserved to the people. For this grand plan to work, a body which was independent of fleeting political conflicts had to enforce the Constitution as the fundamental law. The justices of the Supreme Court are that body. The Supreme Court has the power to interpret the Constitution and U.S. law. The Constitution has a system of "checks and balances" that prevent the misuse of power. While the President can veto acts of Congress, and the Supreme Court can strike down laws if they violate the Constitution, Congress can pass revised laws or sponsor amendments that change the Constitution.

GIVING LOSERS ANOTHER CHANCE

The Supreme Court sits atop a federal court system that includes 12 regional appeals courts and a specialized court that reviews patents and international trade claims. Most federal cases start before a magistrate or a U.S. district judge and move up from them. Cases also come to the high court from a state court if a dispute there turns on an issue of federal law or the Constitution.

To win a review in the high court, you must be a loser. The court hears appeals only from parties who have a lost a case, or at least a significant part of a case, in a lower court. The case also must present a live dispute with real consequences. Purely abstract issues of law are shunned. Most importantly, however, the case must present a significant legal question which is in dispute. The first reason for accepting the case, according to the justices, is when the lower courts are split on an issue of federal law. It does not make sense to have a federal law mean one thing in Boston and something quite different in Houston. If at least four of the nine justices vote to hear an appeal, the court will grant it a review. It takes a majority of five to decide the case.

FEDERAL VS. STATE LAWS

As written in 1787, the Constitution had only 4,500 words. It left many questions unanswered. Foremost among them was: What about the states? The representatives of 12 of the 13 original states (Rhode Island did not participate) wrote and ratified the plan for a government of the new "United States," yet then, as now, most day-to-day governing took place at the state and municipal levels. There, citizens register to vote. There, roads, schools, parks and libraries are built and operated. There, police and fire departments protect the public's safety. The Supreme Court has devoted much of its time to adjudicating conflicts between the powers of the federal government and the powers of the states and localities. It has not resolved all the conflicts.

Basic Facts About the U.S. Supreme Court: The Court

APPOINTMENT TO THE COURT
by the President

CONFIRMATION OF APPOINTMENT TO THE COURT
by the U.S. Senate

NUMBER OF JUSTICES SINCE 1790
100 Associate Justices,
17 Chief Justices

APPOINTED BUT NOT CONFIRMED
36

CLERKS PER JUSTICE
3

LENGTH OF THE APPOINTMENT
Lifetime or until retirement

FIRST AFRICAN-AMERICAN JUSTICE
Justice Thurgood Marshall
Appointed 1967

FIRST WOMAN JUSTICE
Justice Sandra Day O'Connor
Appointed 1981

FIRST HISPANIC JUSTICE
Justice Sonia Sotomayor
Appointed 2009

The Civil War began in 1861 when the Southern states asserted a right to secede from the United States.

Such federal-state conflicts, while not so incendiary, continue today. Nearly every term, the court decides several cases involving federal-state conflicts. Many products, including prescription drugs, are tightly regulated from Washington by the federal Food and Drug Administration. So, can a patient who is hurt by a regulated drug sue the manufacturer under a state's consumer protection law? Yes, the court said in *Wyeth v. Levine*, deciding the federal law did not displace the state's law.

Diana Levine, a musician from Vermont, sued Wyeth, a drug maker, after she was injected with an anti-nausea drug and suffered a horrible complication. She did not know, nor did the nurse who injected her, that this drug could cause gangrene if it were injected into an artery. Levine's lower arm was amputated, and the Supreme Court upheld the jury's $7 million verdict against the drug maker.

In 2012, however, the court said the federal immigration law can displace a state's policy of aggressive enforcement against illegal immigrants. In *Arizona v. United States*, the court rejected most of a state law that authorized local police to arrest and jail illegal immigrants over the objections of federal officials. Justice Anthony Kennedy said the Constitution makes federal measures "the supreme law of the land."

THE CONSTITUTION GUIDES THE COURT

The court's best-known decisions in recent decades arose from constitutional claims involving individual rights. The Bill of Rights protects the freedom of speech, the free exercise of religion, and the freedom from an official "establishment of religion" and from "unreasonable searches" and "cruel and unusual punishments." Those rights are tested every year in real cases.

The court invoked the Eighth Amendment's ban on "cruel and unusual punishments" to limit harsh treatment for young offenders. In 2005, the justices abolished the death penalty for convicted murderers under the age of 18 (*Roper v. Simmons*), and they later said that young offenders may not be sentenced to life in prison with no hope of parole for crimes such as robbery or rape (*Graham v. Florida*, 2010). More recently, the court took a third step and ruled that, before juvenile murderers are sentenced to prison for life, a judge must weigh their youth as a reason for a lesser term (*Miller v. Alabama*, 2012).

"As a nation, we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate." – Chief Justice John G. Roberts Jr., *Snyder v. Phelps*, 2011

The principle of free speech is a pillar of the Constitution, and the court has said it will protect the rights of unpopular speakers, even when their words are outrageous and hurtful. In 2009, the court rejected a multimillion dollar jury verdict against a Kansas minister and his family for picketing and carrying signs at the funerals of soldiers who fought in Iraq. "Thank God for Dead Soldiers," one said. Chief Justice John Roberts said it is tempting to punish speakers whose words are the most offensive. "As a nation, we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate," he said in *Snyder v. Phelps*. (2011) The court in 2012 upheld the free-speech rights of liars and boasters when it struck down the Stolen Valor Act, a federal law that made it a crime to falsely claim to have won military honors (*United States v. Alvarez*).

The court also must decide whether the government can use public money to shape the message of others. Several international groups working to combat HIV and AIDS objected to a U.S. federal funding law that required them, as a condition of receiving money, to have a public policy "explicitly opposing prostitution and sex trafficking." They said such a policy would make it more difficult to persuade sex workers to come for testing and treatment. Early in 2013, the court agreed to rule on whether forcing a private group to espouse a government's policy violated its rights to free speech *(U.S. Agency for International Development v. Alliance for Open Society International*).

The court has given the strongest protection to speech that involves politics, but that, too, has provoked controversy. In 2010, the justices ruled that Citizens United, a small incorporated political group, had a free-speech right to make and market a DVD called *Hillary: The Movie* that harshly portrayed former first lady and then–New York Senator Hillary Rodham Clinton as she ran for president in 2008. The ruling set off a political furor because it made void a long-standing federal ban on campaign spending by corporations. The story may not be over. Opponents to the Citizens United decision, including several states, are urging Congress to pass a Constitutional amendment to reverse the Supreme Court decision.

In the past, critics have faulted the court's decisions which struck down long-standing practices, such as segregation in public schools (*Brown v. Board of Education*, 1954), official prayers in public schools (*Engel v. Vitale*, 1962), laws against abortion (*Roe v. Wade*, 1973) or laws directed against gays and lesbians (*Lawrence v. Texas*, 2003). But the justices say the Constitution's drafters wrote a government charter designed to protect freedom, one that could be adapted to changing times. "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress," Justice Kennedy wrote in the Lawrence decision. "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." ❧

The opinions expressed in this article do not necessarily reflect the view or policies of the U.S. government.

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The U.S. Court System

1. Cases start
in these courts:

- 94 U.S. Courts and U.S. Tax Court
- U.S. Court of International Trade, U.S. Court of Federal Claims, U.S. Court of Veterans Appeals
- Army, Navy-Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals

2. Disputes
can be appealed and decided by these courts:

- U.S. Court of Appeals, 12 Circuits*
- U.S.Court of Appeals for the Federal Circuit**
- U.S. Court of Appeals for the Armed Forces

3. The Final Appeal
goes to the Supreme Court, the last and highest authority

Supreme Court of the United States

** 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*

Influence and Independence: Role of Politics in Court Decisions

By Suzanna Sherry

Suzanna Sherry is the Herman O. Loewenstein Professor of Law at Vanderbilt University Law School in Nashville, Tennessee. She has co-authored three books on constitutional law and constitutional theory: *Judgment Calls: Separating Law From Politics in Constitutional Cases* (2008), *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (2002), and *Beyond All Reason: The Radical Assault on Truth in American Law* (1997). She has also written dozens of articles and co-authored three textbooks. Sherry acknowledges fears that a given justice's political opinions shape his or her rulings. These fears, she concludes, are greatly overstated. Many factors, both personal and institutional, outweigh a justice's political leanings in explaining his or her decisions.

Almost two centuries ago, the famous student of American life and customs Alexis de Tocqueville wrote, "[T]here is hardly a political question in the United States which does not sooner or later turn into a judicial one." That statement is still accurate today, and it poses a unique dilemma for American courts. How can judges resolve issues that, by their nature, are political rather than legal? The answer lies in the structure of the judicial branch and the decision-making process in which judges engage.

Unlike judges in many other countries, American judges are drawn from the ranks of ordinary lawyers and installed on the bench without any specialized training. Not even Supreme Court justices, although they often have prior experience on other courts, receive specialized training beyond the legal education of every lawyer in the United States. And while individuals (including future Supreme Court justices) studying to become lawyers may choose to emphasize particular subject areas, such as employment law or antitrust law, there are no courses that aim to prepare them for a judicial career.

Supreme Court justices, then, begin their careers as lawyers. Their backgrounds, their political preferences, and their intellectual inclinations are, in theory, as diverse as you might find in any group of lawyers. This diversity on the Supreme Court — especially political diversity — is somewhat narrowed by the process through which justices are chosen: Each is nominated by the president and must be confirmed by a majority vote in the Senate. Once appointed, justices serve until they die or choose to retire; there are no fixed terms and no mandatory retirement. Vacancies on the Supreme Court are thus sporadic and unpredictable, and the political views of any particular justice will depend on the political landscape at the time of his or her appointment. A popular president whose party is in the majority in the Senate will likely make very different choices than a weak president faced with a Senate in which the opposing party has the majority.

At any particular time, the Court will consist of justices appointed by different presidents and confirmed by different Senates. As the Court began its term in October 2012, for example, the nine sitting justices were appointed by five different presidents — three Republicans and two Democrats. The diversity of political views on the Court and the periodic appointment of new justices guarantee that no single political faction will reliably prevail for long.

Differences aside, all of the justices share a commitment to uphold the Constitution. Their fidelity to that goal makes the United States a country governed by the rule of law, rather than by the rule of men. The justices, in interpreting and applying the Constitution and laws, do not view themselves as Platonic guardians seeking to govern an imperfect society but, instead, as faithful agents of the law itself. The Supreme Court can, and does, decide political questions, but does so using the same legal tools that it uses for any legal question. If it were

Justice David Souter (left) did not always follow the political lead of President George H.W. Bush. ©*AP Images*

President Bill Clinton and his Supreme Court nominee Stephen Breyer at the White House in Washington in 1994. Breyer remains among the liberal Supreme Court judges. *Courtesy of the Supreme Court of the United States*

otherwise, the Court might jeopardize its own legitimacy: The public might not regard it as an institution particularly worthy of respect.

PERSONAL AND POLITICAL VIEWS

Nevertheless, justices do have personal views. They are appointed through a political process. Observers naturally must ask how great a role their political views actually play. Some scholars argue that the justices' political preferences play a large role, essentially dictating their decisions in many cases. They point to the fact that justices appointed by conservative presidents tend to vote in a conservative fashion and those appointed by liberal presidents vote the opposite way. The confirmation battles over recently nominated justices certainly suggest that many people view the justices' personal politics as an important factor in judicial decision making.

But we should not so quickly conclude that Supreme Court justices, like politicians, merely try to institute their own policy preferences. A number of factors complicate the analysis. First, it is difficult to disentangle a justice's political preferences from his or her judicial philosophy. Some justices believe that the Constitution should be interpreted according to what it meant when it was first adopted or that statutes should be interpreted by looking only to their texts. Others believe that the Constitution's meaning can change over time or that documentary evidence surrounding a statute's enactment can be useful in its interpretation.

Some justices are extremely reluctant to overturn laws enacted by state or federal legislatures, and others view careful oversight of the legislatures as an essential part of their role as guardians of the Constitution. A justice who believes that the Constitution ought to be interpreted according to its original meaning and who is reluctant to strike down laws will probably be quite unsympathetic to claims that various laws violate individuals' constitutional rights. If that justice also happens to be politically conservative, we might mistakenly attribute the lack of sympathy to politics rather than a judicial philosophy.

A justice's personal experiences and background also may influence how he or she approaches a case — although not always in predictable ways. A judge who grew up poor may feel empathy for the poor or may, instead, believe that his or her own ability to overcome the hardships of poverty shows that the poor should bear responsibility for their own situation. A justice with firsthand experience with corporations or the military or government bodies (to choose just a few examples) may have a deeper understanding of both their strengths and their weaknesses.

In the end, it seems difficult to support the conclusion that a justice's politics are the sole (or even the primary) influence on his or her decisions. There are simply too many instances in which justices surprise their appointing presidents, vote contrary to their own political views, or join with justices appointed by a president of a different party. Two of the most famous liberal justices of the 20th century, Chief Justice Earl Warren and Justice William Brennan, were nominated by Republican President Dwight Eisenhower — and Warren was confirmed by a Republican-majority Senate. Between

a quarter and a third of the cases decided by the Supreme Court are decided unanimously; all the justices, regardless of their political views, agree on the outcome. One study has concluded that in almost half of non-unanimous cases, the justices' votes do not accord with what one would predict based on their personal political views. Moreover, some deeply important legal questions are not predictably political: We cannot always identify the "conservative" or "liberal" position on cases involving, for example, conflicting constitutional rights or complex regulatory statutes.

OTHER FACTORS IN DECISION MAKING

The structure and functioning of the judiciary also temper any individual justice's tendency toward imposing personal political preferences. The most important factor is that the Court must publicly explain and justify its decisions: Every case is accompanied by one or more written opinions that provide the reasoning behind the Court's decision, and these opinions are available to anyone who wants to read them. They are widely discussed in the press (and on the Internet) and are often subject to careful critique by lawyers, judges, and scholars. This transparency ensures that justices cannot bend the law indiscriminately; their discretion is cabined by the pressures of public exposure. And any justice who does not want to be thought a fool or a knave will take care to craft persuasive opinions that show the reasonableness of his or her conclusions.

Deliberation also plays a role in moderating the influence of politics on justices' decision-making. Before reaching a decision, each justice reads the parties' briefs, listens to (and often asks questions of) the parties' lawyers at oral argument, and converses with other justices. The justices may also discuss cases with their law clerks, recent law school graduates who may bring a somewhat different perspective. After an initial vote on the case, the justices exchange drafts of opinions. During this long deliberation process, the justices remain open to persuasion, and it is not unusual for a justice to change his or her mind about a case. Because the justices, the lawyers, the parties, and the clerks represent a diverse range of political views, this process helps to focus the justices on legal, rather than political, factors.

Finally, the concept of *stare decisis*, or adherence to the decisions made in prior cases, limits the range of the Court's discretion. Absent extraordinary circumstances, the Supreme Court will follow *precedent* — the cases it has previously decided. Even justices who might disagree with a precedent (including those who dissented when the case was originally decided) will almost always feel bound to apply it to later cases. As decisions on a particular issue accumulate, the Court might clarify or modify its doctrines, but the earlier precedents will mark the starting point. History is full of examples of newly elected presidents vowing to change particular precedents of the Supreme Court, but failing despite the appointment of new justices. *Stare decisis* ensures that doctrinal changes are likely to be gradual rather than abrupt and that well-entrenched decisions are unlikely to be overturned. This gradual evolution of doctrine, in turn, fosters stability and predictability, both of which are necessary in a nation committed to the rule of law.

No system is perfect, of course. In a small number of cases, one likely explanation for particular justices' votes seems to be their own political preferences. These cases are often the most controversial and usually involve political disputes that have divided the country along political lines. It is no surprise that they similarly divide the justices. The existence of such cases, however, should not lead us to conclude that politics is a dominant factor in most of the Court's cases.

Many factors, therefore, influence the Supreme Court's decisions. The justices' political views play only a small role. Were it otherwise, the Court would be less able to serve as an independent check on the political branches, less able to protect the rights of individuals, and less secure in its legitimacy. The public would not have as much confidence in a Court seen as just another political body, rather than as an independent legal decision maker. The justices (and other judges) know this, and they safeguard the Court's reputation by minimizing the role of politics in their own decisions. ❧

The opinions expressed in this article do not necessarily reflect the views or policies of the U.S. government.

Justices Who Change: Justices, Judgments and the Court's Workings

By Linda Greenhouse

Sonia Sotomayor is escorted by Chief Justice John Roberts following her investiture ceremony. ©*AP Images/Evan Vucci*

Linda Greenhouse is Knight Distinguished Journalist in Residence and Joseph Goldstein Lecturer in Law at Yale Law School in New Haven, Connecticut. From 1978 to 2008, she covered the Supreme Court for the *New York Times*.

The Supreme Court's outlook is much more than the static views of nine individuals. A justice's worldview evolves with the passage of time, exposure to world events, and with close personal and intellectual interaction with the other justices. The results can be unpredictable.

During the U.S. Senate confirmation hearing on Sonia Sotomayor's nomination to the Supreme Court, the focus was naturally enough on what kind of Supreme Court justice she would be. Her assurance that her watchword as a judge was "fidelity to the law," and that she saw a judge's job as applying the facts of the case to the relevant law, satisfied most of the senators. After confirmation by a vote of 68 to 31, Sotomayor took her seat on August 8, 2009.

Her description of the job as a kind of mechanical exercise, nevertheless, begged several interesting questions. If the craft of judging is really so simple and straightforward, how do we account for the fact that during the Supreme Court's last term, the justices decided nearly a quarter of their cases (15 out of 63) with majorities of only 5 votes. (Thirteen of these cases were decided by votes of 5 to 4, and two others, with a justice not participating, by votes of 5 to 3.) Presumably, the justices on each side of those disputed decisions thought they were being faithful to the law. But for any of a variety of reasons, they saw the law differently.

That much is both obvious and predictable; if the justices didn't differ from one another, then the process of filling a Supreme Court vacancy would hardly be the galvanizing event in American politics that it is today.

But the mechanical description of the judicial role begged another, more elusive question about judicial behavior: how to account for the change that many, if not most, Supreme Court justices undergo during their tenure. Not uncommonly, and sometimes quite dramatically, a justice's perspective changes. A justice may still be applying the facts to the law while coming

to different conclusions about which facts really matter and which legal precedents provide the right framework for the decision. A president may believe correctly that he has found a Supreme Court nominee who shares his priorities and outlook on the law. But years later, perhaps long after that president has left office, that nominee, shielded by life tenure, may well become a very different kind of judge. Examples are legion. Here are just a few.

FROM PRESIDENTIAL AUTHORITY TO AFFIRMATIVE ACTION

When Robert H. Jackson, attorney general in the administration of President Franklin D. Roosevelt, took his seat on the Supreme Court in 1941, he was a strong advocate of presidential power. Early in his tenure, shortly after the United States entered World War II, the Court decided an important case on the dimensions of the president's wartime authority. The question in this case (*Ex parte Quirin*) was the validity of the military commission that tried and sentenced to death eight Nazi saboteurs who had been caught trying to enter the country.

Robert H. Jackson changed his views on presidential powers after 11 years on the Supreme Court. ©*AP Images*

The court upheld the procedure and outcome, but Jackson, in an unpublished opinion that came to light only years later, would have gone further. The saboteurs were "prisoners of the president by virtue of his status as the constitutional head of the military establishment," he wrote, suggesting that the Court should not even have undertaken to review Roosevelt's exercise of his authority.

Few people would have predicted that just 11 years later, Jackson would take a very different position in one of the most famous of all Supreme Court decisions on the limits of presidential authority. During the Korean War, the country's steel mills were shut down by a strike, cutting off production of weapons and other important items. President Harry S. Truman ordered a government seizure of the steel mills. The Supreme Court declared the president's action unconstitutional (*Youngstown Sheet & Tube Co. v. Sawyer*). Jackson agreed, in a concurring opinion that the Court has cited in recent years in decisions granting rights to the detainees in the U.S. prison at Guantanamo Bay, Cuba. A president cannot rely on the unilateral exercise of executive power, Jackson said; the Court would not rubber-stamp presidential actions taken in the absence of authorization by Congress but would evaluate them in context to see whether the president's claim of power was legitimate.

Barely a decade on the Court had transformed Robert Jackson from one of the presidency's strongest defenders to one of the most powerful advocates of limits on presidential authority.

President Dwight D. Eisenhower named a political rival, Governor Earl Warren of California, as chief justice. Warren had spent 23 years as a local prosecutor and state attorney general, and during his first term on the Court, 1953–1954, he voted most of the time against criminal defendants and against people who claimed that their civil rights were being violated. But over the next 15 years, he became a champion of criminal defendants and civil rights plaintiffs, and the Warren Court is known for its expansive interpretation of the rights of both.

The career of Justice Byron R. White, named to the Court by President John F. Kennedy in 1962, illustrates a modern example of a justice who became more conservative over time. He grew disenchanted with the pro-defendant rulings of the Warren Court and did what he could to limit the scope of the famous *Miranda* ruling, which invalidated the convictions of defendants who had not been read a list of their rights in advance of being questioned by the police. A majority opinion he wrote in 1984 (*United States v. Leon*) placed the first important limitation on the "exclusionary rule" that had long required courts to exclude incriminating evidence that the police had obtained improperly.

Justice Harry A. Blackmun was named to the Court in 1970 by President Richard M. Nixon, who had vowed during his 1968 campaign for the White House to find "law and order" justices who would reverse the rulings of the Warren Court. Early in his tenure, Harry Blackmun seemed to fill the role perfectly. He dissented in 1972 from the Supreme Court decision that invalidated all death penalty laws in the country, and he joined the majority four years later when the Court upheld new laws and permitted executions to resume. In 1973 he wrote in a majority opinion that requiring payment of a $50 fee to file for bankruptcy did not violate the rights of poor people. This decision (*United States v. Kras*) outraged one of the most liberal justices, William O. Douglas, who complained, "Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy."

Yet only four years later, Blackmun was arguing strenuously in dissent that the government should pay for abortions for women who were too poor to afford them. By the end of his Supreme Court career, in 1994, he was an avowed opponent of capital punishment and was widely considered to be the most liberal member of the Supreme Court.

Justice Sandra Day O'Connor, the first woman on the Supreme Court, named by President Ronald Reagan in 1981, was also reliably conservative in her early years. She was highly critical of *Roe v. Wade*, the 1973 Supreme Court decision that established a constitutional right to abortion. She also was skeptical of government programs that gave preferences in hiring or in public works contracts to members of disadvantaged minority groups. Yet in 1992 O'Connor provided the crucial fifth vote that kept *Roe v. Wade* from being overturned (*Planned Parenthood of Southeastern Pennsylvania v. Casey*). And in 2003 she wrote the Court's majority opinion that upheld an affirmative action program that gave an advantage to black applicants for admission to a leading public law school at the University of Michigan (*Grutter v. Bollinger*).

A TRANSFORMATIVE EXPERIENCE

How common are such profound shifts? More common than most Americans realize. Professor Lee Epstein of Northwestern University Law School in Chicago has studied the history of what she calls "ideological drift" among Supreme Court justices. In a 2007 article on her findings, she observed, "Contrary to received wisdom, virtually every justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times" *[http://www.law.northwestern.edu/journals/lawreview/colloquy/2007/8]*.

The intriguing question is why this happens. Supreme Court justices, after all, arrive at the Court as mature adults, often quite prominent in public life — not the sort of people, in other words, who are still finding their way.

Robert Jackson posed the same question in a book he published shortly before his own appointment to the Court. Writing as a close student of the Court, he asked in *The Struggle for Judicial Supremacy*, "Why is it that the Court influences appointees more consistently than appointees influence the Court?" In other words, his own observation told him that the bare fact of serving on the Court was a transformative experience. His own experience would prove unique: He took a year off from his Supreme Court duties to serve as the chief prosecutor at the Nuremburg war crimes trials. Is it fanciful to suppose that his close examination of the effects of unbridled executive power in Nazi Germany influenced his thinking about the need for limits on presidential authority?

Harry Blackmun underwent a different kind of transforming experience. He wrote the opinion in *Roe v. Wade,* an opinion that spoke for a 7-to-2 majority and that came to him not by his choice but by assignment from Chief Justice Warren E. Burger. Nevertheless, the public quickly attached the abortion decision to Blackmun personally. He received hate-filled letters by the tens of thousands from those who opposed the decision and was greeted as a hero by those who supported it. As a result, his own self-image became inextricably connected to *Roe v. Wade* and to its fate in an increasingly hostile atmosphere, and it is possible to trace his liberal evolution to his self-assigned role as the chief defender of the right to abortion.

Several recent studies have found that those justices most likely to migrate from their initial ideological outlooks are those who are newcomers to Washington rather than "insiders" familiar with the ways of the capital. This observation has common-sense appeal: A mid-life move to Washington, under a national spotlight, has to be an awesome experience that may well inspire new ways of looking at the world. Professor Michael Dorf of Columbia Law School has found in studying the last dozen Republican nominees to the Court that those who lack prior experience in the executive branch of the federal government are most likely to drift to the left, while those who have such experience are not likely to change their ideological outlook.

That also makes sense: Those with executive branch experience, typically a prominent legal position in the White House or Justice Department, have paid their dues and are known quantities. Warren Burger and William H. Rehnquist, the last two chief justices, fit that model; both had served as assistant attorneys general. Chief Justice John G. Roberts Jr., who served as a young lawyer in the White House and as a senior lawyer in the Solicitor General's Office in the Justice Department, appears highly likely to fit it as well. Approaching a decade as Chief Justice, he remains staunchly conservative, with little sign of "drift."

But with the average tenure of a Supreme Court justice now at 18 years, the timeline is a generous one. Epstein's analysis of Sandra Day O'Connor's voting patterns over her 24-year career shows that as late as 2002, O'Connor would predictably have voted to strike down the same University of Michigan affirmative action program that she in fact voted to uphold the next year. O'Connor herself has spoken warmly of the influence she felt from Justice Thurgood Marshall, with whom she shared her first decade on the bench. A great civil rights crusader and the country's first black Supreme Court justice, Marshall would often illustrate legal points with stories from his own

Justice Sandra Day O'Connor was a Supreme Court selection of President Ronald Reagan. ©*AP Images*