Preface

The Supreme Court

The workings of the Supreme Court of the United States today do not differ dramatically from the court's practice for more than two centuries. As openings occur, the justices are still appointed by the sitting president "with the Advice and Consent of the Senate," as prescribed in Article II, Section 2, of the U.S. Constitution. Justices still hear oral arguments, read relevant documents shedding light on the particulars of a case, are guided by precedent—the court's earlier decisions on similar matters of law—confer in private to arrive at their decisions, and issue written opinions, with concurrences and dissents, presenting the legal reasoning of the majority opinion deciding the case. Time and technology have, of course, affected some of the more external workings of the court, particularly in how it communicates with the public and other branches of the government, yet the court's procedures—for better or, in the eyes of some, for worse—have proved to be remarkably durable.

Article III, Section 2, of the U.S. Constitution presents the nature of the cases that are the proper business of the Supreme Court, regarding which "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Under certain circumstances, the Supreme Court is to be a trial court: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." Yet what we now regard as the court's primary task—judicial review, or deciding the constitutionality of legislatively enacted laws—is not expressly enumerated in the Constitution but rather took shape as the court began functioning, when Chief Justice Marshall claimed this power for the court in *Marbury v. Madison* (1803).

If the court's primary mission has evolved over time, so has its stature. This upward trajectory is traced by Jill Lepore in "Benched: The Supreme Court and the Struggle for Judicial Independence," the essay that is presented as a prologue to this volume. Theoretically the founders regarded the judiciary as a co-equal branch of the federal government, alongside the executive branch (the president and cabinet) and the legislative branch (the two houses of Congress). But controlling neither the "sword" nor the "purse," as Alexander Hamilton memorably put it in *The Federalist, No.* 78, the court at first commanded little respect or prestige. President George Washington, as Lepore points out, was hard pressed to fill the position of chief justice. Once Marshall laid claim to judicial review, however, the court was set on the path to its current eminence. It did not quickly embark on that path, however; after *Marbury,* the court did not again declare a federal act unconstitutional until it struck down the Missouri Compromise in *Dred Scott v. Sandford* (1857), a decision deplored by Abraham Lincoln, among many others—including later justices of the court. Chief Justice Charles Evans Hughes called it a "self-inflicted wound." Still, judicial review with respect to federal laws—used sparingly for so long—was

exercised with increasing frequency thereafter. (The court did fairly regularly exercise judicial review in cases involving state laws, however.)

In his concurrence in *Brown v. Allen* (1953), Associate Justice Robert Jackson famously wrote of the Supreme Court of the United States in his day: "We are not final because we are infallible, but we are infallible only because we are final." As Jackson well understood, while the Supreme Court is the nation's highest appellate court, the ultimate arbiter in any given case, and its verdict is indeed final for that case, "what seems established by one decision is apt to be unsettled by another." Witness, for example, the court's embrace of "separate but equal" in *Plessy v. Ferguson* (1896) and subsequent rejection of that doctrine in *Brown v. Board of Education of Topeka* (1954), or its finding in *Lawrence v. Texas* (2003) that consensual sexual conduct (whether heterosexual or same-sex) is a liberty protected by substantive due process under the Fourteenth Amendment, thus overturning its previous (and relatively recent) ruling in *Bowers v. Hardwick* (1986).

The Federalist, No. 78 was written in part to counter the claims of the "Anti-Federalists"—opponents of the Constitution that was to replace the Articles of Confederation as the embodiment of the nation's form of government—that the Constitution granted too much power to the judiciary, especially in extending the power of the federal judiciary over state courts. Judicial review gradually increased the court's power to heights Alexander Hamilton did not deem possible in *The Federalist,* and raising the stakes when the court did evolve in its thinking as Jackson described. Jackson worried about the court's credibility, and in fact over some of the same issues that troubled the Anti-Federalists. As Jill Lepore points out, "Historically the struggle over judicial review has been part of a larger struggle over judicial independence: the freedom of the judiciary from the other branches of government, from political influence, and, especially, from moneyed interests, which is why the Court's role in deciding whether Congress has the power to regulate the economy"—that is, the scope of the Commerce Clause—"is so woefully vexed."

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This book explores the Supreme Court from a variety of perspectives, beginning with how the court does its work and proceeding to look at the current court: the individual justices, their complex interactions with and influences on their colleagues, their jurisprudence—that is, the principles and philosophies that govern their thinking—and how their opinions, concurrences, and dissents not only apply constitutional law but shape it. Faith in the integrity of the justices is of the utmost importance to the court's legitimacy in the eyes of the public. As the Pew Research Center's analysis has shown, citizens may approve or disapprove of the court depending on some combination of their personal circumstances—education and religious beliefs, for example—and their political persuasion. If we are to maintain a functioning democracy "under law," however, disapproval cannot spill over into a full-fledged loss of confidence in the court's legitimacy, for the court "says what the law is," as Marshall reminds us.

Therefore the book goes on to examine the pull of politics and ideology on the court: its paradoxical idealization as being above politics despite its necessarily thorough grounding in it, both because of the nature of the confirmation process and because, however subliminally, the justices are attentive to the political currents of the day. Chief Justice John G. Roberts Jr. acknowledged as much at the outset of his tenure on the court, expressing concern about the effects of numerous 5–4 decisions in important cases on the court's legitimacy in the eyes of the public. After all, nine justices cannot be expected to view a complex legal matter in precisely the same way, but if their votes (whatever their reasoning) are repeatedly nearly equally divided on closely watched cases that directly affect the lives of millions of Americans—such as the 2012 ruling on the constitutionality of the Affordable Care Act or the 2013 decision striking down the Defense of Marriage Act (both were 5–4 decisions) citizens may reasonably conclude that factors other than "what the law is" are playing a role in determining the court's decisions.

Those decisions are the focus of the next section of the book, beginning with the court's ruling in *Bush v. Gore* (2000), a watershed decision for the modern Supreme Court that effectively delivered the state of Florida's electoral votes—and hence the 2000 presidential election—to George W. Bush. The power of judicial review ensures that the court regularly passes judgment on the actions of the legislative branch, but on no other occasion has it been involved so decisively in the affairs of the executive branch. Other cases and court orders discussed in this section have far-reaching implications in the private sphere as well as ramifications for public policy. The articles presented here often return to the question of judicial activism as against a purported norm of judicial restraint with respect to precedent, ending with Richard L. Hasen's consideration of "How Justices Move the Law."

In its final section the book directly addresses public perceptions of the court and the justices. Is political polarization the "new reality of today's Supreme Court . . . in a way that parallels" the polarization of "other political institutions and the rest of society," as Norm Ornstein asserts? That question is more complex than it may at first appear. Transparency in the form of the direct access to the court's proceedings that modern technology can offer may or may not shed real light on its workings, may or may not ensure or promote the openness and judicial independence that Americans say they seek. And judicial independence, fundamental as it is to the integrity of the court, does not in itself offer a guarantee that the complex can be made simple or the shadowed clear to the satisfaction of all citizens. Laurence H. Tribe cites a "fundamental truth of our Constitution and democracy: "The most complex questions can never be answered once and for all, certainly not by nine black-robed men and women interpreting a centuries-old charter." What the justices confront is the "court's unending quest to balance conflicting rights, to distill the meaning of U.S. history, to draw a map of constitutional guarantees even as the terrain shifts beneath its feet."

Tribe wrote in response to the 2010 commencement address delivered at Harvard University by David H. Souter, in which the retired justice described the Constitution as "no simple contract." The Constitution's language, he said, "grants and

guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.

"Remember that the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the creatures of our aspirations," Souter continued, "to value liberty, as well as order, and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises. . . . If we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.

"That is how a judge lives in a state of trust, and I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States."

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The Court and Its Workings

SCOTUSblog intern Dan Stein runs the printed court ruling on Section 4 of the Voting Rights Act from the U.S. Supreme Court building to his colleagues, June 25, 2013.

Principles and Practice

The Supreme Court of the United States is notoriously reticent about its work. It observes long-established traditions and complex rules as well as the provisions of Article 3 of the U.S. Constitution, the formal legal basis for the court and its authority. The text of that section—included here—is brief in comparison with the sections establishing the other two branches of the federal government, and as a rule the court does not, or at least traditionally has not, attracted nearly as much attention as those other two branches. Periodically there have been exceptions, such as the period in the mid-1930s when the Hughes Court (under Chief Justice Charles Evans Hughes) struck down one New Deal law after another, earning the wrath of the people as well as that of President Franklin D. Roosevelt. Yet in a telling demonstration of Americans' deference to the court, Roosevelt's plan to circumvent the Hughes Court's conservatism by "packing" the court with additional justices caused the popularity of this exceedingly popular president to plummet. Remarkably, the court itself changed course, and the strategy was dropped, averting a constitutional crisis. Still, it had been made clear that the American public was unwilling to tolerate political interference in the court's work.

In recent years, as the stakes of the high-profile cases brought before the Supreme Court have risen, the Supreme Court's own profile has been rising, and scrutiny of the court and its workings has grown accordingly. There appears to be a new urgency to some old complaints, as commentators express their modern fears of political interference and raise some of the same objections to the court that have been raised since the time the Constitution was subject to ratification. Historically, these objections have focused on the justices' life tenure; the authority of the court to thwart the will of the people by invalidating acts passed by the people's representatives; the court's intervention in matters formerly left to the discretion of the states; the lack of a procedure for removing justices (short of conviction of treason, bribery, or "high crimes and misdemeanors"); and the court's "latitude," or authorization "not only to carry into execution the powers expressly given," as "Brutus" wrote in Anti-Federalist, No. 11, "but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions." It remains a source of controversy that the justices judge but are not themselves judged, except in the court of public opinion—just as Alexander Hamilton, for one, seems to have intended, for he thought judicial independence depended on insulating the justices from the political fallout of their decisions.

Some of these same criticisms have even appeared in the dissents and concurrences of the justices themselves. When Justice Robert H. Jackson wrote his concurrence in *Brown v. Allen* (1953), he deplored the tendency he saw in the court "to magnify federal, and incidentally its own, authority over the states," declaring

that the court's interpretation (in this case of the Fourteenth Amendment) "will be more or less swayed by contemporary intellectual fashions and political currents." Jackson thought that the "belief is widely held . . . that this Court no longer respects impersonal rules of law. . . . Whatever has been intended, this Court also has generated an impression . . . that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." Today Jackson's words echo (less elegantly, in general) in the articles, columns, blog posts, social media messages, and radio and television commentary of a world he might scarcely recognize.

In the face of such wide-ranging criticism, the public may be forgiven for occasionally needing to be reminded that the justices' critically important role in our governmental system is not easily executed. The demands on the justices are many and little known to the public at large, which usually focuses intensively on the court only for that brief period in June of each year when the court's most important decisions are typically handed down.

How does the process that culminates on decision days work? The articles that follow begin with bedrock: Article III of the Constitution of the United States. In addition to that constitutional language so intensively parsed before and since, readers will find Alexander Hamilton's defense of the Constitution's conception of the Supreme Court, including the "good behavior" (lifetime) tenure of justices and the commanding place of the court in the nation's judicial system. Aspects of the current workings of the court include the role of the clerks in the justice's work, including legal research and the drafting of the justices' opinions; the remarkably small pool of top-flight lawyers chosen for oral argument before the court; the reasons why a case or collection of cases may be denied review; and how and why a given case may be accepted by the court from among the thousands of petitions submitted for its consideration each year. The groundwork for later discussion of the justices' jurisprudence is laid with a discussion of stare decisis, the doctrine of respect for precedent that has long been accepted by most Supreme Court justices in word if not entirely in deed; judicial activism and judicial restraint both play out in relation to this norm.

The court's own formulation of the rules governing the "generations" of its opinions appear here, for their own sake and because they bear on the court's communication with other parts of the judiciary and with the public. Opinions occasionally undergo changes between the time they are read from the bench and their incorporation in definitive form into the *United States Reports;* a discussion of the history and significance of such changes appears here, for although most such changes may be characterized as mundane, some are substantive indeed. One example cited in an article about Harvard law professor Richard J. Lazarus's revealing 2014 report on this subject is Chief Justice Roger B. Taney's addition of "some 18 pages to his Dred Scott opinion months after it was announced."

Finally, readers are invited to consider both why we should care about the inner workings of the court and what the obligations of the justices to history might be. Currently the justices' papers remain their own personal property, to be disposed of

as they see fit, whereas papers and records produced by elected and appointed officials in other branches of the federal government belong to the public.

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By and large, the articles collected in this section deal with the court as it is, not as it might be. The court is sensitive to public concerns about the way it does its work, however, and in recent years it has implemented changes in how it releases and disseminates opinions, if not entirely to the satisfaction of those accustomed to the contemporary climate of instantaneous communications. That the process of melding the court's traditional practices with modern technology has not been entirely smooth is well illustrated by the events on June 28, 2012, when the announcement of the Supreme Court's decision upholding the Affordable Care Act created a "genuine media drama," in the words of lawyer Tom Goldstein of SCOTUSblog.

As Goldstein recounts in "We're Getting Wildly Different Assessments," his SCOTUSblog post of July 7, 2012, the announcement proceeded according to the court's usual protocol. The court's marshal called the court to order, and the justices took their seats on the bench. The galleries for the public and the press were packed, and the atmosphere was "tense with anticipation." Printed copies of the decision were to be released to reporters stationed in the press room on the floor below the courtroom as the announcement of the decision began; additional reporters and media anchors were outside on the court steps, ready to broadcast the ruling as soon as it was conveyed to them (electronically or in hard copy) by colleagues inside the court building. "Runners"—often interns—were ready to physically carry the text from the press room to the colleagues outside.

The role of media technology—the Web and social media—in the release of the court's opinions was by now well established. The court itself formerly e-mailed its opinion after announcing it to the lawyers on both sides of a case, but by June 2012 it disseminated opinions electronically only by posting to its website.

As the chief justice started to read the opinion in the Affordable Care Act case—the last of the term's decisions to be released—a frantic effort to grasp and relay the substance of the opinion began. Millions of people simultaneously tried to access the court's website, and the site could not withstand the demand. Goldstein, recounting the events as they unfolded minute by minute, remarked that "At this moment, the website is the subject of perhaps greater demand than any other site on the Internet—ever." The court was unable to publish its own decision for a half hour, and no one not physically present at the court—including President Barack Obama—could learn the result by any means other than media reports.

If technology failed in this instance, printed copies and runners didn't. But the summary of the decision in the first few pages of the hard copy began with the rejection of the government's primary argument, that the Affordable Care Act's individual mandate that citizens purchase healthcare insurance was constitutional on the grounds of the Commerce Clause. The CNN and Fox News producers at the court seized on this statement as meaning that the act had been struck down and relayed that message to their control teams, which published their erroneous

conclusion with astonishing speed through all of their outlets—websites, television networks, social media outlets such as Twitter. In fact the majority, notably including the chief justice, had accepted the government's other argument and upheld the act on the grounds that its individual mandate was within Congress's taxing power. The producers realized their error fairly swiftly, but, as Goldstein recounted in his post, they had already "pulled the trigger."

Bloomberg News, shortly followed by the wire services, scanned the decision and reported it correctly. Meanwhile Goldstein and his core SCOTUSblog team conducted a conference call with major news organizations, including the *New York Times,* the *Wall Street Journal,* and the *Los Angeles Times,* as well as the White House, while SCOTUSblog co-founder Amy Howe tended its Live Blog.

At the White House, the first news received by president himself came via the incorrect CNN and Fox reports, while his press secretary, in another office, saw those reports but was still on the SCOTUSblog conference call and monitoring the Live Blog. Goldstein, the SCOTUSblog gatekeeper, cautioned his conference call auditors and Live Blog readers that although the government had lost on the Commerce Clause, there was more to the decision. Less than a minute later, Goldstein reported that the individual mandate had been upheld. At the court, Chief Justice Roberts was still reading the portion of the opinion rejecting the Commerce Clause argument. The administration's lawyer in the Solicitor General's office at the court only then obtained a hard copy of the opinion and relayed confirmation of the SCOTUSblog report to the White House. More than five minutes after the initial CNN report, the president learned that the legislation embodying his signature domestic policy initiative had survived its court challenge.

Doubtless the technical and procedural flaws on the electronic side have been addressed, and news producers have had an object lesson in the need to take a more temperate approach to their work. But a public clamoring for changes in the court's procedures needs to be made aware that such changes do not occur easily, and the potential for disruption is great.

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The Constitution of the United States: Article III

U.S. National Archives and Records Administration

Article III.

Section 1.

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

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,*—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be

convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

*Note: Article III, section 2, of the Constitution was modified by amendment XI.

AMENDMENT XI
Passed by Congress March 4, 1794. Ratified February 7, 1795.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.