CONSTITUTIONALLY *Speaking*

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Establishing Judicial Review—Origins of the U.S. Supreme Court

A 2024 Gallup poll revealed that 52% of Americans disapprove of the job that the U.S. Supreme Court is doing. According to a 2024 Associated Press-NORC Center for Public Affairs poll, 7 in 10 Americans believe the justices on the Court are motivated by **ideology**, not fairness.

Ken I. Kersch, a political science professor at Boston College and author of *The Supreme Court and American Political Development*, says the Court has faced disapproval since its inception.

"The history of the Supreme Court is rife with outbreaks of attacks on individual Supreme Court decisions, and on the legitimacy of the Supreme Court and the federal judiciary more generally," Professor Kersch says. "Supreme Court justices have often been politicians before serving on the bench. This means that they have ties to political parties, which often take positions on constitutional issues when campaigning for election. And just as is the case today, they have often been identified with distinctive, and even antagonistic, approaches to interpreting and applying the Constitution."

Professor Kersch points to one of the U.S. Supreme Court's earliest decisions—*Chisholm v. Georgia* (1793)—where the Court ruled that two South Carolina men could sue the state of Georgia for debts they were owed. The fallout from that decision led to the U.S. Constitution's 11th Amendment which prohibits any federal court from hearing cases where individuals from one state attempt to sue another state. He also notes other Supreme Court decisions were controversial at the time, including *McCulloch v. Maryland* (1819), which upheld the constitutionality of a national bank,

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The Influence of a U.S. Supreme Court Dissent

When a U.S. Supreme Court **majority opinion** is released, legal scholars scrutinize it, either praising it for its considered legal argument or disparaging it because they disagree with its conclusion. What about the **dissenting opinion**?

Not much attention is paid to dissenting opinions—most of the time. U.S. Supreme Court dissenting opinions sometimes influence future opinions of the Court, shape case law, and in some cases, change the course of U.S. history.

In his book *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*, Melvin I. Urofsky, a noted legal historian and history professor at Virginia Commonwealth University, wrote that only the hardest cases to resolve get to the U.S. Supreme Court. He notes in the book that if an issue was easy, it would have been decided by lower courts.

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Is the U.S. Constitution Dead or Alive?

When the U.S. Constitution was written in 1787 it took at least 30 seconds to load a musket. Could the framers of the Constitution have envisioned automatic weapons? In a time when writing daily letters was the norm could they have imagined the legal issues related to email, texting or the internet?

How do courts, from lower courts all the way to the U.S. Supreme Court, interpret the U.S. Constitution to decide 21st Century issues? Two schools of thought on interpreting the U.S. Constitution—originalism and living constitutionalism—take differing views.

Ken Kersch, a political science professor at Boston College, explains that originalism and a living constitution are both theories, mainly created by law professors and directed toward judges, on the best way to interpret the U.S. Constitution when the document's language alone does not provide a clear answer to a constitutional question.

"Living constitutionalists have long argued that it is inevitable that the short and sometimes broadly worded constitutional text will be indeterminate [uncertain]," Professor Kersch explains. "For this reason, they say, judges must resolve its ambiguities by reading it in light of current, and evolving, understandings of what would be best."

According to Professor Kersch, the theory of originalism began in the 1970s. Originalists pushed the idea that living constitutionalism was a way for judges to ignore the law, introducing their own politics into their rulings—in effect "legislating instead of judging."

"Originalists argue that judges have a duty to follow the 'fundamental law' of the Constitution," Professor Kersch says. "The most effective recipe for doing so, they argue, is to read the text in a way that approximates the way that text was originally understood at the time it was adopted—that is, at the time it gained authority as 'law.'"

Although the term "originalism" is credited to Paul Brest, a professor at Stanford Law School, the theory first appeared in a 1971 article written by Robert Bork, a professor at Yale Law School and published in the *Indiana Law Journal*. Professor Bork argued that judges "must stick close to the text [of the Constitution] and the history, and their fair implications, and not to construct new rights."

In a 1985 speech to the American Bar Association, Edwin Meese, who served as Attorney General in the Reagan administration, argued that sticking to the "**jurisprudence** of original intention would produce defensible principles of government that would not be tainted by **ideological** predilection." Meese claimed that "any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law."

Living or dead?

In response to Meese's speech, former U.S. Supreme Court Justice William J. Brennan Jr.'s 1985 speech at Georgetown University made a case for living constitutionalism. Where originalists believe that the meaning of the Constitution is fixed at the time it was written and discernible in the present, living constitutionalists insist that the meaning of the document can evolve in response to changing societal perceptions and demands.

"We look to the history of the time of framing and to the intervening history of interpretation," Justice Brennan said. "But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its

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Jodi L. Miller
Editor

Constitutionally Speaking
Advisory Panel
Joshua S. Bauchner, Esq.
Kelly Ann Bird, Esq.
Michele G. Dorney, S.P.H.R., N.B.C.T.
Jason J. Krisza, Esq.
Danielle A. Schweizer, Esq.
Kimberly A. Yonta, Esq.

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Dead or Alive? *Continued from page 2*

great principles to cope with current problems and current needs."

Former U.S. Supreme Court Justice Antonin Scalia famously said that the U.S. Constitution is a "dead document." In a 2008 interview with National Public Radio (NPR), Justice Scalia argued against a living constitution.

"If you somehow adopt a philosophy that the Constitution itself is not static, but rather, it morphs from age to age to say whatever it ought to say—which is probably whatever the people would want it to say—you've eliminated the whole purpose of a constitution. And that's essentially what the 'living constitution' leaves you with."

In a 2021 column for the American Bar Association Journal, Erwin Chemerinsky, dean of the University of California at Berkeley School of Law, wrote that many of the precedent setting U.S. Supreme Court rulings would not fare well if originalism were to be widely embraced by the courts.

"It would seem that *Brown v. Board of Education* (1954) was wrongly decided from an originalist perspective because the same Congress that ratified the 14th Amendment also voted to segregate the District of Columbia public schools," wrote Professor Chemerinsky, who is also the author of *Worse Than Nothing: The Dangerous Fallacy of Originalism*.

In the NPR interview, however, Justice Scalia said that precedent should be accepted.

"You can't reinvent the wheel. You've got to accept the vast majority of prior decisions. ... I do not argue that all of the mistakes made in the name of the so-called living constitution be ripped out," Justice Scalia told NPR. "I just say, let's cut it out. Go back to the good, old dead Constitution."

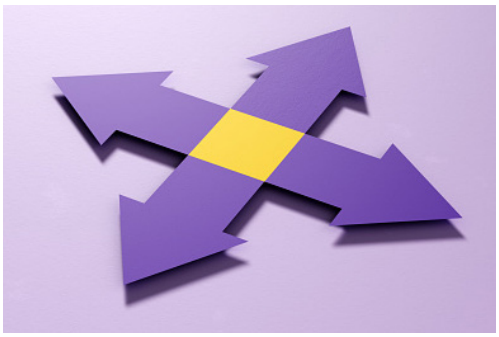
Still, Chemerinsky is skeptical and points out that long-standing precedents have been overturned in recent years at the U.S. Supreme Court. He also pointed out in the column that at least three of the current U.S. Supreme Court justices—Clarence Thomas, Neil Gorsuch and Amy Coney Barrett—are "self-avowed" originalists.

"Originalists say their theory constrains what justices can do," Professor Chemerinsky writes. "Nonoriginalists say it makes no sense to be governed today by the views and understandings of the agrarian [agricultural], slave society of 1787. The Constitution, to be relevant, must be a living document."

Throwing textualism into the mix

The terms originalism and textualism are sometimes used interchangeably; however, Professor Kersch says there is technically a difference between the two. Some originalists, Professor Kersch says, like Justice Scalia, have described themselves as both textualists and originalists.

"Textualists argue that the text itself—what the Constitution literally says—should be a judge's touchstone. 'Plain meaning' is afforded a high status by textualists," Professor Kersch explains. "The problem is that the literal text can still be ambiguous. If—and only if—the text is uncertain or ambiguous, many textualists will then turn toward originalism to resolve the uncertainty or ambiguity concerning the meaning of the text. In this way, one can be both a textualist and an originalist. True textualists will go to the text first, and only use originalism if necessary. True originalists, by contrast, will typically begin with a foray into original understandings."



In a 1996 speech at Catholic University, Justice Scalia talked about the two theories.

"The theory of originalism treats a constitution like a **statute** and gives it the meaning that its words were understood to bear at the time they were promulgated [disseminated]. You will sometimes hear it described as the theory of original intent," Justice Scalia said. "You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words."

Finding common ground with originalism

Some critics of originalism contend that judges need to be historical experts to apply originalist principles to modern-day issues and rulings. Professor Kersch says that historians would agree with that

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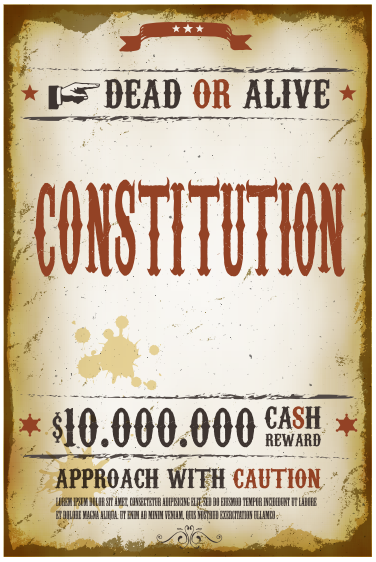
criticism, but originalism takes place in the "law world" not in history departments.



"The law world–law professors, law clerks, lawyers, and judges—draw, often highly selectively, on the best historical scholarship by professional historians," says Professor Kersch. "One problem is that historians accept it as routine that history is full of complexities, gaps, disagreements, and contradictions. The legal world, on the other hand, values the clear, determinative answer that justifies the decision and decides the case."

So, how do courts find guidance on modern day issues relying on originalism?

"The most sophisticated originalists acknowledge that our world and the world of the Founders are very different," says Professor Kersch.

For example, Justice Scalia in another speaking engagement, cited punishments such as public flogging or branding, which might have been tolerated during the colonial period.

"Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an Eighth Amendment challenge," Justice Scalia said. The Eighth Amendment to the U.S. Constitution bars against cruel and unusual punishment.

According to Professor Kersch, originalists have devised methods that recognize and account for changes. For example, he says that when considering the question of free speech on social media, an originalist would likely determine whether forms of social media are similar to newspapers. When it comes to discrimination against the LGBTQ+ community, Professor Kersch says, originalists would compare it to discrimination on the basis of race or sex.

Today's U.S. Supreme Court

The U.S. Constitution is the oldest written constitution still in force. The website of the U.S. Supreme Court states: "That this Constitution has provided continuous democratic government through the periodic stresses of more than two centuries illustrates the genius of the American system of government. The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court's considered judgment, conflict with the Constitution. This power of 'judicial review' has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a 'living Constitution' whose broad provisions are continually applied to complicated new situations."

In a public interview at Northwestern University in 2022, current U.S. Supreme Court Justice Elena Kagan said that the framers "knew they were writing for the ages," sometimes writing in broad and vague terms.

"They didn't list specific practices," Justice Kagan said. "They used those... generalities for a reason because they knew the country would change...and that you had to apply these principles to circumstances that they couldn't imagine."

On the U.S. Supreme Court's website, the section titled "The Court and Constitutional Interpretation" ends with a quote from former Chief Justice John Marshall who served on the Court from 1801 until his death in 1835.

"We must never forget that it is a constitution we are expounding... intended to endure for ages to come, and consequently, to be adapted to

DISCUSSION QUESTIONS

1. **Pick either the originalism or living constitutionalism theory. Explain in detail how that theory is the best way of interpreting the U.S. Constitution.**
2. **The article mentions a few issues that couldn't have been imagined by the framers of the U.S. Constitution. What other modern-day issues can you think of that are not explicitly outlined in the U.S. Constitution?**

Supreme Court Reforms—from Court Packing to Term Limits

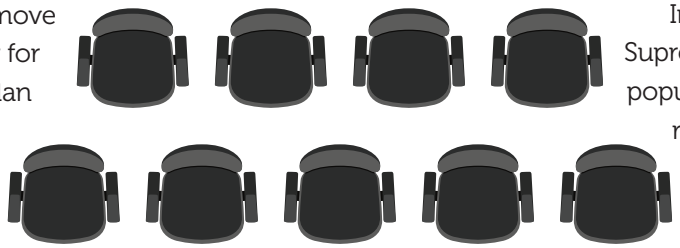
Amid calls for U.S. Supreme Court reform, then President Joseph Biden issued an executive order in April 2021 that formed the Presidential Commission on the Supreme Court of the United States. The commission, comprised of experts on the Court and the Court reform debate, was not established to make recommendations to the President, but to provide "analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals." In December 2021, the commission submitted its final report to the President.

Packing the Court

Throughout history, when the legitimacy of the Court has come into question, several remedies have been proposed. One such remedy, considered by President Franklin Roosevelt, was court packing. Membership on the U.S. Supreme Court has fluctuated over the years. It has been as low as five justices and as high as 10. Since 1869, the number has been steady at nine justices.

In 1937, President Roosevelt, frustrated at the U.S. Supreme Court for invalidating parts of his New Deal legislation, devised a "court-packing" plan after a two-year study by the Department of Justice (DOJ) that considered several Court reform plans. Because the U.S. Constitution does not specify how many justices should be on the Court, the DOJ advised that "the proposal to enlarge the Supreme Court, while not without flaw, was the only one which is certainly constitutional and...may be done quickly and with a fair assurance of success." President Roosevelt's plan involved him appointing one additional justice for each justice over age 70, unless they retired within six months. This potentially could have expanded the Court to 15 members.

In one of his famous fireside chats, President Roosevelt appealed to the American people, saying that "new blood" was needed on the Court because it was "acting not as a judicial body, but as a policy-making body." Even though President Roosevelt's party controlled 70% of Congress at the time, many thought of the move as an attempt to grab more power for the Presidency. By July 1937, the plan had been defeated.



In the 1950s, an amendment to the U.S. Constitution, which would permanently fix the number of U.S. Supreme Court justices at nine, was proposed. The measure passed in the U.S. Senate but failed in the U.S. House of Representatives. Attempts to keep the number of justices at nine were also proposed more recently in 2019 by then Senator Marco Rubio, and in 2022 by Representative Dusty Johnson. Both of those efforts failed as well.

Report issued

Court packing has been mentioned in the current debate over Court reform, as well, arguing that it would allow for more diversity on the Court. Out of all the justices appointed to the U.S. Supreme Court—approximately 130 so far—only eight have been either a woman or a person of color.

The commission's report to President Biden states: "Critics of court expansion worry that such efforts would pose considerable risk to our constitutional system, including by spurring parties able to take control of the White House and Congress at the same time to routinely add justices to bring the Court more into line with their **ideological** stances or **partisan** political aims."

In the past, other plans for altering the composition of the Court, according to the commission's report, included rotating the Court's membership, which "would structure the Supreme Court as a shifting or rotating set of nine (or more) justices from among a larger set of Article III judges." The details of how rotation would work vary, but essentially the justices would rotate between service on the U.S. Supreme Court, as well as on lower federal courts.

Another plan mentioned in the report outlines a plan to have the justices sit on panels to hear cases, similar to circuit courts that have three-judge panels. These subsets could be charged with hearing certain types of cases. "For instance, one subset of justices might be entrusted to decide questions of original jurisdiction, another subset of justices might be empowered to hear **appeals**," the report states. Both the rotating plan and the three-judge panel scheme are thought to violate the "one Supreme Court" directive from Article III, Section I of the U.S. Constitution.

Imposing term limits on U.S. Supreme Court Justices is another popular solution for Supreme Court reform. However, the wording "shall hold their Offices during good Behavior" in Article III

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Reforms *Continued from page 5*

of the U.S. Constitution has been interpreted to mean that justices on the Court—and lower federal court judges for that matter—have lifetime appointments. In other words, unless the justice wants to retire, they cannot be made to do so and many have stayed on the bench until their death. According to the commission's report, "The United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term of years for its high court justices."

An Associated Press-NORC Center for Public Affairs Research poll revealed that 67% of Americans support term limits or a mandatory retirement age for U.S. Supreme Court Justices. Several suggestions for term limits have been proposed; most, including legislation proposed by U.S. Senator Cory Booker of New Jersey, would cap terms at 18 years. In 1954, the U.S. Senate proposed a constitutional amendment that would have mandated a retirement age of 75 for all federal judges, including U.S. Supreme Court Justices. The effort failed. The commission's report to the President points out that in order to consider either term limits or a minimum retirement age, the U.S. Constitution would need to be amended. ★

DISCUSSION QUESTIONS

1. **What do you think of lifetime appointments for U.S. Supreme Court Justices? What are the benefits? What are the drawbacks?**
2. **Several measures for reforming the U.S. Supreme Court are discussed in the article, including court packing, instituting term limits, mandatory retirement age, or rotating Court membership. Select one of these proposals and explain why you think it would be the best course of action.**

Origins *Continued from page 1*

and *Brown v. Board of Education* (1954), which found racial segregation of children in public schools unconstitutional.

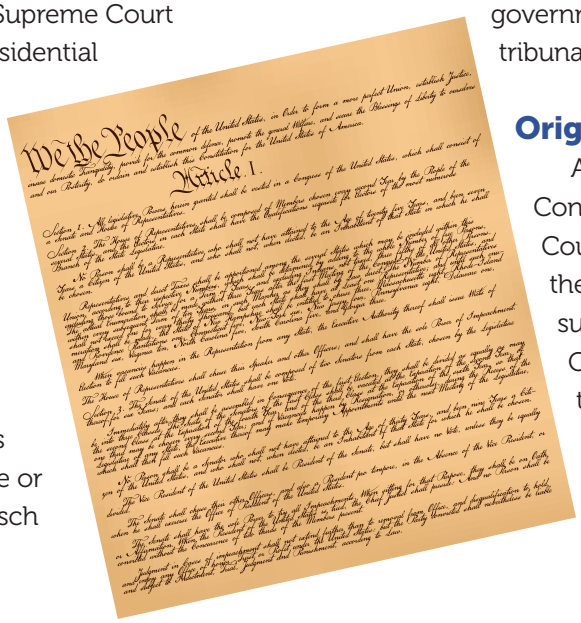
"Challenges [to the U.S. Supreme Court] have been common, to the point of being routine, throughout American history," says Professor Kersch. "That is the fate of the Supreme Court as both a legal and a political institution. It does not exist outside of American politics."

In addition, Professor Kersch says that many presidents have campaigned on unpopular U.S. Supreme Court decisions. For example, during his presidential campaign, Theodore Roosevelt attacked the Court's decision in *Lochner v. New York* (1905), which struck down a New York law regulating bakery workers' hours.

"Similarly, Abraham Lincoln campaigned for the U.S. Senate, and then the Presidency, by attacking the Supreme Court's Dred Scott (1857) decision, which held that it was unconstitutional for an American state or territory to ban slavery," Professor Kersch says.

In his first inaugural address President Lincoln indicated his misgivings about the U.S. Supreme Court's power.

"The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the Supreme Court," President Lincoln said, "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."


We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Origins of the Court

Article III, Section 1 of the U.S. Constitution established the U.S. Supreme Court. It reads: "The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior,

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and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

It should be noted that by "inferior courts" the Framers of the Constitution did not refer to the quality of the courts but the fact that these courts would be lower than the U.S. Supreme Court, meaning that the Supreme Court would have final say over federal law. In addition to serving on the highest court in the land, in the early days, each U.S. Supreme Court justice was required to travel to other federal judicial districts, also known as circuits, to hear lower cases. This practice was known as "circuit riding" and was pretty unpopular among the justices. Circuit riding remained in place for a little over a century until an act of Congress abolished it in 1891.

The U.S. Constitution set up the U.S. Supreme Court, but Congress' passage of the Judiciary Act of 1789 and the Evarts Act of 1891 is where our modern-day, three-tier court structure comes from. In the federal system, the U.S. Supreme Court sits at the top. Beneath that are circuit courts, also known as courts of appeals, and beneath that are district courts. The Evarts Act established the role of the U.S. Courts of Appeal, or U.S. Circuit Courts, which eliminated the need for "circuit riding."

Today, in the federal court system, there are 94 district courts, where a single judge presides; and 12 regional circuit courts where **appeals** are heard by a three-judge panel. In addition, the middle tier includes a 13th appeals court—the Court of Appeals for the Federal Circuit.

Power of the U.S. Supreme Court

While the U.S. Supreme Court was established via the U.S. Constitution, its power was solidified with the ruling in *Marbury v. Madison* (1803). The case centered around William Marbury, who was one of 42 new justices of the peace appointed by outgoing President John Adams. Marbury's commission, as well as several others, was not delivered before incoming President Thomas Jefferson took office. Once in office, President Jefferson directed that the commissions should not be delivered. When *Marbury v. Madison* came before the Court, the questions to be decided were whether Marbury—the **plaintiff**—had a right to receive his commission and could he sue for that right. Also to be decided, was whether the U.S. Supreme Court had the authority to order the delivery of the commission.

It wasn't so much what the Court decided in the case that made it important. It was the reasoning behind it that set a **precedent** which endures to this day. The Court found that while Marbury was entitled to his commission, and had a right to sue to obtain it, the U.S. Supreme Court could not grant it to him. The Court held that Section 13 of the Judiciary Act of 1789, the provision that enabled Marbury to bring his claim directly to the U.S. Supreme Court, was itself unconstitutional, since it extended the Court's original jurisdiction beyond that which Article III, Section 2, of the U.S. Constitution established. Original jurisdiction simply refers to what court can first (or originally) hear a case.

Chief Justice John Marshall, writing for the majority of the Court, reasoned that the Judiciary Act of 1789 conflicted with the U.S. Constitution, and Congress did not have the power to modify the Constitution through regular **legislation**.

"The government of the United States has been emphatically termed a government of laws, and not of men," Chief Justice Marshall wrote in the Court's **majority opinion**. "It is emphatically the province and duty of the Judicial Department to say what the law is."

With this decision, Justice Marshall established what is known as "judicial review," a concept that cemented the U.S. Supreme Court's authority to declare a law unconstitutional and, therefore, strike it down. Marbury never received his commission. Here's another fun fact—the signature on these disputed commissions was none other than John Marshall, serving in his capacity as President John Adams' Secretary of State at the time before he was appointed as Chief Justice of the U.S. Supreme Court.

How the U.S. Supreme Court works

Currently, the U.S. Supreme Court is comprised of one Chief Justice and eight Associate Justices. As per the U.S. Constitution, all federal judges/justices, including U.S. Supreme Court Justices, are appointed by the President of the United States and confirmed by the U.S. Senate. If a judge or justice is not confirmed by a majority of the Senate, the President must appoint another candidate.

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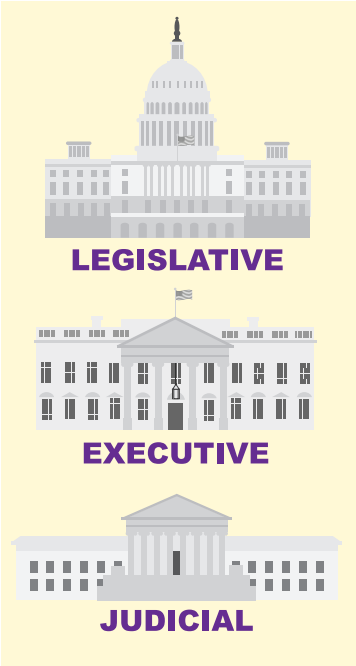
This process is just one of the ways that the U.S. Constitution puts checks and balances on the three branches of government—Executive (President), Legislative (Congress) and Judicial (Courts).

The U.S. Supreme Court receives as many as 7,000 to 10,000 requests per year to review cases. The Court usually accepts anywhere from 100 to 150 cases for review. The process begins with a challenger submitting a "*writ of certiorari*," also called a cert petition. *Certiorari* is Latin for "to inform, apprise or show." The justices review the petitions and vote on whether to hear the case. Four of the nine justices must vote in favor of taking a case. The Court refers to this as the Rule of Four. When the Court agrees to take a case, it is called "granting cert."



As Professor Kersch explains, the Chief Justice of the Court presides over its procedures, processes, conferences, and deliberations. Once a case has been heard before the Court, a vote is taken among the justices. If the Chief Justice is in the majority, Professor Kersch says, they are charged with assigning the writing of the majority opinion to a justice of their choice or they may choose to write it. If the Chief Justice is not in the majority, the most senior justice in the majority has the power to assign the opinion.

Organizations or individuals often submit *amicus* briefs to the U.S. Supreme Court when they have a vested interest in the outcome of a particular case. *Amicus* is Latin for friend or comrade, so *amicus* briefs are also called "friend of the court" briefs. These briefs attempt to persuade the justices to their side. So, do the justices put much stock in these briefs? Do they read them?

In fact, according to Professor Kersch, *amicus* briefs have been very influential in shaping modern U.S. Supreme Court opinions because not only do the justices read them, but some also end up adopting the legal argument provided in them. Sometimes the justices cite the briefs in their opinions, Professor Kersch says, and sometimes they don't. The justices weigh all the arguments, he says, and then adopt those that they find most persuasive. So, the reality is that any justice's legal argument could have come from a lawyer representing an expert or an advocacy group, who has submitted an *amicus* brief.

"The justices have no hesitation about adopting the arguments made by the lawyers in those *amicus* briefs," Professor Kersch says. "In fact, those who follow these things closely know that it is hard to imagine how the justices would write judicial opinions without them."

Ethics Standards

Federal law requires federal judges to **recuse** themselves from any case "in which their impartiality might reasonably be questioned." There is also a code of conduct for lower federal judges, and additional misconduct standards as well.

Justices on the U.S. Supreme Court, however, had no ethics code or code of conduct for more than 230 years. On November 17, 2023, the U.S. Supreme Court announced the adoption of the Justices' Code of Conduct—the first time the justices had put a code in writing. The code of conduct was met with criticism because there is currently no formal mechanism to enforce it, according to the Congressional Research Service, a non-partisan research institute within the Library of Congress.

Justice Elena Kagan addressed the criticism when she sat on a panel for the 2024 Ninth Circuit Judicial Conference, calling it a "fair" criticism and admitted that the Court should "figure out some mechanism" for enforcement of the code. Justice Kagan suggested that the Chief Justice could appoint a committee "of highly respected judges with a great deal of experience, and a reputation for fairness" to enforce the code

The problem with enforcement of a code of conduct at the U.S. Supreme Court level, according to Professor Kersch, is that they are enforceable only by higher ranking judges.

"Because there are no higher-ranking judges than the justices of the U.S. Supreme Court, there is no one to enforce the standards against them, outside of the possibility that they would be **impeached** and removed from office," Professor Kersch says.

Again, this is dictated by the separation of powers or checks and balances outlined in the U.S. Constitution. It means that the President and Congress do not have the power to discipline members of the U.S. Supreme Court.

"To allow that would make them superior to the U.S.

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Origins *Continued from page 8*

Supreme Court, in a matter where the Court is given the power under the U.S. Constitution to operate independent of the other branches," says Professor Kersch. "In areas where the judiciary is constitutionally authorized to act, to subject the Supreme Court's justices to external supervision would potentially undermine judicial independence, autonomy, and supremacy in a way contrary to the Constitution's logic and design." ★

DISCUSSION QUESTIONS

1. **How do you think the U.S. Supreme Court could improve its approval rating?**
2. **Should the public's approval be something that the Court ought to be concerned with? Why or why not?**

Dissent *Continued from page 1*

"Because the questions are hard, and because they cause disagreement among the people, it is not surprising that the justices of the high court will also disagree," Professor Urofsky wrote. "The dissenter will point out what he or she perceives to be the weakness of the majority opinion, the faulty constitutional reasoning, or a failure to understand the actual facts of the case. The dissenter is telling the majority, 'Wait. I think you have this wrong. You need to look at that constitutional clause and its history again. You need to ask other questions."

Who is it for?

Who are dissenting opinions intended to convince? Fellow justices? Future courts?

It is both, according to Edward Hartnett, a professor at Seton Hall University Law School, and an expert on the history and practice of the U.S. Supreme Court. Professor Hartnett explains that before U.S. Supreme Court opinions are publicly released, they are circulated internally among the justices.

"A dissent circulated inside the Court has the potential to change another justice's mind," Professor Hartnett says. "What was first circulated internally as a draft dissent might turn into a majority opinion, while what was first circulated as a draft majority opinion might turn into a dissent."

When the Court was first established in 1789, and up until approximately 100 years ago, Professor Hartnett notes that it was common for justices to only dissent internally, among their fellow justices but not in public. A justice would only publicly dissent if "they thought it was especially important to do so," he says. Professor Hartnett notes that custom is "not the current practice" of today's Court.

"When a justice dissents publicly, he or she is writing for the future," Professor Hartnett says. "Sometimes it is to persuade future justices; sometimes it is to persuade Congress to act; sometimes it is to call attention to an issue; and sometimes it is to try to minimize the damage done (as the dissenter sees it) by the majority."

Thomas J. Healy, a professor at Seton Hall University Law School and author of *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*, thinks that most dissenting justices are speaking to those outside the Court with the hope that their views will eventually triumph.

"A justice who dissents has, by definition, already failed to persuade a majority of the Court. Dissenting is a way to point out the error of a decision to future courts and those outside the judicial system," Professor Healy says. "In the best-case scenario, a dissent may end up prevailing in the long run and eventually becoming law. This has happened a number of times throughout history."

Ruth Bader Ginsburg, who sat on the U.S. Supreme Court from 1993 until her death in 2020, and wrote her fair share of dissents, once said, "It has been a tradition in the United States of dissents becoming the law of the land. So, you're writing for a future age, and

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Dissent *Continued from page 9*

your hope is that with time the Court will see it the way you do."

Professor Hartnett notes that dissents in a wide range of cases have strongly influenced later majority opinions. Examples, according to Professor Hartnett, include dissents that have questioned the constitutionality of legally mandated racial segregation, punishing subversive speech under the First Amendment, limiting economic regulation under the due process clause, and compelled payments from public employees to unions under the First Amendment.

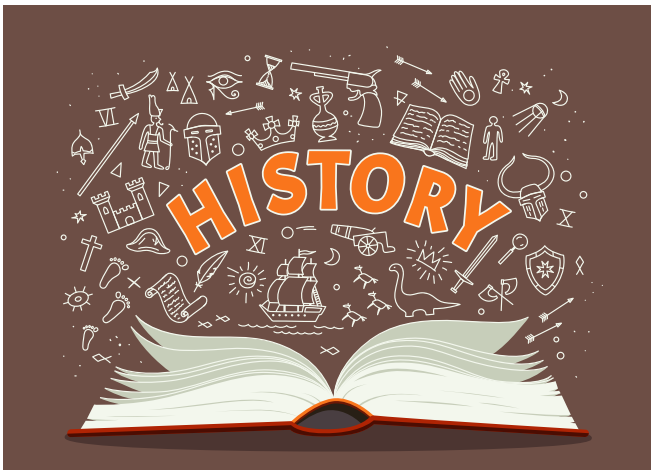
Changing history

The two dissents issued in the 1857 case of *Dred Scott v. Sandford* are examples of U.S. Supreme Court dissents that helped change the course of history.

Dred Scott was enslaved in Missouri in the 19th century. His master, Dr. John Emerson, was a surgeon in the army and took Scott with him when he travelled. Those trips took Scott to Illinois, a free state, as well as the territory of Wisconsin, which was also free. The legal precedent at the time, especially in Missouri, was "once free, always free," meaning that if a slave was taken into a free state, and resided there, they automatically gained freedom. The doctrine stated that they could not be re-enslaved if they returned to a slave state. In April 1846, Scott sued for his freedom.

The Missouri Supreme Court did not uphold the "once free, always free" doctrine, holding instead that Scott was still enslaved. Once the case came before the U.S. Supreme Court, it ruled 7-2 that Blacks had no right to sue in federal court. The Court's majority opinion, written by Chief Justice Roger B. Taney, further stated that Blacks were not, and never could be, citizens of the United States. The ruling also declared that the 1820 Missouri Compromise was unconstitutional. The Missouri Compromise attempted to maintain the balance between slave states and free states, admitting Maine as a free state and Missouri as a slave state. It also restricted slavery to territories south of a certain dividing line (the 36th parallel).

Justice John McLean, who sat on the U.S. Supreme Court from 1829-1861, and Justice Benjamin Curtis, who sat on the Court from 1851-1857, issued separate dissents in the *Dred Scott* case. Both disagreed with Justice Taney's argument that Blacks were not citizens at the time of the U.S. Constitution's adoption, pointing out that free Blacks had political rights in 1787, and in some states—Massachusetts, New Hampshire, New Jersey (for a limited time) and New York—they could vote. Justice McLean's dissent discussed the concept that one's place of birth was tied to citizenship. His argument eventually influenced the 14th Amendment, which granted birthright citizenship to those that had been previously enslaved.



"Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen," Justice McLean wrote. "Where no slavery exists, the presumption, without regard to color, is in favor of freedom."

Justice Curtis' dissent focused on, among other things, the overreach of the majority of the Court, who were decidedly pro-slavery.

"When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is according to their own views of what it ought to mean," Justice Curtis wrote.

According to Professor Urofsky's book, a New York publisher printed the Curtis dissent in its entirety as a pamphlet. It was used by the new Republican Party candidates, who were against slavery, in the 1858 mid-term elections, as well as the 1860 presidential election. In fact, Abraham Lincoln quoted from Justice Curtis' dissent in some of his most famous speeches during his presidential campaign.

Ultimately, the Civil War and later

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Dissent *Continued from page 10*

the **ratification** of the 13th, 14th and 15th Amendments to the U.S. Constitution effectively **overturned** the Court's decision in *Dred Scott*.

Right all along

Justice John Marshall Harlan, who served on the U.S. Supreme Court from 1877 until his death in 1911, issued a lone dissent in the 1896 case of *Plessy v. Ferguson*, proving that a lone voice can make a difference.

With its majority opinion in *Plessy*, the U.S. Supreme Court upheld a Louisiana law—the Separate Car Act—requiring separate railroad cars for Black and white passengers. The Louisiana law is where the phrase "separate but equal" comes from.

Homer Plessy, who was seven-eighths white, but technically Black under Louisiana law, was recruited by a civil rights group that wanted to overturn the law. Plessy took a seat in the whites-only car on a Louisiana train. When he refused to vacate his seat, he was arrested. His attorneys argued that the Separate Car Act violated the U.S. Constitution's Thirteenth and Fourteenth Amendments.

The Court's majority opinion in *Plessy* stated, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

In an often-quoted dissent Justice Harlan wrote, "Our Constitution is colorblind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved..."

Nearly six decades later, Thurgood Marshall, then the lead attorney for the **plaintiff** in *Brown v. Board of Education*, who would later become the first African American appointed to the U.S. Supreme Court, cited the arguments in Justice Harlan's *Plessy* dissent to bolster his case. *Plessy* was overturned in 1954 with the Court's decision in *Brown*. The Court unanimously ruled that racial segregation in public schools is unconstitutional.

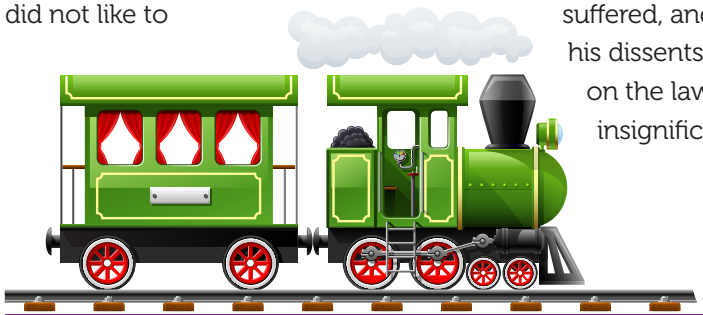
Dissenting rarely

Justice Oliver Wendell Holmes served on the U.S. Supreme Court for 30 years, from 1902-1932, and is sometimes called "The Great Dissenter." Ironically, according to Professor Healy, Justice Holmes did not like to dissent, "believing it undermined the reputation and collegiality of the Court." He says Justice Holmes dissented if he felt strongly about an issue and did so in high-profile cases involving workplace regulations and free speech.

"Justice Holmes' dissents were powerful because they were rare. In several instances, his dissents ended up having more influence on the law than the majority opinions he disagreed with," notes Professor Healy. "A justice who dissents all the time becomes like the boy who cried wolf."

As an example, Professor Healy points to Justice Felix Frankfurter who served on the Court from 1939 to 1962.

"When Felix Frankfurter took his seat on the Court in 1939, he was one of the most respected legal minds in the country," Professor Healy wrote in a review of Professor Urofsky's book that appeared in the *Boston Review*. "But after writing 251 dissents over the course of twenty-three years—many of them long, pedantic [dull], and condescending—his reputation suffered, and with it the power of his dissents; today his influence on the law is considered insignificant." ★



DISCUSSION QUESTIONS

1. **What do you think of the power of dissent at the U.S. Supreme Court? Why do you think it takes so long in some cases for dissent to change minds and become law? Explain your answer.**
2. **Justice Harlan was a lone dissenter in a case about equality. What issue would you fight for even if it meant going against the majority? Explain what issue and why.**

GLOSSARY WORDS

appeal — a complaint to a higher court regarding the decision of a lower court.

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

ideological — based on or related to a system of ideas, especially one which forms the basis of economic or political theory.

ideology — a system of ideas, especially one which forms the basis of economic or political theory.

impeach — to charge a holder of public office (or a judge) with misconduct.

jurisprudence — the theory or philosophy of law.

legislation — laws made by a legislative body such as Congress or a state legislature.

majority opinion — a statement written by a judge or justice that reflects the opinion reached by the majority of their colleagues.

overturned — in the law, to void a prior legal precedent.

partisan — someone who supports a party or cause with great devotion.

plaintiff — person or persons bringing a civil lawsuit against another person or entity.

precedent — a legal case that will serve as a model for any future case dealing with the same issues.

ratification — the action of formally signing a contract or agreement to make it official.

recuse — (in terms of a judge) excuse oneself from hearing a case because of a conflict of interest.

statute — legislation that has been signed into law.

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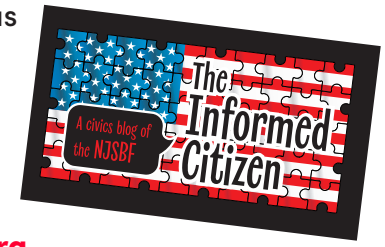

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