Lecture Notes

# Chapter 1: Understanding the U.S. Supreme Court

## Annotated Chapter Outline

1. Processing Supreme Court Cases
   1. See Figure 1.1.
   2. Deciding to Decide: The Supreme Court’s Caseload
      1. How Cases Get to the Court: Jurisdiction and the Routes of Appeal
         1. Cases come to the Court in one of four ways:
            1. A request for review under the Court’s original jurisdiction.
            2. One of three appellate routes—appeals, certification, and petitions for writs of certiorari.
         2. Original cases are those that no other court has heard.
            1. The Court normally reviews only those cases in which one state is suing another.
         3. See Figure 1.2.
         4. To invoke the Court’s appellate jurisdiction, litigants can take one of three routes, depending on the nature of their dispute:
            1. Cases “on appeal” involve issues Congress has determined are so important that a ruling by the Supreme Court is necessary.
            2. Lower appellate courts can file writs of certification asking the justices to respond to questions aimed at clarifying federal law.
            3. In a petition for a writ of certiorari, the litigants seeking Supreme Court review ask the Court, literally, to become “informed” about their cases by requesting the lower court to send up the record.
      2. How the Court Decides: The Case Selection Process
         1. The original pool of about six to eight thousand petitions faces several checkpoints.
         2. The clerk’s office examines petitions to make sure they are in proper form and conform to the Court’s precise rules.
         3. Clerks from the different chambers collaborate by dividing, reading, and then writing memos on the petitions.
         4. The justices then use the pool memos, along with their clerks’ reports, as a basis for making their own independent determinations about which cases they believe are worthy of a full hearing.
         5. Before the justices meet to make case selection decisions, the chief circulates a “discuss list” containing those cases they feel merit consideration.
         6. The discussion of each petition begins with the chief justice presenting a short summary of the facts and, typically, stating their vote.
         7. The associate justices then comment on each petition in order of seniority.
         8. See Figure 1.3.
         9. By tradition, the Court grants certiorari to those cases receiving the affirmative vote of at least four justices.
      3. Considerations Affecting Case Selection Decisions
         1. Legal considerations are listed in Rule 10, which the Court has established to govern the certiorari decision-making process.
         2. Three are particularly important political factors that may influence the Court’s case selection process:
            1. The U.S. solicitor general (SG).
            2. The amicus curiae (friend of the court) brief.
            3. The ideology of the justices.
   3. The Role of Attorneys
      1. Written Arguments
         1. Written arguments, called briefs, are the major vehicles for parties to Supreme Court cases to document their positions.
         2. The appealing party (known as the appellant or petitioner) must submit its brief within forty-five days of the time the Court grants certiorari.
         3. The opposing party (known as the appellee or respondent) has thirty days after receipt of the appellant’s brief to respond with arguments urging affirmance of the lower court ruling.
         4. The justices may use written briefs to formulate the questions they ask the lawyers representing the parties.
         5. Those wishing to submit friend of the court briefs must obtain the written permission of the parties or the Court.
      2. Oral Arguments
         1. Each side has thirty minutes to convince the Court of the merits of its position and to field questions from the justices.
         2. In some important cases, the Court will allocate additional time for arguments.
         3. The justices can interrupt the attorneys at any time with comments and questions.
         4. Oral arguments are the only part of the Court’s decision-making process that occurs in public.
   4. The Supreme Court Decides: Some Preliminaries
      1. The Conference
         1. The Court insists that its decisions take place in a private conference, with no one in attendance except the justices.
            1. The Court is supposed to base its decisions on factors other than public opinion.
            2. Although the Court reaches tentative decisions on cases, the opinions explaining the decisions remain to be written.
         2. The justices have not experienced many information leaks.
            1. *Dobbs v. Jackson Women’s Health Organization.*
         3. After the public announcement of a decision, clerks and even justices have sometimes thrown their own sunshine on the Court’s deliberations.
            1. *National Federation of Independent Business v. Sebelius (2012).*
            2. The chief justice presides over the deliberations.
            3. He calls up the case for discussion and then presents his views about the issues and how the case should be decided.
            4. The remaining justices state their views and vote in order of seniority.
            5. The level and intensity of discussion differ from case to case.
      2. Opinion Assignment and Circulation
         1. When the chief justice votes with the majority, they assign the writing of the opinion.
         2. When the chief justice votes with the minority, the assignment task falls to the most senior member of the Court who voted with the majority.
         3. First and perhaps foremost, the assigner tries to equalize the distribution of the Court’s workload.
         4. They may also consider the justices’ particular areas of expertise.
         5. There has been a tendency among chief justices to self-assign especially important cases.
            1. *Brown v. Board of Education (1954).*
         6. For cases decided by a one-vote margin, chiefs have been known to assign the opinion to a moderate member of the majority.
         7. The writer begins the process by circulating an opinion draft to the others.
         8. Once the justices receive the first draft of the opinion, they have many options:
            1. They can join the opinion.
            2. They can ask the opinion writer to make changes.
            3. They can tell the opinion writer that they plan to circulate a dissenting or concurring opinion.
            4. They can tell the opinion writer that they await further writings.
         9. Many different opinions on the same case, at various stages of development, may be floating around the Court over the course of several months.
         10. Eventually, the final version of the opinion is reached, and each justice expresses a position in writing or by signing an opinion of another justice.
2. Supreme Court Decision Making: Legalism
   1. The legalistic theory of judicial decision making focuses on the role of law and legal methods in determining how justices interpret the Constitution.
   2. The realistic theory of judging emphasizes nonlegalistic factors, including the role of politics.
   3. There are reasons to believe that justices seek to follow a legal approach:
      1. The justices themselves often say they look to the founding period, the words of the Constitution, previously decided cases, and other legalistic approaches.
      2. The justices are obliged to be “principled in their decision-making process.”
   4. Legalism in constitutional law centers on the methods of constitutional interpretation.
      1. See Table 1.1.
   5. Originalism
      1. Originalists attempt to interpret the Constitution in line with what it meant at the time of its drafting.
      2. One form of originalism, *intentionalism*, emphasizes the objectives or purposes of the Constitution’s framers.
         1. ***Hylton v. United States***
         2. *Hustler Magazine v. Falwell (1988)*
         3. Advocates of this approach offer several justifications for the relevance of the intent of the framers.
            1. The framers acted in a calculated manner.
            2. If justices scrutinize the intent of the framers, they can deduce “constitutional truths,” which produces neutral principles of law and eliminates value-laden decisions.
            3. It fosters stability in law.
      3. Another form is *original meaning or understanding*.
         1. It emphasizes “the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.”
         2. The merits of this approach are similar to those of intentionalism.
         3. *Nixon v. United States (1993).*
      4. Originalism has generated many critics over the years.
         1. Thurgood Marshall did not believe that the Constitution’s meaning was “forever ‘fixed’ at the Philadelphia Convention.”
         2. One reason for the controversy is that originalism became highly politicized in the 1980s.
         3. Justice Brennan argued that if the justices employed only this approach, the Constitution would lose its applicability and be rendered useless.
         4. A criticism often leveled at intentionalism is that the Constitution embodies not one intent but many.
         5. *District of Columbia v. Heller (2008).*
   6. Textualism
      1. Textualists look no further than the words of the Constitution to reach decisions, without seeking the *intended* meanings behind the words.
         1. Under the original meaning approach, it is fair game for consider what the words would have ordinarily meant to the people of that time.
         2. Pure textualists or *literalists* believe that justices ought to consider only the words in the constitutional text, and the words alone.
      2. Originalism and pure textualism sometimes overlap, and sometimes lead to radically different results.
      3. Textual analysis is quite common in Supreme Court opinions.
      4. Like originalists, advocates viewed textualism as a value-free form of jurisprudence.
      5. Justice Black’s literal brand of jurisprudence has been vulnerable to attack.
         1. Some assert that it led him to take some rather peculiar positions.
         2. Another objection is that literalism can result in inconsistent outcomes.
         3. Additionally, it presupposes a precision in the English language that does not exist.
         4. Finally, despite the precision of some constitutional provisions, they are loaded with “reasons, goals, values, and the like.”
   7. Structural Analysis
      1. Structural reasoning suggests that interpretation of Constitutional clauses should follow from, or at least be consistent with, overarching structures or governing principles established in the Constitution.
      2. These structures are so important that judges and lawyers should read the Constitution with an eye toward preserving them.
      3. There are many famous examples of structural analyses.
         1. *McCulloch v. Maryland (1819).*
      4. Structural reasoning does not necessarily lead to a single answer in each and every case.
         1. *INS v. Chadha (1983).*
   8. Stare Decisis
      1. “Let the decision stand.”
         1. Jurists should decide cases on the basis of previously established rulings, or precedent.
         2. The law they generate becomes predictable and stable.
      2. Precedent can be an important factor in Supreme Court decision making.
         1. See Table 1.2.
      3. Many allege that judicial appeal to precedent often is mere window dressing.
         1. The Court has generated so much precedent that it is usually possible for justices to find support for any conclusion.
         2. It may be difficult to locate the rule of law emerging in a majority opinion.
            1. “Establishing the principle of the case,” or the ratio decidendi.
         3. Many justices recognize the limits of stare decisis in cases involving constitutional interpretation.
   9. Pragmatism
      1. The members of the Court often consider the effects of a decision for different segments of society.
         1. This interpretive approach often takes the form of a balancing exercise.
         2. A justice will select from among plausible constitutional interpretations the one that has the best consequences.
      2. Justices may attempt to create rules, or analyze existing ones, so that they maximize benefits and minimize costs.
         1. *United States v. Leon (1984).*
   10. Polling Other Jurisdictions
       1. A justice might probe English traditions or early colonial or state practices to determine how public officials of the times—or of contemporary times—interpreted similar words or phrases.
          1. ***Wolf v. Colorado (1949).***
          2. *Rochin v. California (1952).*
          3. *Mapp v. Ohio (1961).*
       2. The method is far from foolproof.
          1. The Constitution of 1787 as it initially stood and has since been amended rejects many English and some colonial and state practices.
          2. Even a steady stream of precedents from the states may signify nothing more than that judges imitated each other under the rubric of stare decisis.
          3. It is difficult to imagine how the thinking of people in the eighteenth century could be used to evaluate government practices in the twentieth and twenty-first centuries.
       3. The Supreme Court continues to consider the practices of other U.S. jurisdictions.
       4. Courts in other societies occasionally look to their counterparts elsewhere.
          1. *The State v. Makwanyane (1995)*
          2. *United States v. Alvarez-Machain (1992)*
3. Supreme Court Decision Making: Realism
   1. Preference-Based Approaches
      1. Preference-based approaches see the justices as rational decision makers who hold certain values they would like to see reflected in the outcomes of Court cases.
      2. Judicial Attitudes
         1. Attitudinal approaches emphasize the centrality of the justices’ political ideologies.
         2. Each justice evaluates the facts of disputes and arrives at decisions consistent with their personal ideology.
         3. C. Herman Pritchett was one of the first scholars to study the relevance of the justices’ personal attitudes.
            1. Pritchett observed that dissent had become an institutionalized feature of judicial decisions.
            2. Pritchett concluded that the justices were “motivated by their own preferences.”
            3. Pritchett’s findings touched off an explosion of research on the influence of attitudes on Supreme Court decision making.
         4. Much scholarship attempts to predict justices’ voting behavior based on their ideological preferences.
            1. See Figure 1.4.
            2. Data show dramatic differences among four important jurists, especially in cases involving civil liberties.
            3. The liberal position is a vote in favor of the individual who is claiming a denial of these basic rights.
            4. Economics cases involve challenges to the government’s authority to regulate the economy.
            5. The liberal position supports an active role by the government in controlling business and economic activity, and a conservative position opposes such government intervention.
         5. It is common to describe a particular era of the Court in terms of its political preferences.
            1. See Figure 1.5.
         6. Preference-based approaches are not foolproof.
            1. They can involve circular reasoning.
            2. Knowing that the Court decided a case in a liberal or conservative way does not tell us much about the Court’s actual policy positions.
            3. Ideological labels are occasionally bound to particular historical eras.
            4. *Muller v. Oregon (1908).*
            5. Some decisions do not fall neatly on a single conservative-liberal dimension.
            6. ***Wisconsin v. Mitchell (1993).***
      3. Judicial Role
         1. The judicial role is norms that constrain the behavior of jurists.
            1. Each justice has a view of his or her role.
            2. The view that is based far less on political ideology and far more on fundamental beliefs of what a good judge should do or what the proper role of the Court should be.
         2. Analysts typically discuss judicial roles in terms of activism and restraint.
            1. An activist justice believes that the proper role of the Court is to assert independent positions in deciding cases, to review the actions of the other branches vigorously, to be willing to strike down acts the justice believes are unconstitutional, and to impose far-reaching remedies for legal wrongs whenever necessary.
            2. A restraint-oriented justice believes courts should not become involved in the operations of the other branches unless it is absolutely unavoidable, the benefit of the doubt should be given to actions taken by elected officials, and courts should impose remedies that are narrowly tailored to correct a specific legal wrong.
         3. We might expect to find activist justices more willing than their opposites to strike down legislation.
            1. See Table 1.3.
            2. Although the justices do differ, they all show a willingness to join their colleagues in casting aside laws whose validity they question.
         4. Judicial activism and restraint do not necessarily equal judicial liberalism and conservatism.
   2. Strategic Approaches
      1. Strategic accounts of judicial decisions rest on a few simple propositions:
         1. Justices may be primarily seekers of legal policy.
         2. They may be motivated by jurisprudential principles.
         3. They are not unconstrained actors who make decisions based solely on their own ideological attitudes or jurisprudential desires.
      2. Justices are strategic actors who realize that their ability to achieve their goals depends on:
         1. Consideration of the preferences of other relevant actors.
         2. The choices they expect others to make.
         3. The institutional context in which they act.
      3. This approach derives from the rational choice paradigm.
      4. Strategic behavior manifests in many ways.
         1. One way is in the frequency of vote changes.
         2. Another is the revision of opinions that occurs in almost every Court case.
         3. *Griswold v. Connecticut (1965).*
   3. External Factors
      1. Public Opinion
         1. Scholars offer three reasons for the claim that the justices are affected by public opinion.
            1. Because justices are political appointees, they reflect, however subtly, the views of the majority.
            2. The Court, at least occasionally, views public opinion as a legitimate guide for decisions.
            3. The justices have no mechanism for enforcing their decisions, depending on other political officials to support their positions and on general public compliance.
         2. Supporting and contradicting examples.
            1. *Korematsu v. United States (1944).*
            2. The Court struck down much New Deal legislation, despite public support.
         3. Some scholars doubt that public opinion affects the Court’s decision making.
            1. Norpoth and Segal concluded that new justices create the illusion that the Court echoes public opinion.
         4. Whether public opinion affects Supreme Court decision making is still open for discussion.
      2. Partisan Politics
         1. Many assert that the Court is responsive to the influence of partisan politics, both internally and externally.
         2. It’s possible the justices carry their partisan attachments onto the bench.
            1. Those who have ascended to the Supreme Court have typically had strong connections to political institutions.
            2. Justices who affiliate with the Democratic Party tend to be more liberal in their decision making than those who are Republicans.
            3. *Bush v. Gore (2000).*
         3. Political pressures from the outside also can affect the Court.
            1. The president has some direct links with the Court.
            2. A less direct source of presidential influence is the executive branch, which can help or hinder the Court in implementing its policies.
            3. *Marbury v. Madison.*
            4. Another indirect source of influence is the U.S. solicitor general.
            5. The legislature has many powers over the Court the justices cannot ignore.
            6. Congress can restrict the Court’s jurisdiction to hear cases, enact legislation or propose constitutional amendments to recast Court decisions, and hold judicial salaries constant.
      3. Interest Groups
         1. Supreme Court litigation has become political over time.
         2. The most striking example is the incursion of organized interest groups into the judicial process.
         3. Interest groups try to influence Court decisions by submitting amicus curiae briefs.
            1. *Regents of the University of California v. Bakke (1978).*
            2. ***Grutter v. Bollinger (2003).***
            3. ***Fisher v. University of Texas (2013).***
            4. *Obergefell v. Hodges (2015).*
            5. *Dobbs v. Jackson Women’s Health Organization (2022).*
         4. Groups go to the Court to influence the Court’s decisions.
         5. But group also go to set institutional agendas, and to counterbalance other groups.
         6. They also seek to publicize their causes and their organizations.
            1. *Brown v. Board of Education (1954).*
         7. When interest groups participate on both sides, it is reasonable to speculate that one or more exerted some intellectual influence.
            1. In some instances, the Court’s opinion may cite directly an argument advanced in an amicus brief.
            2. That might indicate merely that a justice is citing the brief to support a conclusion he or she had already reached.
         8. Attorneys for some groups are often more experienced and their staffs more adept at research than “one-shotters.”
         9. Some evidence suggests that attorneys working for interest groups are no more successful than private counsel.
4. Conducting Research on the Supreme Court
   1. Locating Supreme Court Decisions
      1. The four major reporters are:
         1. *U.S. Reports.*
         2. *United States Supreme Court Reports, Lawyers’ Edition.*
         3. *Supreme Court Reporter.*
         4. *U.S. Law Week.*
      2. They vary in the kinds of ancillary material they provide.
         1. See Table 1.4.
      3. Case citations take different forms, but they all work in roughly the same way.
         1. Example: *Texas v. Johnson (1989).*
         2. 491 U.S. 397; *U.S. Reports*.
         3. 105 L. Ed. 2d 342 (1989); *United States Supreme Court Reports, Lawyers’ Edition.*
         4. 109 S. Ct. 2533 (1989); *Supreme Court Reporter.*
         5. 57 U.S.L.W. 4770 (1989); *U.S. Law Week*.
      4. The first set of numbers is the volume number.
      5. The second set is the starting page number.
      6. Several companies maintain databases of the decisions of federal and state courts, along with a wealth of other information.
      7. The Legal Information Institute (LII) at Cornell Law School, FindLaw, and the Supreme Court itself house Supreme Court opinions and offer an array of search capabilities.
   2. Locating Other Information on the Supreme Court and Its Members
      1. *The Supreme Court Compendium: Two Centuries of Data, Decisions, and Developments*, 7th edition, contains information on many dimensions of Court activity.
      2. *Guide to the U.S. Supreme Court*, 5th edition, provides a fairly detailed history of the Court.
      3. *The Oxford Companion to the Supreme Court of the United States*, 2nd edition, is an encyclopedia containing entries on the justices, important Court cases, and the amendments to the Constitution.
      4. The Legal Information Institute contains links to various documents (such as the U.S. Code and state statutes) and to a vast array of legal indexes and libraries.
      5. SCOTUSblog provides extensive summaries of pending Court cases, as well as links to briefs filed by the parties and amici.
      6. The U.S. Supreme Court Database provides a wealth of data from the time of the Vinson Court (1946 term) to the present.