Chapter One

Jurisdiction and Organization of the Federal Courts

Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

—Justice Robert H. Jackson (1953)

American constitutional law represents only a tiny fraction of the entire corpus of the law. Routine litigation between private parties seldom falls into the category of “cases” to which the judicial power of the Supreme Court extends. Even cases involving constitutional questions may be sidestepped. The Supreme Court of the United States is not “a super legal aid bureau.”

This chapter presents certain rules and procedures guiding the justices in choosing the cases they will decide and sketches the major steps leading to a decision. The rules governing jurisdiction and standing to sue vest in the justices’ considerable discretionary power. The justices control their workload by selecting the cases that demand attention at the highest level. In the governing process, the Supreme Court has an important, if circumscribed, role to play.

The Judicial Power

The Constitution in Article III makes possible the resolution of certain legal disputes in national, as opposed to state, courts. One significant difference between American government under the Articles of Confederation and the Constitution was the provision in the latter for a system of national courts. Under the Articles, there was not even a Supreme Court.
Jurisdiction and Organization of the Federal Courts

FIFTY-ONE JUDICIAL SYSTEM. Civilian courts in the United States comprise 52 separate judicial systems: the court systems of the 50 states plus the District of Columbia, and the court system of the national government. The latter are commonly referred to, somewhat misleadingly, as federal courts and exist because of acts of Congress. By contrast, state courts derive their existence from the constitutions and statutes of their respective states. This dual system of federal and state courts means that almost everyone in any of the 50 states is simultaneously within the jurisdiction, or reach, of two judicial systems, one state and the other federal. Jurisdiction refers to the authority a court has to decide a case. The term has two basic dimensions: who and what. The first identifies the parties who may take a case into a particular court. The second, the “what,” refers to the subject matter the parties may raise in their case.

According to Article III, federal judicial power extends to: (1) cases arising under the Constitution, the laws of the United States, and treaties made under the authority of the United States; (2) admiralty and maritime cases; (3) controversies between two or more states; (4) controversies to which the United States is a party, even where the other party is a state; (5) suits between citizens of different states; and (6) cases begun by a state against a citizen of another state or against another country. (As explained in Chapter Four, the Eleventh Amendment modified Article III to bar suits brought against a state by a citizen of another state or country.) The Constitution vests this judicial power of the United States in “one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.” This provision is not self-executing, and Congress at the outset of the government in 1789 created a system of lower federal courts in addition to the Supreme Court. As currently organized, this system consists of: (1) a court of appeals for each of the 11 judicial circuits, plus one for the District of Columbia; (2) district courts, of which there are now 91 (89 in the 50 states, plus one in the District of Columbia and one in Puerto Rico); and (3) other courts, such as the Court of Appeals for the Federal Circuit. (See Figure 1.1 on page 0.)

The Supreme Court, courts of appeals, and the district courts within the 50 states, District of Columbia, and Puerto Rico are known as constitutional, or Article III courts. Their judges are appointed by the president, confirmed by the Senate, and enjoy the constitutional assurances of tenure “during good behavior” (effectively lifetime appointment) and no reduction in salary. Specialized courts such as the Court of Federal Claims or the Court of Appeals for the Armed Forces are legislative, or Article I courts, meaning that they were created by Congress in furtherance of a power granted by Article I. In contrast to Article III courts, Congress has full power over the salaries and tenure of judges of these Article I legislative courts and may assign administrative or legislative duties to them. The district courts in the territories of Guam, Northern Mariana Islands, and the Virgin Islands are also Article I courts. The distinction between Article III and Article I judges has real operational significance. In *Nguyen v. United States* (2003), the Supreme Court vacated two judgments of the Ninth Circuit Court of Appeals because the panel of three judges included the chief judge of the District Court of the Northern Mariana Islands (an Article I judge) who was sitting by designation with the Article III appeals court judges.

JURISDICTION OF THE DISTRICT COURTS. The district courts are the trial courts of the federal judicial system (see Figure 1.2 on page 0). Their original jurisdiction includes cases that raise a federal question and cases that involve more than $75,000 where the parties are citizens of different states. (A court has original
FIGURE 1.1 The National Court System
Cases in the federal courts usually originate in the district courts. Cases in state courts may qualify for review by the U.S. Supreme Court if they raise a federal question.
FIGURE 1.2 Geographic Boundaries of the U.S. Courts of Appeals and U.S. District Courts

This map shows how the 94 U.S. District Courts and the 13 U.S. Courts of Appeals exist with the court systems of the 50 states and the District of Columbia. The District Courts include 89 divided among the 50 states, plus one each for the District of Columbia, Guam, Puerto Rico, Northern Mariana Islands, and the Virgin Islands.
jurisdiction when a case begins or originates there, appellate jurisdiction when a case involves review of the decision of a lower court. A federal question is one that involves the meaning and/or application of the Constitution, a statute, or a treaty of the United States. Two wholly independent bases of jurisdiction are thus provided: The first is defined by the nature of the question, and the second (diversity jurisdiction) by the citizenship of the parties and the amount at stake. Diversity jurisdiction allows cases presenting issues normally heard in state court to be tried in federal court. District courts also have supervisory powers over bankruptcy courts within each district and appellate jurisdiction with respect to a few classes of cases tried before U.S. magistrate judges. These judicial officers issue search warrants, conduct arraignments of persons charged with federal crimes, and perform other duties assigned by their district court. The U.S. District Court for the District of Columbia has a special responsibility in reviewing changes in electoral practices in certain states under the Voting Rights Act. (See Chapter Five.)

Jurisdiction of the Courts of Appeals. Congress has given the courts of appeals jurisdiction in appeals taken from the district courts within their respective circuits, from judgments of the Tax Court, and from the rulings of particular administrative and regulatory agencies such as the National Labor Relations Board and the Securities and Exchange Commission. In addition, courts of appeals may review cases from the district courts in the territories. (For example, Guam and the Northern Mariana Islands are part of the Ninth Circuit.) The Court of Appeals for the Federal Circuit has a more specialized jurisdiction. Unlike the other 12, it hears appeals in patent, trademark, and copyright cases and in certain administrative law matters from district courts in all circuits as well as from the Court of Federal Claims, Court of International Trade, Court of Appeals for Veterans Claims, and specified administrative bodies.

Jurisdiction of the Supreme Court. The Supreme Court’s jurisdiction is in two parts: original and appellate. The Court’s original jurisdiction is specified in Article III and can be neither diminished nor enlarged by Congress. It includes four kinds of disputes: (1) cases between one of the states and the national government; (2) cases between two or more states; (3) cases involving foreign ambassadors, ministers, or consuls; and (4) cases begun by a state against a citizen of another state or against another country. Only controversies between states qualify today exclusively as original cases in the Supreme Court. For the others, Congress has given concurrent jurisdiction to the lower federal courts. As a result, almost all of the Court’s cases come from its appellate jurisdiction.

According to Article III, the Supreme Court has appellate jurisdiction “in all other cases both . . . as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” Congress, in other words, decides which categories of cases in the lower courts qualify for review by the Supreme Court. Not until 1889, for example, was there a right of appeal to the Supreme Court in some federal criminal cases. Perhaps Congress could even deprive the Court of all appellate review and make final the decisions of lower courts. An extreme example occurred in 1869 when Congress, fearing that the Court would invalidate the Reconstruction Acts, hastily withdrew the Court’s jurisdiction under the Habeas Corpus Act of 1867. The Court thus became powerless to pass on a case in which argument had been heard (Ex parte McCordale, in Chapter Two). A latter-day re-enactment of McCordale seemed to be in the making after Congress in the Detainee Treatment Act of 2005 seemed to withdraw most federal court jurisdiction to challenges to detention by prisoners at Guantanamo Bay. However, intimating that such legislative action would
pose “grave constitutional questions,” the majority in *Hamdan v. Rumsfeld* (2006) (see Chapter Fifteen) sidestepped decision on that prickly issue by finding that jurisdiction in such instances had actually not been withdrawn.

The major change in the appellate jurisdiction of the Supreme Court since 1789 has been in the proportion of cases qualifying for obligatory as opposed to discretionary review. Although the Judiciary Act of 1789 allowed Supreme Court review of certain cases from the state and lower federal courts by way of a writ of error, it was not until 1891, with passage of the Circuit Courts of Appeals Act, that the justices gained some discretion over the cases they would decide.

The Judges Act of 1925 further reduced the mandatory jurisdiction. As a result, most cases raising a federal question reached the Court on *certiorari* (Latin for “to make sure”). Review in this category was plainly discretionary. The justices could select for decision those cases they considered most worthy of their time. A smaller number of cases came to the Court on appeal. As with the old writ of error, these cases qualified by statute for obligatory review without regard to the importance of the issue raised or its impact on the government or the general public. By the mid-1980s, the appeal category of the Court’s appellate docket accounted for only 5 percent of the total filings but a full one-third of the cases the Court decided on the merits.

In 1988 Congress enacted a major overhaul of the Supreme Court’s jurisdiction. With the start of the October 1988 term, the Court’s appellate jurisdiction became almost entirely discretionary, meaning that nearly every case now comes to the Court on certiorari. The mandatory appeal category has been virtually abolished, except for decisions by three-judge district courts (required by Congress in a few instances), which reach the Supreme Court on direct appeal, bypassing the courts of appeals.

SELF-IMPOSED LIMITATIONS ON JUDICIAL POWER. In many cases where the federal courts, including the Supreme Court, would appear to have jurisdiction, one or more other requirements may prevent a court from accepting and deciding the case. Alexander Bickel once referred to such stipulations as the “passive virtues” that facilitate resolution of cases without actually rendering rulings on the merits. Some of these self-denying ordinances were set forth by Justice Brandeis, concurring, in *Ashwander v. TVA* (1936). Summarized briefly, these so-called *Ashwander rules* provide that:

1. The Court will not issue a constitutional ruling in a friendly, nonadversary proceeding.
2. The Court will not anticipate a question of constitutional law in advance of the necessity for deciding it.
3. The Court will not formulate a rule of law broader than the facts of the case require.
4. If possible, the Court will dispose of a case on nonconstitutional grounds.
5. The Court will not pass upon the validity of a statute on complaint of one who fails to show injury to person or property.
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has accepted its benefits.
7. Whenever possible, the court will construe statutes so as to avoid a constitutional issue.

Specifically, before a federal court will accept jurisdiction, there must be an actual **case or controversy**, in the language of Article III. That is, the conflict must be real, touching the parties who have adverse interests. This case or controversy requirement means, therefore, that a case must present a live dispute. In *DeFunis v. Odegard* (1974), for example, the Court held that a suit brought by a white law
student, challenging a racially preferential admissions program at the University of Washington, was moot. Although the case had attracted national attention, the majority concluded that since DeFunis had already been admitted to law school by court order and was about to graduate, he had suffered no injury.

Similarly, a case must be “ripe for review.” The *ripeness* requirement injects an element of timing in order to avoid premature adjudication. A controversy must have reached a certain stage of maturity before the Court will engage it.

The case or controversy requirement also means that the federal courts, unlike the courts of some states, will not render an *advisory opinion*—a statement about a hypothetical situation or a statement indicating how a court would rule were litigation to develop. This policy originated in 1793. Responding to a request from President George Washington and Secretary of State Thomas Jefferson, the justices declined to offer their views on “the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which ‘do not give a cognizance of them to the tribunals of the country.’”

Closely related to the case or controversy stipulation is the rule requiring “standing to sue.” *Standing* focuses attention on whether the litigant is the proper party to bring a lawsuit, not whether the issue itself is appropriate for courts to decide. Standing is a threshold question, for without it, litigants do not get to press the merits or substance of their dispute. In federal litigation, standing consists of three elements: (1) the plaintiff must have suffered an “injury in fact” (an invasion of a legally protected interest that is “concrete and particularized” and is “actual or imminent”); (2) a “causal connection” must exist between the injury and the conduct complained of; and (3) it must be “likely,” and not merely “speculative,” that the injury will be redressed by a favorable decision (*Lujan v. Defenders of Wildlife*, 1992).

For example, *Frothingham v. Mellon* (1923) held that a federal taxpayer could not challenge the Federal Maternity Act because the taxpayer’s interest was minute and indeterminable. In spite of this decision, the Court in 1968 conceded standing to a federal taxpayer who sought to challenge an alleged breach of the First Amendment’s establishment-of-religion clause through federal expenditures under a 1965 act for textbooks and instructional costs in sectarian schools (*Flast v. Cohen*). The Court distinguished this situation from the typical taxpayer suit by viewing the establishment clause as itself a limitation on the taxing and spending power of Congress; hence taxpayers could urge more than their general interest in the expenditure of federal funds. Yet in 1982, the Court denied standing in a case where surplus government property had been transferred to a sectarian school (*Valley Forge Christian College v. Americans United for Separation of Church and State*). The majority regarded the transfer as an executive action under the property clause of Article IV, not congressional action under the taxing and spending clause, as had been the case in *Flast*. So the easier standing rules of *Flast* did not apply. Moreover, *Hein v. Freedom from Religion Foundation* (2007) refused to extend *Flast* to encompass activities of executive branch offices that encouraged faith-based groups to compete for federal funds, thus effectively immunizing the White House from taxpayer suits over the promotion of religion.

Absence of a live controversy, ripeness, standing, or jurisdiction makes a case *nonjusticiable*, or inappropriate for settlement by a court. Justiciability in turn merges into the *political question doctrine* (discussed more fully in Chapter Two). A political question is one that the Court believes should be decided by the “political branches” of the government—Congress or the presidency. Today, political questions include certain foreign-policy matters, the Constitution’s stipulation of
a “republican form of government” for every state, and the ratification of constitutional amendments. At one time legislative apportionment and districting were deemed “political” and hence out of judicial bounds.

Modesty pervade these self-denials, and the justices differ markedly in defining their role. Judicial activists (those more eager to intervene and to substitute their views for those of other policymakers) tend to gloss over such matters as “technical.” Judicial restraintists (those inclined to defer to decisions made elsewhere in the political system) can frequently avoid a decision on the merits by insisting that a litigant has run afoul of one or more rules.

SUPREME COURT DECISION-MAKING

Article III of the Constitution establishes “the judicial power of the United States” in “one Supreme Court.” Initially staffed by six justices, since 1869 the Supreme Court’s size has been set by Congress at nine—eight associate justices and the Chief Justice of the United States. Also by statute, the Court’s annual term opens on the first Monday in October and concludes when the justices have disposed of all argued cases, usually in late June or very early July.

Access to the Supreme Court. Having a case decided by a state or lower federal court by no means assures the losing litigant of eventual review by the United States Supreme Court. The justices reject many more cases for review than they decide—indeed, so many more that most of what the Supreme Court does is to say “no.” In recent terms, the justices have annually denied review in over 7,000 cases and have given plenary treatment (consisting of oral argument and a signed opinion, as explained below) to fewer than 100. Another several dozen other cases may be decided summarily. About 1,100 cases may be carried over for action the following term. Indeed, despite an enlarged docket, the number of decided cases has actually fallen. (See Table 1.1.) Moreover, prisoner appeals, most of which are assigned to the “miscellaneous” docket for indigents (where fees and other requirements are waived), are routinely granted review at a far lower rate than cases on the “paid” docket.

The Justices at Work. The actual work of the Supreme Court proceeds through five stages: agenda setting, briefs on the merits, oral argument, conference, opinions and decision.

(1) Agenda Setting. Petitions for review from litigants and their counsel who lost in the court below arrive in the form of documents called briefs that demonstrate why the Court should accept the case for decision. Litigants and their counsel who won in the court below file briefs in opposition, explaining why the Court should not grant review. A minimum of four justices must vote to accept the case. This is the so-called rule of four. (However, in capital cases where there the petition for review is also a petition for a stay of execution, the condemned prisoner needs five votes to prevail.) Deciding what to decide is therefore an important stage in the judicial process. At this and other stages in Supreme Court decision making, the United States government is represented by the solicitor general, the third-ranking official in the Department of Justice. Thus, when an agency of the national government such as the Federal Election Commission has lost a case in a court of appeals, it is the solicitor general who makes the call whether to seek review in the Supreme Court.
32 Chapter One

Table 1.1 Caseload in the United States Supreme Court, 1930–2006

<table>
<thead>
<tr>
<th>Term</th>
<th>Total Cases on Docket</th>
<th>Cases Decided with Opinion*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1929–1930</td>
<td>981</td>
<td>156</td>
</tr>
<tr>
<td>1939–1940</td>
<td>1,078</td>
<td>151</td>
</tr>
<tr>
<td>1949–1950</td>
<td>1,441</td>
<td>122</td>
</tr>
<tr>
<td>1959–1960</td>
<td>2,143</td>
<td>132</td>
</tr>
<tr>
<td>1969–1970</td>
<td>4,172</td>
<td>126</td>
</tr>
<tr>
<td>1979–1980</td>
<td>4,781</td>
<td>155</td>
</tr>
<tr>
<td>1989–1990</td>
<td>5,746</td>
<td>146</td>
</tr>
<tr>
<td>1999–2000</td>
<td>8,445</td>
<td>81</td>
</tr>
<tr>
<td>2000–2001</td>
<td>8,965</td>
<td>83</td>
</tr>
<tr>
<td>2001–2002</td>
<td>9,176</td>
<td>85</td>
</tr>
<tr>
<td>2002–2003</td>
<td>9,406</td>
<td>84</td>
</tr>
<tr>
<td>2003–2004</td>
<td>8,833</td>
<td>89</td>
</tr>
<tr>
<td>2005–2006</td>
<td>9,608</td>
<td>87</td>
</tr>
<tr>
<td>2006–2007</td>
<td>10,256</td>
<td>78</td>
</tr>
</tbody>
</table>

*Data include all cases submitted to oral argument and disposed of by a signed or per curiam opinion; the number of such opinions filed each term may be slightly lower because a single opinion may dispose of more than one case.

When the justices meet in conference to act on petitions for review, the chief justice uses a “discuss list.” This is a timesaving device. Any justice may add a case to the discuss list, but unless a case makes the list—and over 70 percent do not—review is automatically denied, without discussion. If the Court grants review, the case moves to the steps explained below. If the Court denies review, the case is ordinarily at an end. The decision of “the court below”—the last court to render a decision in the case—stands.

Mystery surrounds selection of cases because the justices only very rarely publish their reasons favoring a grant or denying of review. Yet experience suggests that the presence of one or more of the following factors increases the likelihood that the justices will accept a case: (a) the United States is a party to the case and requests review; (b) courts of appeals have issued conflicting decisions on the question; (c) the issue is one some justices are eager to engage; (d) the court below has made a decision clearly at odds with established Supreme Court interpretation of a law or constitutional provision; (e) the case is not “fact-bound”—that is, of primary interest only to the parties to the case; and (f) the case raises an issue of overriding importance to the nation.

(2) Briefs on the Merits. Once the justices have accepted a case, opposing counsel submit yet another round of briefs. Like briefs seeking or opposing review, their length has been limited since 1980 to a maximum of 50 pages each. These briefs focus not on why the Court should hear the case but on the substantive issues the case presents. Sometimes the Court will have specified in its grant of review that it wants to limit consideration to a single question. Persons, governments, and organizations interested in but not parties to a case may file their own briefs as amici curiae, or “friends of the Court.” (Less frequently, an amicus may have already submitted a brief during stage one, thus alerting the Court to the national importance of
a case.) Nongovernmental entities filing an amicus brief must obtain the permission of the opposing parties, although the Court itself may grant permission if a litigant refuses. The solicitor general and state attorneys general may file amici briefs without seeking permission.

(3) Oral Argument. In addition to reading the printed briefs submitted by counsel, the Court listens to oral argument. During the chief justiceship of John Marshall (1801–1835), arguments were well nigh interminable. Daniel Webster, a leading attorney of that day, used to run on for days. In 1849, the Court reduced the time for oral argument to two hours: one for each side. Opposing counsel now divide an hour between themselves, with additional time allotted only in exceptional circumstances. From October until the end of April, Mondays, Tuesdays, and Wednesdays of two consecutive weeks are set aside for oral argument, with at least two weeks following being reserved for the preparation of opinions. The justices hear arguments on those days from 10:00 A.M. until 3:00 P.M., with an hour recess at noon for lunch. This stage of the decision-making process gives the justices an opportunity to ask questions to clear up uncertainties or other matters that they may have noticed in the briefs. For even seasoned attorneys, the experience can be like a grueling oral examination.

Oral arguments are open to the public, but most seating in the small courtroom is on a first-come, first-served basis. The Marshal makes an audio recording of arguments, but no cameras are permitted in the courtroom. As of late 2002, the Court abandoned its curious policy of prohibiting ordinary spectators from making written notes in the courtroom. (Attorneys and journalists had always been allowed to do so.) But the policy against slouching, placing one’s arm along the top of a bench, or nodding off—applied to all visitors—remains and is strictly enforced. Probably in no other place in official Washington is decorum so highly prized.

(4) Conference. Wednesday and Friday ordinarily are conference days—the time set apart primarily for confidential discussion and decision of cases argued during the week. “As soon as we come off the bench Wednesday afternoon . . . ,” Chief Justice Rehnquist once explained, we go into private “conference” in a room adjoining the chambers of the Chief Justice. At our Wednesday afternoon meeting we deliberate and vote on the . . . cases which we heard argued the preceding Monday. The Chief Justice begins the discussion of each case with a summary of the facts, his analysis of the law, and an announcement of his proposed vote (that is, whether to affirm, reverse, modify, etc.). The discussion then passes to the senior Associate Justice who does likewise. It then goes on down the line to the junior Associate Justice. When the discussion of one case is concluded, the discussion of the next one is immediately taken up, until all the argued cases on the agenda for that particular Conference have been disposed of.

In cases of greatest importance, discussion may take place at more than one conference before the justices are prepared to reach a decision. All cases are decided by majority vote, a fact that gives meaning to the question Justice Brennan routinely posed to his new clerks each year: “What is the most important rule around here?” he would ask. After they offered various incorrect responses, Brennan would say, “It’s the ‘rule of five.’ You need five votes to get anything done.”
Chapter One

(5) Opinions and Decisions. On Monday after a two-week argument session, the chief justice circulates an assignment list to the justices. If the chief justice is in the majority, he assigns the task of writing the opinion for the Court; if not, the senior associate justice in the majority makes the assignment. Preparation of the majority opinion requires much give and take, with an opinion going through as many as a dozen drafts. The goal is an opinion of the Court representing the consensus of the majority, not merely the views of the writer, that explains and applies the legal principles applicable to that case. In situations where a majority of the justices are unable to agree on a single opinion, a plurality opinion announces the “judgment of the Court” (the outcome of the case) and explains the views of the plurality. The justices’ positions are fluid. Up to the moment—weeks or months after the opinion writing began—that the decision is announced in open Court, the justices are free to change their votes.

In contrast to a norm of consensus in the nineteenth century and early twentieth century Supreme Court that discouraged published dissents (even when justices disagreed with a decision), in only about a quarter of the decisions each term today is the Court unanimous. In the rest dissenters file one or more opinions explaining their differences with the majority. According to Chief Justice Hughes, a dissent is “an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” Justices may also write a concurring opinion to indicate their acceptance of the majority decision but either an unwillingness to adopt all the reasoning contained in the opinion of the Court or a desire to say something additional.

Throughout this decision-making process, justices are assisted by their law clerks. Congress authorized the first clerk or “secretary” (as the position was first labeled) in 1886. Today, most justices annually employ four clerks, each a recent law school graduate usually with experience clerking on a lower federal court. In addition with one aide to chambers (formerly called a messenger) and two secretaries for each justice (the Chief enjoys a somewhat larger staff), the Court, as Justice Powell once remarked, resembles a collection of “nine small, independent law firms.” Increased reliance by most members of the Court on their clerks—the “junior Supreme Court” in Justice Douglas’s words—both in making recommendations on which cases to accept for review and in writing opinions calls into question the observation made long ago by Justice Brandeis that “the Justices...are almost the only people in Washington who do their own work.” Yet by congressional or White House standards, the Court’s support staff remains small. “[I]ndividual justices still continue to do a great deal more of their own work,” Chief Justice Rehnquist insisted, “than do their counterparts in the other branches of the federal government.”

SOURCE MATERIALS

Within barely more than a decade, the Internet has transformed study of the judiciary. Today, with a computer properly connected, even someone in a remote location has easy access to many resources previously available only at law or other research libraries. What follows is a listing and annotation of essential source materials in both print and electronic form.

M02_MASO9915_15_SE_C01.QXD  9/29/07  12:45 PM  Page 34
Supreme Court Decisions. The reported decisions and opinions of the Supreme Court form the basic material for the study of constitutional law. They appear in several printed editions and formats and are accessible on the Internet.

(1) United States Reports. This is the official edition published by the Government Printing Office. Until 1875, the reports were cited according to the name of the Reporter of Decisions, with the reporter's name usually abbreviated. Beginning with volume 91 in 1875, the reports have been cited only by volume and page number and the designation "U.S." For example, a case cited as 444 U.S. 130 is located in volume 444 of the U.S. Reports, beginning on page 130.


(3) Supreme Court Reporter (until 1996 published by West Publishing Company; now published by West Group). This is similar in concept to Lawyers' Edition but includes only decisions since 1882. Thus for cases in volumes 1–105 U.S., one must consult one of the other editions. It is cited as S.Ct. (58 S.Ct. 166).

(4) United States Law Week (published by the Bureau of National Affairs, another commercial publisher). This is a loose-leaf service, one advantage of which is that decisions are published within a day of their release at the Court. Thus, decisions appear in Law Week well before the advance issues distributed by the two other commercial publishers listed above. Law Week also keeps track of all cases on the Supreme Court's docket, whether ultimately accepted for decision or not, and publishes timely excerpts from oral arguments in selected cases throughout the Court's term. It is cited as U.S.L.W. (71 U.S.L.W. 4263).

(5) Electronic access. Supreme Court decisions are accessible through Westlaw and Lexis-Nexis (available through many college and university libraries or by subscription), on CD-ROM, and at various Internet sites. At present, the sites listed below are available at no charge. Be advised that any Internet address is subject to change.

(a) The LII and Hermes: The Legal Information Institute and Project Hermes provide decisions since May 1990 through Cornell University. Decisions are ordinarily accessible within hours of their announcement by the Supreme
Chapter One

Several hundred selected decisions prior to 1990 are available from LII at the second address.

http://www.law.cornell.edu/supct/index.html
http://supct.law.cornell.edu/supct/cases/name.htm

(b) FindLaw: FindLaw Internet Legal Resources includes decisions since 1791.

http://www.findlaw.com/casecode/supreme.html

(c) The U.S. Supreme Court: This official site contains the current docket, calendar, court rules, transcripts of oral arguments (posted within 15 days after the close of the particular argument session), decisions, orders, press releases, and some speeches by the justices.

http://www.supremecourtus.gov

(6) Case record. The record of each decided case includes briefs of counsel, oral argument, proceedings in lower courts, and exhibits. Unfortunately, these are not nearly so widely available as the Supreme Court decisions themselves. University Publications of America publishes Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. With new volumes added annually, this set contains the complete extant record of major constitutional decisions of the Supreme Court, beginning in 1793, including many of the cases selected for this book. Briefs in recent cases are available online through FindLaw: http://supreme.findlaw.com/supreme_court/resources.html. Briefs filed by the solicitor general may be accessed at http://www.usdoj.gov/osg.


State Court Decisions. The decisions of the highest state courts are published separately by either the state or a commercial publisher. A sectional reporter system, which combines selected decisions of the courts of several states in one publication, is also available in most law libraries. The National Center for State Courts maintains a directory of state court sites: http://www.ncsconline.org/. Information on the organization of state courts is available through the Justice Department’s Bureau of Justice Statistics: http://www.ojp.usdoj/bjs/courts.htm.

Miscellaneous Judicial Resources Online. In addition to sites that make judicial decisions available, other Internet locations contain a variety of materials related to the courts.

(1) Oyez: The Oyez Supreme Court Multimedia site at Northwestern University holds digital sound recordings of oral arguments at the Supreme Court in selected cases since 1956.

(2) The Federal Judicial Center: Of particular interest is the “History of the Federal Judiciary.” This online reference contains a biographical database of federal judges since 1789, histories of the federal courts, and historical documents related to the judicial branch of government.

http://www.fjc.gov

(3) The Federal Judiciary Home Page: Maintained by the Administrative Office of U.S. Courts, the site provides the text of both current and back issues of The Third Branch newsletter, various reports and other publications, and press releases.

http://www.uscourts.gov

(4) The Law and Politics Book Review: Produced by the Law and Courts Section of the American Political Science Association, this electronic journal is the best single source for timely reviews of recent books on constitutional law, the Supreme Court, and the judicial process generally.

http://www.bsos.umd.edu/gvpt/lpbr

(5) LAWlink: Maintained by the American Bar Association, this is a depository of links to dozens of law and law-related sites.

http://www.abanet.org/lawlink/

(6) Medill On The Docket: Maintained by Northwestern University’s Medill School of Journalism, the site provides a list of pending cases, dates of oral arguments and questions presented.

http://docket.medill.northwestern.edu/

(7) SCOTUS blog: Established by journalist Lyle Denniston, this blog features a variety of postings about developments at the Supreme Court

http://www.scotusblog.com/movabletype/

LEGISLATIVE AND ADMINISTRATIVE MATERIALS. Acts of Congress may be found chronologically arranged in United States Statutes at Large, of which a new volume appears annually, and, for statutes currently in effect, are available in an analytical form in the United States Code (Government Printing Office), United States Code Annotated (West Group), and United States Code Service (Lexis-Nexis). The U.S. Code is accessible online:

http://www.gpoaccess.gov/uscode/index.html

Debates in Congress are available under the following titles and have been officially published since 1873: Annals of Congress, 1789–1824; Register of Debates in Congress, 1824–1837; Congressional Globe, 1833–1873; Congressional Record, 1873–. Text of the Congressional Record (as well as bills), beginning with the 101st Congress in 1989, is available online at http://thomas.loc.gov. The Library of Congress is gradually placing earlier congressional materials online at http://www.loc.gov/index.html

Executive orders and proposed administrative rules and orders are published chronologically in the Federal Register; regulations in force are presented analytically in the Code of Federal Regulations. These publications are accessible online at
Chapter One


**READING A SUPREME COURT DECISION**

Every discipline has its own literature, and the literature of the study of the Constitution includes judicial opinions. It is essential, therefore, to acquire a talent for reading cases because they represent the medium through which a court speaks. Students of the Court will find it helpful to take careful notes in the form of an outline on the cases they read. Making the outline is called **briefing a case**. Thorough case briefing consists of a summary of at least four elements.

**LITIGANTS AND THE FACTS.** Always located at the beginning, the name or title identifies the parties to the case called the litigants. The name of the person or entity bringing the case to the Supreme Court appears first; the party being brought to the Court is listed second. The *v.* stands for “versus” or “against.” In cases that reach the Supreme Court on certiorari (as almost all now do) the **petitioner** brings the case against the **respondent**. In cases on appeal, the **appellant** brings the case against the **appellee**. Cases are real, not hypothetical, controversies between parties. The
issues of a case arise from circumstances or events that have prompted one or both parties to seek redress or in court. The facts of a case may or may not be in dispute, but they are always a factor in how cases are decided.

**Questions(s).** The facts of a case present one or more issues or questions for decision. Most of a judicial opinion is an effort to answer those questions. Although even a relatively simple case may generate many questions, counsel in the Supreme Court seek review only of those of the gravest importance—to the parties involved and to the nation. Ordinarily, the Supreme Court decides questions of law, not fact. In reviewing a criminal conviction, for instance, the Court is rarely concerned with a defendant’s actual guilt or innocence. Rather, the justices focus on procedural issues, such as the admissibility of evidence or the lawfulness of an arrest.

**Decision.** The answers to the questions that arise from the facts of a case lead to a decision. This is the result or outcome of a case. For example, a government agency has, or has not, exceeded its authority under the law or the Constitution. Typically in the Supreme Court, decisions take the form of **affirming** (accepting) or **reversing** (rejecting and setting aside) the judgment of the court below. When reversing, the justices will often **remand** (send back) a case to the lower court for action “consistent with” the Court’s decision.

**Reasoning of the Opinions.** As explained in a previous section, the goal of the Court’s decision-making process is a statement reflecting the consensus of a majority of the justices. This statement is the opinion of the Court—also called the majority opinion—that explains why a certain question requires a certain answer. An exercise in persuasion, the majority opinion attempts to justify the decision the Court has reached. Concurring and dissenting opinions should also be examined closely because they may shed light on what has been decided. Dissenting opinions attempt to highlight weaknesses in the majority’s reasoning. Concurring opinions may indicate the limits to a line of reasoning beyond which certain members of the majority are unwilling to go. Both may highlight legal trends. Moreover, awareness of the votes of individual justices can alert the reader to shifts in a justice’s position. Throughout this book, the headnote for each excerpted case displays the voting alignment.

**Key Terms**

- federal courts
- state courts
- jurisdiction
- Article III courts
- Article I courts
- original jurisdiction
- appellate jurisdiction
- federal question
- diversity jurisdiction
- magistrate judges
- certiorari
- appeal
- direct appeal
- Ashwander rules
- case or controversy
- ripeness
- advisory opinion
- standing
- nonjusticiable
- political question
- doctrine
- judicial activists
- judicial restraintists
- briefs
- rule of four
- solicitor general
- amicus curiae
- oral argument
- conference
- opinion of the Court
- plurality opinion
- dissent
- concurring opinion
- law clerks
- briefing a case
- petitioner
- respondent
- appellant
- appellee
- affirming
- reversing
- remand
1. Review Table 1.1 on page 00. What do the data suggest about the importance of state and lower federal courts in helping to shape American constitutional law?

2. How can “threshold questions” such as standing be crucial in the outcome of a constitutional case?

3. Between 1800 and the 1940s, nonunanimous Supreme Court decisions were the exception, not the rule. Rarely did a published dissent appear in as many as 25 percent of the cases, and the dissent rate usually hovered near 10 percent. The pattern in the past sixty years has been sharply different. Nonunanimous decisions are the rule, not the exception. Published dissents routinely appear in at least half the decisions. What factors might account for this change? Is the Court helped or hurt by dissenting opinions?

4. Fred Graham, former Supreme Court reporter for the New York Times and CBS News and a founder of Court TV, has said, “The only groups who don’t appear on television are the Supreme Court and the Mafia.” Although the Court’s argument sessions are open to the public, the justices resolutely refuse to allow oral arguments to be telecast at all and only rarely permit even a tape-delayed audio transmission of proceedings. Moreover, few justices grant interviews to journalists and, when they do, rarely speak about specific cases. Should oral arguments be telecast in the same way that the House and Senate allow televised coverage of their floor proceedings? Would the Court appear less mysterious to the public if the justices sought publicity like other officials in Washington? Would increased exposure negatively affect the Court?

SELECTED READINGS


