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The Supreme Court: A Unique Institution

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The U.S. Supreme Court building

Established by the U.S. Constitution in 1789, the Supreme Court is both the final arbiter of significant legal cases and the prevailing authority on the constitutionality of individual laws. While the Constitution specifies the Court's original jurisdiction, it does not spell out how the Court should conduct its business, or even the number of justices who should serve on the Court or what their qualifications should be. Thus, the Founding Fathers provided a High Court for the nation with the adaptability to respond to the needs of its citizens.

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In the majority of modern states, one tribunal is empowered to assess the constitutionality of actions by parliament and the executive while another acts as the final court of appeal. The Supreme Court of the United States is among the distinct minority empowered as both the highest national court and the legal arbiter of constitutionality. One day's work at the Court thus might address matters of historic import, while others are filled with the ordinary chores of a review court, including the supervision of the federal judicial department and the correction of nonconstitutional decisions by subordinate courts.

The U.S. Constitution makes the Supreme Court of the United States a court of first instance (the court of "original jurisdiction") for only two rare types of cases: those in which one American state sues another (usually about a disputed boundary or water rights) and those in which a foreign diplomat is involved. It is a court of review ("appellate jurisdiction") for all other types of cases within the reach of federal judicial power, which in the U.S. federal system is limited both by the nature of the litigants (federal "diversity" jurisdiction applying to cases between citizens of different states) and the subject matter of their dispute (the case must arise under the Constitution, a federal law, or a treaty to which the United States is a party). In our federal system, the highest courts of the 50 states remain

the courts of last resort for all cases in which state law is applied to disputes between citizens of the forum state. Like the federal and state courts below, the U.S. Supreme Court generally decides cases by reference to norms found in the common law, in previously decided cases, in legislation, or in a constitution, state or federal. Since *Marbury V. Madison* (1803), American courts are empowered to review government action for conformity with the supreme law of the land, the U.S. Constitution.

Given the limited nature of its original jurisdiction, the great controversies about public power in America have come to the Supreme Court on appeal or by similar device from other state or federal courts. Thus, by the time that national constitutional controversies reach the Supreme Court, they have been debated, refined, and sometimes dramatically refocused in prior rounds of lawyers' arguments and judicial decisions in one or more courts below. The Supreme Court is the tribunal of last resort for virtually all cases of this sort.

By the same token, constitutional controversies come to the Supreme Court only when they are embedded in specific cases between real litigants. According to Article III of the Constitution, the Supreme Court's power, in common with that of other federal courts, is limited to "cases in Law and Equity." No federal court, including the Supreme Court of the United States, can render an advisory opinion, even at the request of the president or Congress. No matter how great the controversy, the Court will not hear it unless it is reduced to one concrete manifestation for a particular person or specific class of persons, in the form of an injury of the sort the law will notice. At times, outside groups interested in establishing a legal principle will assist a litigant in a particular case, in hopes of framing an appeal that will reach the Supreme Court.

While the U.S. Constitution (Article III, Section 2) specifies the types of cases over which the Supreme Court possesses original jurisdiction, it is silent on whether and how that jurisdiction might be changed. The Court has ruled that its original jurisdiction cannot be enlarged except through amendment of the Constitution itself, and the logic of this reasoning dictates the same conclusion for any limitation of original jurisdiction.

The Constitution is not silent, however, about whether and how the Supreme Court's appellate jurisdiction may be changed; Article III, Section 2 assigns Congress the power to alter it with "exceptions or regulations." Thus, it is only with legislative branch acquiescence that the Supreme Court continues to entertain appeals that pose great constitutional controversies. Even so, Congress has only once (in a case involving the detention of Civil War [1861-1865] prisoners) seen fit to restrict the Court's appellate jurisdiction. Any effort today by Congress to limit the appellate jurisdiction of the Court would undoubtedly prove highly controversial.

Jurisdiction, of course, merely defines the universe of cases that are *eligible* for review; the Constitution does not compel the Court to accept any particular appeal. Indeed, conventional wisdom suggests it could not be otherwise, given the overwhelming number of such applications and the relatively limited decision making resources of the Court. The Court itself selects the overwhelming majority of its docket by means of the writ of *certiorari*, a legal order directing a lower court to send up a complete record of the case below for review.

FEW BASIC RULES

The Constitution provisions that established the Supreme Court deliberately provide only a few basic jurisdictional rules. They do not dictate the procedures under which the Supreme Court does its business. Indeed, they are quite vague about the Court's composition. Article III does not limit the number of Supreme Court judges (justices), and Congress, which has the power to alter the Court's size and composition, has not done so in more than a century, even as the volume of applications to the Court has grown dramatically. Moreover, by its own decision, the Court continues to hear cases sitting only *en banc* (with all justices participating).

Native Americans stage a rally for tribal sovereignty.

Unlike some modern constitutions, the U.S. Constitution does not explicitly command judges to explain their decisions in writing, but American courts, including the Supreme Court, long ago adopted the practice of issuing written opinions explaining and enlarging upon their judgments. Whereas it was (and is) the practice of multijudge English courts to publish the separate opinions of each judge involved, the U.S. Supreme Court early embraced the alternative of joint opinions written by one of the justices and endorsed by one or more of the others. The complete text of these opinions has long been widely published, so that all in America, and elsewhere for that matter, may review almost immediately the legal reasoning on which important judgments are founded. From the beginning, dissenting justices have been heard and their dissents published alongside the majority opinion (or opinions). This allows readers to see, for example, how close the minority view came to persuading one or more justices in the majority. There are several examples in U.S. constitutional history of dissents embodying interpretations that later supplanted the then-majority view.

Although the Constitution imposes specific age, residency, and citizenship qualifications for the president of the United States and members of Congress, it sets no similar qualifications for Supreme Court justices, except that every candidate must be the president's choice and acceptable to a majority in the Senate. No prior experience as a judge, no expertise as a constitutionalist, indeed, no training in the law at all, is formally necessary. Nevertheless, virtually every appointment has come from the pool of those with training in the law and professional experience as lawyers and judges. On a few occasions, great constitutional controversies with obviously moral dimensions (slavery, abortion, segregation) have polarized American opinion about the selection of Supreme Court justices, but whether any candidate's sympathy with one side of a particular issue should determine his or her selection remains an open question.

According to the Constitution as amended, each U.S. president serves a term of four years and may be re-elected for only one additional term. U.S. senators serve six-year terms and may be re-elected without limit, while members of the House of Representatives serve terms of two years and similarly may be re-elected without limit. On the other hand, federal court judges, including the justices of the Supreme Court, serve effectively without any limit short of their life spans. The youngest justice was appointed to the Supreme Court of the United States when he was only 29 years old. Another served on the Court for 34 years, and no new justice has joined the present Court in more than 10 years.

CONSTITUTIONAL MATTERS

Not all American constitutional controversies are large and notorious. Nor are they all decided by the Supreme Court, or indeed by any court. As elsewhere in the world, countless constitutional questions are decided daily in the performance of their duties by officers of the federal and state governments, as well as by legislators voting in Congress and state assemblies. Thus, most constitutional questions in America are answered by democratically elected officials who come and go from the offices in which this power resides. As they come and go, so changes the working version of the Constitution. That said, there remain the relatively few controversies, usually persistent and notorious, that come finally to the Supreme Court. To the extent that any jurist's opinions of fundamental constitutional matters remain more or less intact after weathering term after term of debate, those of a Supreme Court justice are, therefore, relatively more deeply rooted and comparatively more influential than those of decision makers in the political branches of government. Leaving aside any question of inevitable debility, we are left to ponder whether the Constitution itself is well served by such a system, in which a particular constitutional jurisprudence can become so personally entrenched. Calls for limiting judicial tenure, in particular that of the Supreme Court, have sounded occasionally since the turn of the 19th century, so far without persuading the super-majorities required to enact the necessary constitutional amendment.

In the federal democratic republic that is the United States of America, we sometimes look with awe upon the evolution of the judicial power outlined by the Constitution. A nonelected and tenured federal judiciary, led by the Supreme Court of the United States, has assumed the power to declare unconstitutional and, therefore, void the acts of elected assemblies and executives, state and federal. It might seem surprising that the politico-legal culture has for so long and without great stress accommodated that development. The Court's constitutional judgment has been overridden by constitutional amendment only three times so far— by ratification of the Constitution's 11th (limiting federal lawsuits by a citizen of one state [or of a foreign nation] against another U.S. state), 14th (overruling the decision in *Scott v. Sanford* that blacks could not be citizens with access to the federal courts), and 16th (allowing Congress to levy an income tax) Amendments. Yet a closer look ought to reveal the largely self-imposed (but no less effective) limits within which judicial power has been constrained, as well as the political forbearance upon which its continued exercise depends. American rule of law is fluid, collaborative, and adaptable; a less-supple constitutional order might not have survived as long.

The opinions expressed in this article are those of the author.

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