

A PRACTICAL COMPANION TO THE CONSTITUTION

HOW TO USE THIS BOOK

This is a reference book on the Constitution, not a narrative history. It summarizes in a single, readable volume what the Constitution means as the United States Supreme Court sees it. This lofty ambition prescribes its own limitations, for although the Constitution is short, its official commentaries are long. No single volume can do justice to the richness of our constitutional history and the sheer profusion of constitutional analysis, even when narrowed to a single court. Since 1803, when Chief Justice John Marshall declared that judges may strike down federal laws that violate the Constitution, the Supreme Court has decided more than 7,500 cases focusing on or somehow dealing with the Constitution. Just to list their names is a forbidding exercise.

For that reason, too, this book is not a conventional treatise. It does not dwell on the Court's justifications for its decisions or on the fine, even gossamer, distinctions that make the doctrinal path so tortuous. There is scarcely room even to list all the issues and controversies touching on the Constitution. There is certainly no room to tell all their stories in full.

Moreover, because the Constitution is short and old, those who today seek the Constitution's shelter find their problems crowding under the protective shadow of a relatively few short sections. A handful of clauses account for the majority of cases that come to the courts today: the Due Process Clauses, the Equal Protection Clause, the First Amendment, the Fourth Amendment, the Sixth Amendment, and very few others. So diverse are the controversies that fall under these few clauses that a discussion tracking the Constitution's outline can be compared with the famous Saul Steinberg cartoon of the United States from the New Yorker's point of view—a swollen Manhattan and very little else.

To overcome these difficulties to the extent possible, this book is arranged by topic. If you want to learn about the abortion controversy, look it up directly under "abortion," not under the more mysterious entry "Fourteenth Amendment."

To be sure, this arrangement poses its own problems. Because so many issues are connected, a discussion by topic risks the Scylla of repetition or the Charybdis of discontinuity. Through a series of cross-references and typographical conventions, I have attempted to steer between these shoals.

Here is how to use entries in the book.

If you are new to the Constitution and its terminology, first read the short essay entitled **The Constitution: A Guided Tour**, beginning on page 1. This essay explains how the Constitution is structured and what it attempts to do. Second, read **Some Thoughts on Interpreting the Constitution** for an overview of why constitutional meaning is so hotly disputed. Turn to **How the Supreme Court Hears and Decides Cases** for a quick look at how the justices grapple with constitutional controversies. Then look up any topic. For example:

ABORTION . . . In 1973, in *Roe v. Wade*,²⁰¹⁴ the Supreme Court held 7–2 that the fundamental right to PRIVACY, protected by the DUE PROCESS Clause of the FOURTEENTH AMENDMENT, is “broad enough to encompass” a qualified right to an abortion.

Roe is one of the most notable instances of the use of the Fourteenth Amendment to protect a woman’s right to act in her personal life without fear of prosecution. In effect, this line of reasoning, called SUBSTANTIVE DUE PROCESS, says that we retain some personal liberties with which the government may simply not interfere. . . .

The discussion of each topic immediately follows its entry. Words in SMALL CAPITAL LETTERS indicate that a word or phrase in the discussion will be found as a separate entry. To avoid cluttering the pages, footnotes have been avoided; all bibliographic information and occasional comments appear in notes in the section beginning on page 755. An asterisk indicates that additional information concerning the entry may be found in the notes. The superscripted numbers in the text (such as that following *Roe v. Wade* above), whether or not attached to a case name, refer not to the backnotes but to numbered entries in the **Table of Cases**, beginning on page 633. There you will find a brief sketch of the case. Names of cases *italicized* in the text do not, as a rule, carry superscripted numbers, since those cases may be looked up directly in the alphabetically arranged **Table of Cases**.

A “see also” line at the end of a topic tells you where to find related topics that will help round out the discussion.

See also: FOURTEENTH AMENDMENT; FUNDAMENTAL INTERESTS, RIGHTS, AND PRIVILEGES; PRIVACY.

Occasionally the “see also” entry will direct you to a topic by concept rather than by name. For example, in the “see also” line under the entry “Bill of Rights” you are directed to “Amendments 1 through 10” and to “particular rights guaranteed by the first ten amendments.” Such general descriptive terms are necessary to avoid the tedium of listing the dozens of such rights at that point.

The entry for a topic may simply refer you to another topic.

ABRIDGING FREEDOM OF SPEECH, see: freedom of speech

Such cross-references contain no discussion but enable you to look for a topic under a variety of possible labels without having to know in advance what term I or the courts have chosen. The **Index of Subjects and Names** provides a more detailed method of finding particular topics.

For production reasons, the Court’s treatment of constitutional issues during its 1997–98 term is covered in a separate section, also arranged topically, beginning on page 555. Cases decided during this term are contained in the main case table. A dagger (†) at the end of an entry indicates that the topic is considered further in the section on the Court’s 1997–98 term.

Information about all cited cases is set out in the alphabetically and numerically ordered **Table of Cases**. A representative entry is as follows:

2014. *Roe v. Wade*, 410 U.S. 113 (1973).
7–2, BLACKMUN. Concurrences: Burger, Douglas, Stewart. Dissents:
White, Rehnquist. 66pp. *Noted at:* 13, 16, 19–22, 81a, 110b, 125a, 254a, 262b, 309b,
315a, 349a, 378a, 407b, 476a, 489a.

Here, the initial number corresponds to the number used throughout the text to refer to the particular case. It is followed by the case name and the official citation to the *United States Reports*, available in any law library; 410 U.S. 113 means that *Roe v. Wade* can be found in volume 410 of the *United States Reports* beginning on p. 113. (Because the Court’s own volumes have a production lag of a year or two, some of the most recent cases carry the West Publishing Company citation “S.Ct.”) Then comes the Court’s vote. The author of the majority opinion is in CAPITALS, and the names of those who wrote

concurring and dissenting opinions (and, occasionally, the names of those not participating) follow. The number before "pp." is the total page length of all opinions written in that case. The final set of numbers following "Noted at" is an index to pages on which the case is cited or referred to in the text.

Other sections of this book include the following:

- **The Constitution of the United States.** For the complete text of the Constitution and all amendments, see pages 571–584.
- **Concordance to the Constitution.** To find a particular word or phrase used in the Constitution, consult the Concordance, beginning on page 585.
- **Time Chart and Biographical Notes of the Justices.** To see which justices served together, see the **Time Chart of the Justices of the Supreme Court**, beginning on page 607. For basic biographical information about each of the justices, see **Biographical Notes on the Justices of the Supreme Court**, beginning on page 617.
- **Further Reading.** For brief descriptions of other reading, consult the list of readings beginning on page 751.
- **Index of Subjects and Names.** For a detailed guide to names, concepts, references to justices quoted in the text, and so on, consult the index, beginning on page 771, which includes many individual names and other subjects not contained in the cross-references throughout the text.

A Word about What Is *Not* Contained in This Book

Many legal, political, and social issues have constitutional dimensions. But to understand them fully, you must plumb below their constitutional surfaces. The Constitution is not the only law; Congress, the states, their subdivisions, regulatory agencies, and the courts give us plenty of other law to chew on. And since this is not a book about law in general or about specific policy issues, inevitably only parts of many stories are told here. The right to vote, for instance, is a constitutional topic; five amendments and several provisions in the main text of the Constitution deal with it. But purely constitutional issues about the right to vote have long since been resolved. Instead, the most difficult questions today arise under such laws as the federal Voting Rights Act. The reader will search in vain here for a narrative on voting and other major policy problems, because this is a volume about the Constitution and cases that arise under it, not about policy issues that happen to have constitutional dimensions. The Constitution obviously helps shape the policy debate, but it does not dictate in any detail how we must resolve our pressing problems. Many things are permitted under the Constitution but prohibited by other law. Moreover, constitutional law resides not only in Supreme Court decisions but also in the decisions of many other federal and state courts. For lack of space, not lack of significance, discussion of this vast branch of constitutional law is necessarily omitted. Likewise, the profusion of constitutional theories propounded by many scholars is almost wholly ignored, despite their relevance and their habit of turning up years later as the basis of many Supreme Court judgments. Finally, this book does not inquire whether the lower courts and the government abide by the Supreme Court's opinions, even though what happens is often quite different from what the Court says ought to happen. For these limitations I do not so much beg the reader's pardon as ask the reader's understanding—how big a book do you wish to hold in your hands?

Author's Note

References to particular clauses in the Constitution are abbreviated as follows:

Art. I-§8[2] refers to Article I, Section 8, Clause 2.

Amendment 14-§1 refers to Section 1 of the Fourteenth Amendment.

To conserve space, many of the discussions about particular constitutional rights are written as if the Bill of Rights applied directly to the states. Technically, the Bill of Rights limits only the federal government; it does not apply to the states. Beginning in the late nineteenth century, however, the Supreme Court began to apply to the states individual rights contained in the Bill of Rights, by "incorporating" them into the Due Process Clause of the Fourteenth Amendment, which itself applies directly to the states. Through a long process of "selective incorporation" (discussed in detail under INCORPORATION DOCTRINE in this book), the Bill of Rights today has largely been absorbed in the Fourteenth Amendment and hence is equally applicable to the states and the federal government. Because it would be cumbersome in scores of essays to refer to "the Eighth Amendment right against cruel and unusual punishments, as incorporated in the Fourteenth Amendment," the fact of incorporation has largely been omitted.

THE CONSTITUTION: A GUIDED TOUR

The Constitution was a reaction to the states' unhappy experiences in the decade following the Declaration of Independence. Although loosely bound by the Articles of Confederation, the states were largely autonomous. The Continental Congress had few of the powers of a central government. It had no authority to tax. Though theoretically entrusted with the conduct of foreign relations, it could raise troops only with the greatest difficulty and could not control import and export duties. Because nine of the original thirteen states were required to agree on national legislation, Congress was largely paralyzed, unable to deal with serious national concerns. There was no executive authority to command troops and no central judiciary to enforce any laws that did manage to emerge from Congress. Real power lay in the states, and that meant mainly in the state legislatures.

To many thoughtful observers, the state legislatures had become omnipotent and despotic: they confiscated property, enacted *ex post facto* laws, impaired contractual obligations, hindered the repayment of debts, and reversed the judgments of courts. Jealous of their prerogatives, the states coexisted uneasily. Trade wars, which sometimes even led to armed conflict, threatened what feelings of fellowship remained from the revolutionary fervor. Fearing anarchy between the states and despotism within, delegates to a trade convention in Annapolis in 1786 called on their states to send delegates to a new convention to deal with the problems of government in America. Congress endorsed the idea, and the Constitutional Convention was called for May 1787. Four months later the delegates emerged with the present Constitution—"the most wonderful work ever struck off at a given time by the brain and purpose of man," gushed Britain's Prime Minister William Ewart Gladstone on the Constitution's centennial. (For a history of the Convention, see CONSTITUTIONAL CONVENTION OF 1787 and CONSTITUTION, FRAMERS OF.)

Even with amendments, the Constitution is quite short—about 7,500 words altogether. Those words are divided among seven original articles, ratified in 1788, and twenty-seven amendments, ratified between 1791 and 1992. One of the articles (Article VII) is no longer pertinent, having to do with the original writing and ratification. One of the amendments (the Eighteenth, concerning Prohibition) no longer has any effect either, having been repealed by a later amendment (the Twenty-first).

Broadly speaking, the Constitution establishes the federal government and structures the relationship between the central authority and the states. It does so by both conferring and limiting governmental power. Two fundamental principles lie at the heart of the Constitution: separation and limitation of powers. The principle of separated powers stems from the fear of despotism: to prevent the government from becoming tyrannical, power must be separated and divided among different branches of government.

James Madison put it best. In *Federalist* 51, he wrote, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls

on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." These auxiliary precautions were realized in the Constitution's separation of powers.

Separation of Powers

The Constitution separates the powers of government in several different ways.

First, it recognizes three fundamental types of government power—legislative, executive, and judicial—and in Articles I, II, and III vests these powers in three different branches: Congress, the president, and the judiciary.

Second, the Constitution further divides the powers of two of these branches. Congress consists of a Senate and House of Representatives, whose members are elected by different sorts of constituencies. To enact legislation, both houses must agree on the wording of a bill. The federal judiciary is also divided. The Supreme Court has the power to hear appeals, and the lower federal courts have the power to try cases.

Third, the Constitution prohibits members of the legislative branch from serving simultaneously in the executive branch (and, by tradition extending almost to the beginning, a member of neither of these branches may simultaneously serve as a federal judge). It also prevents the law from being politicized by giving life tenure to judges on the federal courts and prohibiting Congress from decreasing their salaries.

Fourth, not all power resides in the federal government; the states have significant powers within a sphere closed to the federal government. And they have, through the electoral college and the basis of representation in the Senate (two senators from each state, regardless of population), a substantial influence on the election of the president and the shaping of federal law.

Fifth, the Constitution bars one branch from exercising certain powers that properly belong to another branch. For example, Congress may not pass a "bill of attainder," a law that directs the executive to imprison a particular person. Judgment of guilt may be pronounced only by courts, not by Congress. The president may direct war, but only Congress may declare it.

Sixth and finally, the Constitution reserves the ultimate power for the people, who may, by amending the Constitution itself and by voting for the president and members of Congress, take the public power from one set of hands and turn it over to another.

Madison summarized what the Constitution would create: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

Checks and Balances and the Sharing of Power

As basic as separation of powers is, it is still not enough to foreclose the possibility of tyranny. The problem remains that unless the branches of government have some means of connecting to and dealing with each other, one branch might usurp all power. Madison found (again in *Federalist 51*) that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others. . . . Ambition must be made to counteract ambition." It is a "policy of supplying, by opposite and rival interests, the defect of better motives," and it is "particularly displayed in all the subordinate distributions of power,

where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." In short, unless the branches of government were to *share* power, they could not serve to check and balance each other's powers.

The Constitution achieves this checking and balancing function in several ways. The president, through the veto, has a major share in the legislative power to enact law. Because he may reject its enactments, Congress must heed the president's agenda. In turn, the president's checking power is itself checkable. Congress may, by a higher vote than originally (that is, two-thirds instead of a simple majority), overturn the veto. The veto power also works in reverse: although the president has the primary power of negotiating treaties and nominating government officials, the Senate may veto treaties and appointments. Likewise, the president has the primary responsibility for carrying out the laws, but Congress has considerable power to influence how government will operate through its power over the budget and its power to establish the various offices of the government.

The courts, too, have a share in the power. They sit to apply the law in particular cases, and through their power to interpret the law and the Constitution itself (although the Constitution is less specific on that point), they can check both Congress's enactments and the president's enforcement policies. But both Congress and the president, in turn, may exert control over the courts. The president names all the federal judges (although the Senate may veto their appointment), and Congress may restrict the types of cases that the courts may hear. Finally, despite the president's power to appoint, Congress may remove any federal official, including members of the Supreme Court, through impeachment. Even this power is divided: the House may impeach, but only the Senate may convict.

Checks and balances are not limited to powers within the federal government. The Constitution provides for checking and balancing between federal and state governments as well. Article IV declares that the United States must guarantee a "republican form" of government in each state, meaning that the federal government could act against any attempt to establish a dictatorship within any state. Far more important in practice is Article VI, which declares that the Constitution, federal law, and treaties are the "supreme law of the land," superseding any conflicting state law. This article ensures that the states may not act to undermine national law and policy.

Limited Powers and Rights of the People

The principle of limited powers stems from the premise that power resides in the people and that the federal government can have only those powers ceded to it by the people. The federal government is, therefore, a government of *enumerated* powers; it can act only through those powers delegated to it. The Constitution limits power in two ways: it specifically delegates only certain powers and it specifically prohibits the government from acting in certain ways. In general, the Constitution gives the federal government only those powers that ought to reside in a national government—power to establish uniform regulations of subjects that concern the nation as a whole (for example, a uniform currency, bankruptcy law, internal commerce, and a postal system) and the power to govern external relations (for example, defense, treaty making, and immigration and naturalization). Legislative powers not delegated to Congress are reserved to the states or are forbidden altogether. Likewise, the federal courts do not have authority to interpret the law whenever they feel like it; they may act only when a case is presented to them. Nor may they hear cases of any description whatever; the Constitution restricts the types that may be brought there.

To secure individual rights, the Constitution as ratified in 1787 also directly prohibited the government from exercising certain powers. For example, it prohibits Congress from suspending the writ of habeas corpus, without which the government could jail anyone without having to give a reason or press charges; from enacting bills of attainder, through which particular individuals could be sent to prison; from passing *ex post facto* laws, which would punish a person for doing

something that was lawful when it was done; and from granting titles of nobility, which prevents the creation of royalty and an official caste system.

The states too are prohibited from enacting many of the same kinds of laws, and others as well, including laws that impair the obligation of contracts and laws that interfere with the national economy and foreign relations. Moreover, the states may not discriminate against citizens of other states, and they are bound to respect each other's laws and judicial rulings.

But the limitation of power was only partly achieved in the original Constitution. The Bill of Rights and subsequent amendments were enacted to secure other basic rights. The twenty-seven amendments can be grouped, generally, into four categories: rights of the people (usually achieved by limiting the powers of government), voting, governmental structure, and governmental powers. The Fourteenth Amendment deserves special note because it radically changed the relationship between federal and state power; its ratification in 1868 may truly be called a second constitutional revolution. This amendment prohibits the states from depriving any person of life, liberty, or property without due process of law; and from denying any person the equal protection of the laws. Just as important, the Fourteenth Amendment granted Congress—and by implication, federal courts—the power to enforce these prohibitions, thereby giving the federal government what in time would become a sweeping power over state laws and policies.

In capsule form, the amendments, grouped by subject, established the following constitutional principles and policies.

RIGHTS OF THE PEOPLE

The Bill of Rights, comprising the first ten amendments to the Constitution, was ratified in 1791 to overcome the principal objection to the Constitution when it was first submitted to the states in 1788: its failure to guard against the abuse of people's rights. The first nine amendments limit the power of the federal government in many ways—and today, through incorporation into the Fourteenth Amendment, they limit the power of the states as well. Among the well-known rights delineated in the Bill of Rights are freedom of speech and press; the rights to exercise one's religion, to assemble and petition the government, to be exempt from arrest or searches without warrant, and to receive just compensation if private property is taken. It guarantees the right to speedy trial, to confrontation by accusers, and to trial by jury, as well as the rights against self-incrimination, double jeopardy, cruel and unusual punishment, and deprivation of life, liberty, or property without due process of law.

Slavery was abolished in 1865 by the Thirteenth Amendment. The Fourteenth Amendment reformed the basic principle of citizenship and, as noted above, limited the power of the states to abuse the rights of the people.

VOTING

Several amendments clarified the right to vote and extended it to classes of people who had been denied access to voting booths in state and federal elections. The Fifteenth Amendment prohibits both the federal government and the states from denying anyone the right to vote because of race or color. The Nineteenth Amendment prohibits denying women the right to vote. The Twenty-third Amendment grants the vote in presidential elections to residents of the District of Columbia. The Twenty-fourth Amendment abolished the poll tax. The Twenty-sixth Amendment lowered the voting age to eighteen.

GOVERNMENTAL STRUCTURE

The Tenth Amendment, the last of the Bill of Rights, restated the basic principle that a power not given to the federal government remains with the states or with the people. Several amendments

altered the plan in the 1787 Constitution for selecting the president and made certain other adjustments. The Twelfth Amendment dramatically altered the way the voting would be counted for the president in the electoral college. The Seventeenth Amendment required senators to be elected directly by the people in each state rather than being selected by the state legislatures. The Twentieth Amendment established new dates for the convening of Congress and the inauguration of the president and provided for the possibility that a president-elect might die before being sworn in. The Twenty-second Amendment limits a president to two terms of office. The Twenty-fifth Amendment deals further with the death or disability of presidents and establishes, for the first time, the office of acting president. The Twenty-seventh Amendment limits the power of Congress to raise its members' salaries.

GOVERNMENTAL POWERS

The trio of Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth—give Congress new national powers not provided in the original Constitution. Congress may act against slavery, peonage, and discriminatory enactments by the states. The Sixteenth Amendment granted Congress the power for the first time to enact a federal income tax. The Eighteenth Amendment, repealed nearly fifteen years after ratification, prohibited the manufacture, sale, or transportation of liquor in the United States “for beverage purposes” and gave Congress and the states the power to enforce it. The Twenty-first Amendment, which repealed Prohibition, allows states the power to continue to enforce a ban on liquor if they choose to do so. Various of the voting amendments also give Congress the power to enforce their provisions.

That the United States still adheres, in significant ways, to a constitution written more than two centuries ago is quite remarkable. And it has done so in a no less remarkable way, by adroitly bending, twisting, and refashioning the constitutional clauses to fit its changing circumstances. No one contemplating the thirteen coastal states with their population of four million in 1787 could have imagined a continental union and then some, with interests and territories in and across oceans, that would govern a population more than sixty times larger through a network of laws and regulations beyond the capacity of anyone to fully fathom.

The trials and errors of two centuries have led to several dramatic departures from the spirit of the original Constitution, if not from its text. High on any list must surely rank the growth of bureaucratic, regulatory government. Other features of modern constitutional life that doubtless would have bewildered the passionate people who wrote and ratified the Constitution are standing armies, immense federal and state budgets, powerful presidents, intrusive police presence, and the sweeping array of personal liberties that have been extracted from the few that were originally named.

Five developments, in particular, largely explain the changes.

The first and earliest was Chief Justice Marshall's bold declaration in *Marbury v. Madison* in 1803 that the Supreme Court may declare laws unconstitutional. This ruling created a system of judicial review more powerful than any other in the world.

Second, and occurring nearly three-quarters of a century later, was the ratification of the Fourteenth Amendment, which imposed new limits on the states, limits that are subject to further clarification by both Congress and the federal courts. In the twentieth century, and mainly during the past forty years, the Supreme Court has “incorporated” into the Fourteenth Amendment's Due Process Clause most of the rights that once limited only the federal government. This process of incorporation has given the federal courts great power to supervise police and trial procedures once thought to be well outside federal jurisdiction.

Third, the plasticity of the phrase “due process of law” has allowed the courts to control not merely legal procedures but also the substance of the laws that both the states and Congress may enact. A doctrine known as “substantive due process” has waxed and waned in different forms for

more than a century, permitting the courts, at various times, to overturn the economic and social agendas of states and the nation. Once substantive due process condemned wage and hour laws, taxing policies, rate regulation, and other economic controls. Today substantive due process has given rise to a condemnation of laws thought to interfere with personal liberties, giving the courts power to declare, for example, a broad right of personal autonomy and privacy, including the right to abortion.

Fourth, during the past forty-five years, a newly invigorated Equal Protection Clause has led to a great profusion of cases that have begun to remake the map of social relations—branding as unconstitutional not only racial discrimination, but laws that distinguish on the basis of sex, ethnicity, alienage, and other factors.

Fifth, invention and industrialization have wholly remade our economy and business relationships, requiring Congress and the federal government to regulate in ways that the Framers could never have imagined.

All of these constitutional developments have been achieved, or deemed necessary, or tolerated by the Constitution and by a restless population that brings its complaints and legal laments to the United States Supreme Court, continually demanding that it add to its ever-growing commentaries on this aging but living charter that shapes our lives still.

SOME THOUGHTS ON INTERPRETING THE CONSTITUTION

The Constitution of the United States is beguilingly—and misleadingly—short, tempting some to suppose that, unlike sacred texts, it can be read and understood by anyone. This error was most succinctly summed up by George M. Dallas, recognizable today more as the eponym of the Texas city than as vice president of the United States. Dallas wrote to his fellow citizens more than 150 years ago, “The Constitution in its words is plain and intelligible, and it is meant for the home-bred, unsophisticated understandings of our fellow citizens.”* He could not have been more mistaken.

The Constitution is elusive, ambiguous, murky, and sometimes quite opaque. Many of its phrases were not fresh creations but were encrusted with history—for example, “due process of law.” Other words and phrases have quite technical meanings accessible only to those schooled in legal arcana—“letters of marque and reprisal,” even “common law.” Parts of the text are narrow and specific (the age below which someone may not serve as president); other parts are broad and tantalizingly general (“equal protection of the laws”). In short, even if the Framers had not been practically deified within a generation of their handiwork, the Constitution of the United States inevitably would have come to be just like a sacred text, its meaning knowable only through some human, and fallible, means of interpretation.

In deciding what the Constitution means, we must first grapple with the question, Whose meaning are we seeking? The meaning of the Framers—that is, are we concerned primarily with what those who wrote it had in mind? Or someone else’s meaning—our own, for example? This basic question has no ready answer, and so it has remained the subject of fundamental debate for two centuries. It has no clear answer because the Framers themselves didn’t supply one in the most obvious place: the Constitution itself. The Constitution is silent on the question of how to interpret itself. It does not say, for example, “In resolving disputes over the meaning of this Constitution, choose that meaning intended by the drafters.” Likewise, it does not say, “Interpret the words to fit the current situation.”

Further difficulties abound. Suppose, for the moment, that we agree the Constitution should be interpreted according to the original intent—the intent of those who drafted it. Just exactly whose intent must we ascertain? And how do we uncover what that intent was? One obvious answer to the first question is that we should consult the intent of the Framers. After all, they wrote it. If a word or phrase has any meaning, it must have the meaning intended by the persons who put it there. But no sooner do we state this obvious proposition than an equally obvious objection arises. There were fifty-five delegates to the Constitutional Convention. The actual words were chosen by a five-member committee on style. Did the stylists, by using particular words, alter the meaning of what had been discussed by all, or at least by many others? Did all those voting in favor of particular concepts—ex post facto law, for example—agree not

only on what those concepts meant generally but also on how the terms selected to express those concepts should be interpreted when a difficult case came up? For example, suppose Congress enacts a retroactive tax law. Does requiring a taxpayer to fork over money on income made some months before the law was enacted violate the Ex Post Facto Clause? The answer is by no means obvious.

It is a commonplace that words are frequently chosen as compromises to skirt hard problems, such as the problem of securing unanimity on every part of every proposal being considered. Legislators “fuzz up” their language every day to get votes for their bills. It is precisely because the language is “open,” without any specific, hard-and-fast meaning, that legislators are willing to vote for it. So it is with the Constitution. Many of its phrases are obscure, we may be reasonably certain, precisely *because* there was no specific meaning on which everyone voting for them agreed. So whose meaning do we select as the *constitutional* meaning—delegate A’s or delegate B’s? The meaning given to the Constitution by this faction of delegates or that one?

Moreover, why settle on the Framers as the people whose intent should govern? They merely proposed the language of the Constitution. Those who ratified it might more properly be supposed to have the crucial intent about its meaning. If they understood a phrase to connote something different from what the Framers thought, doesn’t it make more sense to interpret the Constitution today by their meaning? After all, they were the ones who made it binding law. It is this distinction between the Framers’ and the Ratifiers’ intent that explains James Madison’s seemingly contradictory statements that, on the one hand, judges should interpret the Constitution by looking “to the sense in which [it] was accepted and ratified by the nation” and, on the other hand, the intentions of the Framers “could never be regarded as the oracular guide in expounding the Constitution.”*

Even if we agree to interpret according to the meaning of *somebody* back in 1787, how do we learn what the meaning was? Do we look up constitutional words and phrases in a late eighteenth-century dictionary? Perhaps we should consult the political treatises, histories, and works of philosophy that the Framers read so that we can learn what words and phrases were current and how they were generally used. Historians must surely look to these sources, but they do not yield the precise meanings that would result in inevitable conclusions.

We do have two more likely sources of meaning to which we can turn. One is *The Federalist Papers*, those enduring, brilliant essays by Madison, Alexander Hamilton, and John Jay. But they were writing as partisans, advocates for ratification in New York and Virginia. Furthermore, their purpose was more to convince a doubting public of the necessity of a particular kind of federal union than to explore in detail the reaches of every constitutional word. *The Federalist Papers* were, in short, political documents, not legal ones, and they too suffer from the defect that they express the authors’ beliefs and not those of all the delegates, much less the beliefs of those who were shortly to ratify.

The other principal source is the collection of Constitutional Convention notes of James Madison, who exhaustively chronicled most of the debates during that hot 1787 summer in Philadelphia. But they were not published until 1840, four years after his death, and by then much constitutional groundwork had already been laid in the courts. Moreover, Madison’s notes, like *The Federalist Papers*, do not ultimately yield the detail we might crave in uncovering the meaning of many elusive phrases, for they cover, at most, only one-fifth of the debates in Philadelphia.

Besides, what we really should wish to know is what the Framers or the Ratifiers thought about the question of interpretation itself. If we are to be bound by their intent, then how they intended later generations to go about interpreting the text should be the crucial inquiry. Did the Framers or Ratifiers intend us to interpret “broadly” or “narrowly”? Even more to the point, did they wish us to be bound by their intent or not? The drafters might quite wisely have held that they could not possibly resolve all future questions and so they—and we—would have to rely on

the good judgment of later generations to work out matters case by case. Unfortunately, we know next to nothing about what the Framers thought of this question concerning their intent. And we know nothing whatsoever about how the Ratifiers felt.

There are two other, related difficulties in interpreting according to original intent. One is that on many issues of utmost concern to us, the Framers had no intent because they did not conceive—could not have conceived—the problems that would confront this astonishing American people, whose technology and economy would transform the world. The Framers gave Congress the power to regulate interstate, but not local, commerce. In 1985 the Supreme Court ruled in *Russell v. United States* that the Commerce Clause gives Congress the power to outlaw arson in a two-story apartment building in Chicago. Is arson of a local apartment building included in interstate commerce? Can anyone suppose that such a problem was on the minds of the Framers? We certainly have no evidence for it.

A second difficulty is that the Framers may have been mistaken in their “intent”—mistaken, that is, in believing that the words they chose embraced their intent. This is not as paradoxical as it may seem. Suppose, as Thomas Jefferson once wrote, “all men are created equal.” Suppose, further, that these words had been placed in the Constitution (in fact, of course, they were not put there). Could we have refuted a slave who sought emancipation by saying, “Well, Jefferson didn’t really *intend* to free the slaves”? Perhaps he personally did not so intend, but it will snap the Constitution beyond repair, or at least utility, to argue that the phrase “all men are created equal” (or some similar set of words) should not apply to slavery. If Jefferson had focused on the gulf between his noble sentiment and his ownership of slaves, he might have yielded to the inconsistency and either changed his phrase or manumitted his slaves.* If one does not focus on the discrepancy, it is entirely possible to hold inconsistent positions, but one of them must surely be mistaken. We engage in logical inconsistencies all the time—when, for example, we rail against taxes but expect the government to provide us with ever-growing services.

So it is not enough to ask, “What did the Framers intend about issue X or problem Y?” We must ultimately ask what they intended by the *phrases* that purport to govern that issue or problem. Jefferson might truly have intended, had he thought grandly about it, that all *persons* are truly created equal and that someday a more humane world would surely act upon that knowledge, interpreting the phrase for what it *really* means, and not as he, a prisoner of his age, circumscribed it.

By the same token, we ought to be equally suspicious of arguments that the Constitution really does mean anything that people in power (justices of the Supreme Court) wish it to mean. It is no more sensible to permit Justice X to say that white means black than it is for Framer Y to say that black means white. If we are to have any sort of ordered society, we must live under a Constitution whose words are neither shrunk to an invisible point nor stretched along an infinite line.

How, then, can we go about responsibly interpreting the Constitution? Over the years, the Supreme Court has followed several methods, influenced by shifts in the political mood and the temper of the justices. Because moods and tempers will vary endlessly, the debate over the propriety of interpretation will endure as a hallmark of democratic government. The most significant approaches to interpreting the Constitution are noted briefly here.

Interpretations from Intent

The debate over intent, as we have seen, will never be settled because intent itself is always difficult, and sometimes impossible, to discern. Still, the Court may adhere to some presumed intent of the Framers if it supposes its obligation is to do so. Many of the liveliest constitutional controversies today revolve around the claim that the Framers did or did not intend a certain result. For example, the debate over the separation of church and state centers on what the Framers intended

by the words “establishment of religion.” Did they really mean to erect a “wall of separation” between church and state, in Jefferson’s words, or did they mean only to prevent the state from preferring one church over another?

Interpretations from Logic

Although constitutional analysis is scarcely an exercise in formal logic, some principles or axioms can fairly be invoked to deduce certain results. The Constitution is largely silent about most of the daily concerns of life. To confine the government strictly to those powers specifically mentioned would make governing impossible; it would defeat the purposes for which the explicit powers were granted. For example, the Constitution does not say that Congress may pass criminal laws or provide penalties for those who violate the laws it does enact. To be sure, the Necessary and Proper Clause gives Congress power to fill in the gaps. But even without it, Chief Justice John Marshall reasoned in *McCulloch v. Maryland*, no one ever doubted that Congress has the power to “punish any violation of its laws,” even though “this is not among the enumerated powers of Congress.” Even Thomas Jefferson, a strict constructionist who believed that a power didn’t exist if the Constitution didn’t name it, overcame his scruples in entering into the Louisiana Purchase, despite the Constitution’s silence about the power of the federal government to acquire territory. As Madison said in *Federalist* 44, “Had the Constitution [omitted the Necessary and Proper Clause], there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”

Interpretations from Purpose

Closely related to interpretation from logic is interpretation from purpose. The subject of one of the most heated debates in the nation’s early years was whether Congress had the power to create a national bank. When the issue came before the Supreme Court in 1819, Chief Justice Marshall upheld Congress’s authority under its power to make all laws necessary and proper to carry into effect its other powers. He declared that the Necessary and Proper Clause must be interpreted in light of the Constitution’s purposes: “The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs. . . . We must never forget that it is a *constitution* we are expounding.” His decision in *McCulloch v. Maryland* still stands as one of the most eloquent defenses of a broad reading of the Constitution.

Interpretations from Structure

The Constitution nowhere uses the phrase “separation of powers.” But the structure of its text, placing legislative power in Article I, executive power in Article II, and judicial power in Article III, is the primary basis for inferring the constitutional doctrine.

Interpretations from Context

One question in *McCulloch v. Maryland* was what the words in the Necessary and Proper Clause really mean. Does “necessary” mean only that which is “indispensable”? Or could it mean that which is merely “convenient” or “useful”? Chief Justice Marshall noted the ambiguity of the word: “[I]t has not a fixed character peculiar to itself. It admits of all degrees of comparison. . . . [A] thing

may be necessary, very necessary, absolutely or indispensably necessary." The answer, he discovered, lay in another clause, which prohibits a state from imposing certain duties "except what may be *absolutely* necessary for executing its inspection laws." When Congress wanted to use "necessary" in the sense of "indispensable," it knew how to do so. It did not do so in the Necessary and Proper Clause, Marshall noted; the word is used in different senses and its meaning must be discerned from context.

Interpretations from Canons of Construction

In *Marbury v. Madison*, Chief Justice Marshall confronted the question of whether Congress could enlarge the "original jurisdiction" of the Supreme Court. Nothing in the literal language prohibits Congress from doing so. Marshall disagreed, observing that Article III specifically assigns a few types of cases to the Court's original jurisdiction and all others to its appellate jurisdiction. If Congress could override these assignments, then the clause would "have no operation at all." Following a canon of construction—that is, a rule by which courts have historically construed legal instruments—Marshall said, "It cannot be presumed that any clause in the constitution is intended to be without effect, and therefore such a construction [allowing Congress to reassign jurisdiction] is inadmissible." This approach is not always consistently followed. For example, the Court later held that the Counterfeiting Clause (Art. I-§8[6]) is superfluous since Congress could achieve under the Necessary and Proper Clause all that it could achieve under the specific grant of power to punish counterfeiting.

Interpretations from Plain Meaning

Regardless of the Framers' intent, the Court has often insisted that if a constitutional phrase has a "plain meaning," it is to be applied according to that meaning. For example, in abolishing slavery the Framers of the Thirteenth Amendment had in mind black slaves. In 1873 the Court said in the *Slaughter-House Cases* that "[Although] negro slavery alone was in the mind of Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."

Interpretations from History

The Seventh Amendment guarantees the right to a jury trial in "suits at common law." Does the Seventh Amendment mean to include only suits that were among the types of "common law" cases known in 1789, or does it include suits that are within later extensions of the common law? The historical view would seem to suggest the former. A suit to enjoin a neighbor from playing with dynamite in the basement is not a suit at common law because it would not have been so when the Constitution was ratified. At first glance, such a result may seem to fit nicely with a theory of original intent. Surely the drafters of the Bill of Rights did not mean to include types of suits of which they were unaware or that were not then triable by jury.

But things are not so simple. Historically, the common law has been, and continues to be, variable, evolutionary. For nearly a millennium it has been a system permitting courts to make law. The common law has changed over time because that is its very nature. Neither history nor original intent can sensibly tell us to overlook the evolutionary feature of the common law; its capacity for change is as much a part of the historical record as are the cases recognized two hundred years ago.

So when a tenant sues for damages under federal antidiscrimination law, defending against a landlord's attempt to evict him, is a jury necessary? The common law knew no such proceeding. In *Pernell v. Southall Realty*, the Court held the Seventh Amendment applicable: "[T]rial by jury

[is required] in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." But what of a case in which the Occupational Safety and Health Administration seeks to impose monetary fines on a company for violating its regulations? This, too, was unknown to the common law and sounds like the sort of inquiry "traditionally enforced" in a common law proceeding. In *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, however, the Court held otherwise.

Interpretations from Considerations of Judicial Economy

Some decisions may be understood as influenced by the limited resources of the courts. For example, if the Supreme Court had adhered faithfully to the doctrine of separate but equal, by which racially segregated facilities were said to be constitutionally permissible if the facilities were equal, the courts would have been required to examine tens of thousands of schools, restaurants, theaters, and other facilities and would have had to develop a set of criteria for determining the meaning of equality in each instance. In gross, that is an impossible task, and *Brown v. Board of Education* and later decisions may be understood at least in part as the Court's declaration that any rule short of an outright ban on segregation would have been impossible to enforce. For similar reasons, the Court's enunciation of the Sixth Amendment right to the effective assistance of counsel must strike any fair-minded observer as fanciful or even hypocritical if viewed solely as a matter of doctrine, since the Court has fashioned a rule permitting defendants to remain behind bars when their lawyers have made all sorts of mistakes. Lacking the stomach to order the states and federal government to fund public defender programs at sufficient levels, the Court has had to rely on a "harmless error" rule and a rather strained understanding of what constitutes ineffective assistance of counsel; otherwise court dockets would be overwhelmed with questions of whether lawyers had prepared adequately and employed suitable trial strategies.

Interpretations from Necessity and Experience

In *Missouri v. Holland*, a case testing whether the federal government's treaty power could supplant the power of a state to control migratory birds (a question not much on the minds of George Washington, James Madison, and company), Justice Oliver Wendell Holmes wrote in 1920, "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Interpretations from Precedent

Most decisions of the Court rest on precedent, as outgrowths of earlier decided cases. In ruling on whether a new set of circumstances fits within a constitutional provision, the Court often refers to its earlier cases and reasons from them. In certain cases, it looks to what the First Congress did and to whether the precedent set by that Congress has generally been followed. Criticism of particular cases is often misguided because the critic overlooks the fundamental approach of case-by-case adjudication. Often it is only in hindsight that we can see the Court groping toward a more general solution to a difficult set of problems. The Court's rationale in *Brown v. Board of Education* was attacked initially because it was limited and raised as many problems as it settled. But within

a decade it became clear that the Court was settling on a broader rule. Likewise, the Court's initial privacy rulings may be attacked as made up out of whole cloth. Dissenting in *Griswold v. Connecticut*, the 1965 birth control case, Justice Potter Stewart said that he could find no "general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided" by the Supreme Court. But eight years later, in *Roe v. Wade*, Stewart concurred in the judgment that laws against abortion violate a woman's right to privacy, because later cases made it clear that the real basis of *Griswold* was the unconstitutionality of invading a person's liberty, which is protected by the Constitution, and not a pure right of privacy, which is not. Though not absolute, the lure of precedent is very strong. Many justices who might not originally have accepted a constitutional doctrine wind up adhering to it because it has become a settled expectation of daily life. The most telling example is, of course, *Roe v. Wade*, adhered to by Courts with justices appointed largely by presidents who had sworn to overturn it.

To focus on any single approach to interpreting the Constitution is to falsify historical reality. Few cases favor one approach and exclude others. Nor do the justices often announce that they are following one approach or another. Their interpretive methods are usually implicit and masked. Moreover, the entire enterprise of interpreting the Constitution is at best ramshackle. Because precedents are collected in books, and now in data banks, we can observe the "evolution" of constitutional thought through a complete fossil record. Every constitutional decision published by the United States Supreme Court sits in all but the most modest law libraries, and each is instantaneously retrievable by anyone with a computer, a modem, and the funds to go online. This lush growth of the constitutional forest means that the Court must often engage in attempting to reconcile the unreconcilable, to fit together a pattern of cases decided at different times for different reasons by different justices with different agendas. One may legitimately puzzle why inferences drawn in one field are not permitted in another. For example, the Court has said that the Speech and Debate Clause, which immunizes members of Congress from lawsuits, also embraces their staff employees because it is impossible to carry on legislative business today without staff. On the other hand, the Court refused to follow this logic in the search and seizure arena, holding in *Smith v. Maryland* that people have no reasonable expectation of keeping private the telephone numbers they dial, even though, as Justice Thurgood Marshall pointed out in dissent, "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."

Often a decision will hinge on the severity of the facts and circumstances, forcing the Court to adopt a doctrine that it might otherwise have avoided. For example, a debate rages over whether the Eighth Amendment prohibits criminal sentences disproportionate to the crime. In a 1991 case, *Harmelin v. Michigan*, Justice Antonin Scalia said there is no warrant in the Constitution or in history for a rule of proportionality. But a majority of the Court decreed otherwise, at least for sentences that are "grossly disproportionate" to the crime. Justice Byron R. White noted that the Constitution does condemn "excessive fines" and said that it would not be "unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment." Since legislative majorities rarely do grossly disproportionate things, the general rule is that if a legislature has voted for it, it is not grossly disproportionate. But when an aberration occurs, even those who are strict constructionists will find a way to rule against it. Even Scalia agrees that the death penalty may not be used except for murder.

We return, therefore, where we began. There can never be a fixed, unyielding meaning to the Constitution for the same reason that the Constitution endures. It remains a charter of shimmering truths and obscurities that will ever be tailored to our own purposes, no matter how much genius is devoted to proving that the One True Way should yield some other result.

HOW THE SUPREME COURT HEARS AND DECIDES CASES

We associate the Constitution with the United States Supreme Court because for two hundred years the Court has been its authoritative interpreter. But the Supreme Court does not issue rulings willy-nilly. A few years ago, a Washington journalist wrote that “by ninth grade . . . I heard about the Constitution of the United States. . . . I thought of the Supreme Court as something like a group of Super Bad guidance counselors who were always there to give an opinion on teen problems. I used to send the Court letters posing ‘constitutional questions’ that bugged me: ‘Should wrestling coaches really be teaching psychology?’”¹ Had one of the justices replied, the ninth-grader would have learned that no pronouncement about the Constitution has any *legal* effect unless it is the ruling of a court in a case that has properly come before it. A justice would not have told the student what he or she thought about wrestling coaches, because federal judges do not give their opinions to just anyone who seeks constitutional enlightenment. You cannot write a letter to procure an opinion, for the Constitution itself dictates that courts remain silent unless they are ruling in an actual case.

It may seem to the bleary-eyed scanner of newspaper headlines that sooner or later everything is hauled into court and branded a constitutional issue. But relatively few cases ever come before the Supreme Court, and few of those cases are constitutional. However, when it does decide constitutional cases, its rulings are often momentous. In the 1996–97 term (the last full term with reported statistics before this edition went to press), the Court issued written opinions in only 101 cases of the 7,602 petitions and appeals before it. Of written opinions, 45 dealt with constitutional issues. In almost all the other cases, the Court either denied or dismissed petitions for review or permitted the parties to withdraw their appeals and petitions. The Court granted review in less than 3 percent of the cases appealed.*

With very few exceptions, the Supreme Court is an appellate court. It hears appeals of cases decided in lower federal and state courts; it does not try cases by hearing witnesses and gathering evidence. Which *types* of cases it may hear are determined by federal law; which *particular cases* the Court ultimately hears it decides for itself. Under the Constitution, Congress may prescribe the kinds of cases to be heard in the federal courts, including the Supreme Court. In the nation’s early years, Congress gave the federal courts relatively limited jurisdiction, far less than that allowed by the Constitution itself, so that some types of cases could not get into the courts (for further details, see COURTS, CONGRESSIONAL CREATION AND CONTROL OVER AND JURISDICTION). Also, until relatively recently, Congress told the Supreme Court that litigants with certain types of cases were automatically entitled to have their cases reviewed on appeal. But since 1988 the Court has been given complete control over its docket; the justices themselves decide which cases they will hear of the thousands that pour in. The justices generally look for cases that raise important constitutional issues, for cases that have received conflicting treatment in the lower federal courts of appeals, and for cases that raise important questions of statutory or regulatory interpretation. In selecting cases, the Court may hear appeals from both federal courts of appeals and state supreme courts.

The Court traditionally begins its term on the first Monday in October and usually concludes the term's business by the end of June, when a flurry of decisions is often released at the very last moment. Occasionally the Court sits longer or is forced to return for a case of paramount importance. For example, in *United States v. Nixon*, the Court heard oral argument on July 8, 1974, concerning whether the president could constitutionally be required to turn over confidential tape recordings in a federal criminal case, and it handed down its extraordinary decision on July 24. Even when the Court is recessed over the summer, a litigant may apply to a particular justice for relief under certain circumstances.

Nothing in the Constitution or federal statutes dictates how the justices go about deciding the cases they have chosen to hear. The procedures they use are set by the Court itself and have evolved over many years. For decades the Court has followed the "Rule of Four": if four justices decide to hear a case (in the technical parlance, if they decide to grant a "writ of certiorari," an order to a lower court to send up the record of a case), then the case will be heard.

In every case the justices hear, arguments are submitted first in written briefs. Each case is then argued orally. Oral arguments are open to the public. In the Court's early years, oral argument in important cases could sometimes last for days. No longer. Today each side is allotted thirty minutes to present its case. In most cases, the advocates barely begin to make their arguments when they are peppered with questions from the raised, irregularly shaped bench. (The Supreme Court does not sit in panels, as most other appellate courts do; all the justices sit for each case.) When the advocate has five minutes left, an amber light at the podium winks on. When time has expired, amber turns to red, and the lawyer must stop.

The justices do not decide the case immediately. Each week, at a conference of the justices, every argued case is discussed and tentative votes are taken. The conference discussion is closed to everyone but the nine justices. Indeed, the conference of the justices is one of the most secret meetings in a town full of secret meetings. Unlike most other meetings in Washington, however, what occurs there is leakproof.

By long tradition, the senior justice in the majority assigns the task of writing the opinion to one of the justices. If the chief justice is in the majority, he is the senior justice. If the chief justice is in the minority, the senior justice in the majority is the one who has served longest on the bench.

The writer may take one week to several months to circulate the majority opinion, and during that time, in reaction to the opinion itself or as a result of the persuasion of another justice, votes may change. The Court's decision is never certain until it is printed and announced publicly.

After oral argument the justices may hold a case for as long as they wish, although almost all argued cases are decided by the end of the term. Occasionally the justices may direct the parties to reargue the case. For example, *Brown v. Board of Education*, the seminal school desegregation case, was reargued a year after it first came before the Court. But once the Court publicly announces its ruling, the case is decided. Justices may change their minds often while the opinions are circulating privately between their chambers, but once published, the decisions are final and the case is at an end.

That does not mean, however, that the constitutional or other issues are necessarily settled. Every issue is always open for reargument in later cases; changed parties, changed circumstances, and changed courts often lead to changed conclusions. That is why, for example, abortion has been so active a topic on the Court's calendar a quarter century after *Roe v. Wade*. The Supreme Court remains what it has always been—the most powerful constitutional court in the world.