

# Introduction to Constitutional Litigation and Analysis

## A. Overview

In this chapter, we explain a number of substantive and procedural matters that will give context to the materials in this book — most of which consist of edited Supreme Court decisions. We'll start by setting out some very broad structures that shape how constitutional questions arise and how to begin going about resolving them. We'll then talk about constitutional actors and how “constitutional law” disputes arise. Then we will zero in on the process of constitutional litigation itself. Constitutional cases do not simply appear fully formed in the U.S. Supreme Court and end with the Supreme Court's decision. Rather, they arise out of real-world disputes that find their way into court because they have taken a form suitable for judicial resolution (or because the very question of that suitability for judicial resolution has been called into question — see “Justiciability,” explained in Chapter 6).

Opinions differ on when the material in this chapter will be the most helpful to you. Many law professors believe in providing a “big picture” or “road map” before zeroing in on specific points to enable you, the student, to understand where the specific point belongs and how it fits into the broader scheme of things. On the other hand, a road map is not necessarily helpful to someone who has never read a map before. If you were teaching someone to read a map, you might start with an example of a specific road trip. In other words, starting out with concrete examples or specific cases might provide a better basis on which to ground big picture principles.

There is probably some validity to both approaches. For that reason, we suggest that you at least skim this chapter early in the semester, but that you also return to the chapter later on, once you are well-immersed in your study of constitutional law. As questions arise in your later reading, you may find the explanations in this chapter particularly helpful.

The study of constitutional law necessarily compresses a broad range of doctrine, “black letter rules,” and complex concepts into one or two semester-long courses. This makes it necessary for casebook authors to take some short-cuts that, unfortunately, can hide some of the practical aspects of constitutional litigation that might help put the doctrines in context. Opinions that appear in Constitutional Law casebooks are edited down, often drastically, from their original length, and this book is no exception. What virtually all other constitutional law texts also do — and here, we do try to be an exception — is edit out the most or all of the facts and procedural history from the cases. There's little question that reading assignments for law students have to be kept within manageable limits, and that requires heavy editing. But what often gets lost in the shuffle are key facts telling us who the parties are, what happened in the world that brought the parties into conflict and eventually into court, what remedies they were seeking in court, what rulings were made in the lower courts, and what remedies the parties ended up with. That information is of great interest to the parties and the lawyers, of course, but it also provides insights and perspectives on the meaning of the Supreme Court's decision in the case. These insights and perspectives can also shed light on the practice of law, whether

constitutional law or other fields, by showing how practical concerns can shape judicial decisions and how certain kinds of arguments or procedures can be used to achieve one's clients' goals. In this book, we provide some of that background information. This chapter complements these efforts by explaining in general terms the kinds of case information that is out there if you take the time to look for it.

## **B. What Is Constitutional Law?**

The United States Constitution is fundamentally a set of arrangements, memorialized in a written document, defining the extent of governmental powers. These arrangements are set out expressly or impliedly in the written Constitution. The Constitution consists primarily of grants of power, limitations on power, or procedural rules for governmental institutions. For the most part, the Constitution does not create rights or duties between private parties, as you would find in tort, contract or property law, for example.<sup>1</sup>

In the subsections that follow, we introduce you to the Constitution itself, and then to five categories of what we call “constitutional actors.” Constitutional law can be understood as a series of rules and principles for allocating social and political decisionmaking power between and among those actors. Finally, we consider which of these constitutional actors have the power to interpret the Constitution.

### **1. The Constitution**

U.S. Supreme Court opinions take up the great bulk of the pages in this, or any, Constitutional Law casebook. That makes it all too easy to lose sight of a simple truth: it is *the Constitution* we are studying here.

With every constitutional issue you study, you should always begin with the text of the Constitution itself. You should read the Constitution early (at the very start of the course) and often (going back to the text and re-reading it throughout the course). All constitutional arguments start — or should start — with the text of the most pertinent constitutional provisions. To be sure, constitutional arguments rarely start *and end* with the Constitution's text: there are likely to be at least a few, and possibly dozens of Supreme Court precedents creating a doctrinal overlay interpreting the relevant provision. But, in our view, skipping over the applicable constitutional section or clause and going straight to the case law is a kind of malpractice. It is a neglect of the right and duty of each citizen to try to determine what the Constitution means and says. It may even be legal malpractice, if it were to cause you to miss viable constitutional arguments on behalf of your client. To promote our view, we quote the text of the relevant constitutional provision at the start of each section where that provision is introduced.

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<sup>1</sup>. There are arguable exceptions to this statement. The now-defunct “fugitive slave clause” (Art. IV, § 2, cl. 3), and the Thirteenth Amendment, which abolished slavery, govern what had been deemed a private property relationship. In addition, some disagreement exists as to whether the Fourteenth Amendment can be read to prohibit discrimination by private parties, an argument rejected by the Supreme Court. (See Chapters 1, 8.)

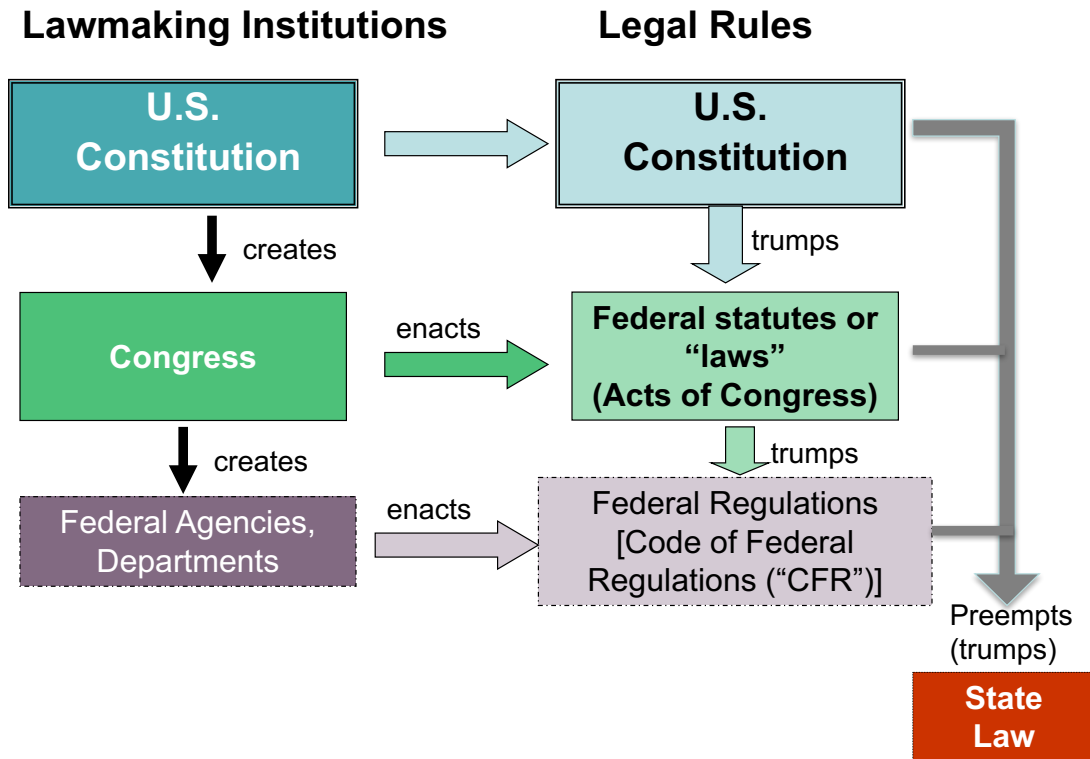
The Constitution was drafted by a national convention in Philadelphia in 1787. The constitutional convention was called for the express purpose of strengthening the union of states that had declared independence from Great Britain in 1776. The relatively loose “confederation” formed by the states and maintained during and after the Revolutionary War had proven unsatisfactory: the Convention was called “to form a more perfect Union,” in the words of the Constitution’s preamble. The Convention adopted the proposed Constitution on September 17, 1787 for submission to state ratifying conventions. Article VII of the Constitution provides: “The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.” New Hampshire became the ninth state to ratify, on June 21, 1788; resolutions of the existing Continental Congress called for elections for the new national Congress and President, and set March 4, 1789, as the date by which proceedings under the new Constitution would commence. Three more states ratified the Constitution in 1789, and Rhode Island became the last of the original 13 states to ratify, in May 1790.

On September 25, 1789, the new, first Congress of the United States adopted a proposed set of amendments, the “Bill of Rights,” and submitted those for ratification by at least three fourths of the state legislatures; this occurred effective December 15, 1791. The Bill of Rights thereby became the first ten amendments to the Constitution.

The Constitution’s first three articles establish, respectively, the Legislative, Executive and Judicial branches of the national government, and assign their functions. The continued existence of the states as sovereign entities that retained “powers not delegated to the United States by the Constitution, nor prohibited by it to the states” (U.S. Const., Tenth Amendment), was implicitly recognized in numerous provisions. Several additional provisions limit governmental power by recognizing rights of individuals — primarily, but not exclusively found in the Bill of Rights, the Thirteenth through Fifteenth Amendments, and a handful of other provisions.

As you will see, most (though not all) constitutional law cases involve judicial review of “laws.” Figure 1, which we call the “ladder of law,” shows the hierarchical relationship of lawmaking institutions and the laws they create under the constitutional scheme.

Figure 1. The Ladder of Law



In a nutshell: federal law trumps state law, federal statutes trump administrative agency “regulations,” and the U.S. Constitution trumps all.

## 2. Constitutional Actors

Constitutional law allocates social and political decisionmaking power among five categories of “constitutional actors.” These are people or institutions who have powers, duties, or rights under the Constitution and who may therefore be in a position to interpret the Constitution by basing their conduct (at least in part) on some constitutional provision. The five categories are: (1) legislative bodies; (2) executive officials and agencies; (3) courts; (4) individuals; and (5) non-governmental institutions.

*Legislative bodies* are those institutions, at all levels of government (federal, state, local), that consist of members elected to create laws. *Executive officials and agencies* consist of an elected “chief executive” of the political unit (the President, state governor, county executive, mayor, etc.) and the (frequently un-elected) officials working under the authority of that chief executive. These include cabinet secretaries, but also bureaucratic appointees and hirees, police officers, and others. *Courts* are the federal and state judicial branch tribunals and their judges (exclusive of administrative or executive branch tribunals). *Individuals* are people who are not acting in any official governmental capacity. *Non-governmental institutions* are business and non-profit corporations,

unincorporated private associations and, perhaps most significantly, the “free market” — that is, the system of private, consensual interactions among these non-governmental institutions and private individuals.

Different labels are used to describe these power allocations depending on which of the five above categories are involved, as shown in Figure 2.

**Figure 2. Constitutional Law Categories**

<b>Allocation of power between or among</b>			<b>Constitutional Label</b>
Legislative, executive or judicial branch	and	Legislative, executive or judicial branch	<i>Separation of powers</i>
Federal governmental branch	and	State governmental branch	<i>Federalism</i>
Federal or state government	and	Individual and/or non-governmental institution	<i>Individual rights</i> (e.g., due process, equal protection, First Amendment)

### **3. The Power to Interpret the Constitution**

It is a commonplace to assume that constitutional interpretation is the job of the courts, and the Supreme Court above all. The first year of law school tends to reinforce this idea by presenting “law” as a series of judicial rulings interpreting constitutional provisions or statutes, or creating rules from courts’ own prior decisions. A more sophisticated version of this idea, from an eminent commentator, suggests that “law” is a prediction of how judges will rule in the next case.<sup>2</sup> The Supreme Court has itself claimed to be the final arbiter of what the Constitution means.

There is much truth to this, in Constitutional Law and other subjects, given the courts’ role in interpreting and applying the law to specific cases. But the Constitution itself nowhere says that the Judicial Branch is superior to its co-equal branches when it comes to interpreting the Constitution. The Constitution creates the Congress and the President, as well as the Judicial Branch, and members of all three branches are sworn to uphold the Constitution. Assuming that these government officials act in good faith toward their constitutional obligations, it is fair to say that members of the legislative and

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<sup>2</sup>. “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

executive branches must, and do, interpret the Constitution in carrying out many of their functions. Unless it intentionally exceeds, or is heedless toward, the limits on its constitutional power in enacting legislation, Congress implicitly (and sometimes expressly) interprets the Constitution by passing bills. The President interprets the Constitution by signing a bill into law, or vetoing the bill on constitutional grounds. When acting in ways that push the limits of their power, members of the Executive branch may be basing their actions on constitutional interpretations and arguments. The extent to which each branch of government has the authority to interpret the Constitution independently when writing on a clean slate, and to follow its own constitutional views when the Supreme Court has ruled on a question, remains subject to debate.

It is, therefore, a mistake to confuse the opinions of the Supreme Court with the Constitution itself. Compared to the text of the Constitution, which remains relatively constant subject only to an arduous amendment process, the opinions of the Supreme Court on constitutional meaning change over time. Whether this is good or bad is a matter of much debate; the opaque nature of much of the Constitution's text, and the changing nature of the social, political, and legal ideas that underlie judicial decisions, probably make such change inevitable. Despite *stare decisis* (the principle of following its precedents), the Court has overruled itself on numerous doctrines in its two-and-a-quarter century history, sometimes in a span of just a decade. Far more often than formally overruling its precedents, the Court will distinguish earlier cases in ways that alter the direction of legal doctrine, sometimes subtly, sometimes dramatically. It is fair to say that some precedents and principles are more stable than others. Getting a feel for which is which is an art, not a science, and an art that we hope you will begin to master in your Constitutional Law course.

Of course, the bulk of what you will study in Constitutional Law consists of Supreme Court decisions. But you should always have two important facts in the back of your mind. The first is that many acts of constitutional interpretation — and even disputes over how the Constitution should be interpreted — never reach the courts. The second is that, even when constitutional disputes reach the courts in the form of cases, the Constitution will have already been interpreted in the events leading up to that dispute by some constitutional actor other than the reviewing court.

### **Exercise: Constitutional Law**

Try to create a list of five examples of constitutional actors — other than judges or litigators filing a case in court — taking some action based on their own constitutional interpretation. Example: a police officer making a judgment call about how much force can properly be used in arresting a suspect, pursuant to the Fourth Amendment's requirement that seizures be "reasonable."

## **C. Constitutional Cases**

### **1. The Requirement of Governmental Action**

As noted above, the Constitution is a set of arrangements granting, allocating and limiting governmental power. It follows that every constitutional law dispute necessarily

involves an underlying governmental action, and, in particular, a claim that some governmental actor or institution has exceeded or abused its power. No government action, no constitutional dispute.

Constitutional disputes that wind up in the courts necessarily involve a claim that one or more officials or institutions of government have caused an injury to the claimant by exceeding their constitutional powers. In most cases, the government action is not difficult to discern. Any legislative enactment, by Congress or a state or local legislative body, will suffice. Any regulation, decision or action by a federal, state or local administrative body will do, too, as will any enforcement action by any executive officer, from a local police officer all the way up to the President of the United States. Note here that we're not saying there will be a valid claim, or even a claim that the courts will agree to decide; we're simply saying that a key threshold requirement — government action — is met in these examples.

In the context of Fourteenth Amendment cases, which are primarily individual rights challenges to state and local governmental action, this concept goes under the heading of “state action.” (See Chapter 8.) But the “state action requirement” of Fourteenth Amendment claims is simply a subcategory of this broader requirement of government action in any constitutional claim.

“State” or “government” action may be less apparent in cases where the primary disputants seem to be private parties. But there may be government action lurking in the background that can suffice to meet the requirement. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court found “state action” for Fourteenth Amendment purposes in a case where the plaintiffs sought to enforce a “racially restrictive covenant” (a private agreement affecting real estate) against a black family that bought a home in their neighborhood. The actions of the state court to enforce these covenants, the Supreme Court held, qualified as state action.

### **Exercise: State Action**

Christy Brzonkala sued Antonio Morrison for money damages arising out of an alleged sexual assault, under a provision of the Violence Against Women Act that created a federal cause of action for a sexual assault victim against the person who assaulted her. This lawsuit resulted in a major constitutional ruling by the Supreme Court. (See *United States v. Morrison*, Chapter 1.) What do you think the government action was in that case? Which party do you think asserted the constitutional right?

## **2. Eight Patterns of Constitutional Cases**

It would be tidy if every constitutional claimant — the challenger to the alleged excess of government power — were the plaintiff and the challenged government actor or institution were the defendant in every case. But constitutional law is not so tidy, and that particular array of parties only occurs in some constitutional cases. The constitutional “challenger” may be the plaintiff or the defendant, the parties may be government officials or institutions or non-governmental institutions or individuals. The cases may be civil or criminal.

Most of the cases in this book are civil cases, for two reasons. First, as mentioned

above, constitutional cases all involve a challenge to some type of governmental act, and the majority of governmental acts do not directly involve the creation or enforcement of criminal laws. Second, the Constitutional Law courses to which this book is directed omit coverage of so-called “constitutional criminal law” — the interplay between criminal prosecution and the Fourth, Fifth, Sixth and Eight Amendments, which deal respectively with search and seizure, self-incrimination, right to counsel and confrontation, and cruel or unusual punishment. (The due process clause of the Fifth Amendment, as opposed to the self-incrimination clause, forms a significant part of this book, however.) Those issues are traditionally broken out and covered in a Criminal Procedure course.

But several cases in this book do arise out of criminal law. Enactment and enforcement of criminal statutes represent a significant assertion of governmental power. Although these activities represent a minority of governmental activities in general, they are a significant minority. Challenges to criminal legislation and enforcement can be based on constitutional principles that are central to this book, such as federalism, separation of powers, due process, or free speech. Some of the cases you study will therefore be criminal cases.

The following is a list of eight patterns of constitutional cases that you will find in this book. We think this list is both detailed and exhaustive, though some cases may be difficult to categorize (or may fall into more than one category); and it certainly is possible to categorize types of constitutional cases in a different way. To help organize the information presented, we’ve broken the eight patterns into two groups:

### **a. Patterns 1 through 4: Constitutional Right Asserted as Litigation Defense**

**Pattern 1: Private party defends against government civil enforcement action.** Numerous federal or state laws authorize the federal or state governments to take non-criminal enforcement measures against private parties. Under some statutes, the government is authorized to file suit; under other statutes, the government may act administratively, and the affected party will have the right to some sort of administrative hearing process and judicial review. In this pattern, the private party defendant asserts that the non-criminal law or regulation that the government is trying to enforce is unconstitutional.

Illustrative examples: *NLRB v. Jones & Laughlin Steel Corp.*; *United States v. Butler* (Chapter 1); *Immigration and Naturalization Service v. Chadha* (Chapter 4); *FCC v. Pacifica Foundation* (Chapter 9).

**Pattern 2: Private party defends against federal or state criminal prosecution.** The federal or state governments initiate a standard criminal prosecution. The defendant challenges the constitutionality of the particular criminal statute, typically, by making a motion to dismiss the indictment (or the charging document in state court); or by challenging the sentence.

Illustrative examples: *United States v. Darby*, *United States v. Lopez* (Chapter 1); *Mistretta v. United States* (Chapter 4); *Lochner v. New York*, *Roe v. Wade* (Chapter 7); *Brandenburg v. Ohio* (Chapter 9).



**Pattern 3: State or state official defends against private party suit.** This pattern of case involves a private party claim authorized by federal law against a state or state official. The claim is directly based on the statute, not the Constitution. The constitutional issue arises as a defense: the state defendant asserts that the federal statute is unconstitutional.

Illustrative examples: *Garcia v. SAMTA*, *Nevada Department of Human Resources v. Hibbs* (Chapter 1).

**Pattern 4: Private party sues private party.** Some constitutional challenges arise entirely between private litigants. Many federal and state laws — either legislative enactments or judicially created rights — structure relations among individuals and non-governmental institutions by recognizing rights that can be asserted as a claim or defense in private litigation. If such a right is challenged as violating the Constitution, then a constitutional issue arises in the private party lawsuit.

The party asserting the federal right is not necessarily relied on to defend its constitutionality; typically, the government will be allowed to intervene to do so. This procedure brought the federal government into the case to defend the Violence Against Women Act in *United States v. Morrison*.

Illustrative examples: *Gibbons v. Ogden*, *Carter v. Carter Coal Co.* (Chapter 1); *Geier v. American Honda Co.* (Chapter 2); *Stern v. Marshall* (Chapter 4); *Dred Scott v. Sanford* (Chapter 5); *New York Times v. Sullivan* (Chapter 9).

## **b. Patterns 5 through 8: Constitutional Right as Basis for Claim**

**Pattern 5: One federal branch, institution, or official sues another.** Federal government officials or institutions may sue one another to resolve difficult disputed issues regarding separation of powers or the structure of government. These cases are often civil in nature, but they may also arise as collateral (“side”) issues in criminal cases — for example, as a motion to quash a subpoena. As a percentage of cases on federal court dockets, these cases are probably overrepresented in our book, but they offer some of the courts’ prime opportunities to address these questions.

Illustrative examples: *United States v. Nixon*, *Campbell v. Clinton*, *Morrison v. Olson* (Chapter 3); *Powell v. McCormack*, *Raines v. Byrd*, *Nixon v. United States* (Chapter 6).

**Pattern 6: State sues federal government in opposition to non-judicial federal enforcement action.** The federal government directly asserts some regulatory authority over state or local governments or officials, and the states or officials challenge the action on constitutional grounds. If the federal government files suit, the state’s argument is an affirmative defense; if the federal government acts through executive enforcement, the state might file suit to challenge the action.

Illustrative examples: *South Dakota v. Dole*, *Katzenbach v. Morgan* (Chapter 1); *Clinton v. City of New York* (Chapter 4).

**Pattern 7: Private party or state proactively sues to block enforcement of federal or state law.** In this pattern of case, challengers who anticipate being harmed by

a federal or state law do not wait for the law to be enforced against them; instead, they get out in front of any potential enforcement action by seeking to block enforcement proactively. Challengers may be individuals, non-governmental organizations, even state governments or officials, or a combination of all of the above. Typically, such challenges are brought very soon after the law is enacted. Many “public interest law” constitutional suits are brought in this manner. Because such claims are brought prior to enforcement, they can raise justiciability problems such as “ripeness” or “standing.” (See Chapter 6.) Also, because the harm has not yet occurred, it is unusual for such cases to involve requests for monetary damages; instead, such suits typically seek injunctive or declaratory relief.

Illustrative examples: *New York v. United States*, *Printz v. United States* (Chapter 1); *Raines v. Byrd* (Chapter 6); *Romer v. Evans* (Chapter 8); *Reno v. ACLU* (Chapter 9).

**Pattern 8: Private party sues based on direct constitutional claim against federal or state agency or official.** Here, the constitutional challenger is a plaintiff who claims injury directly resulting from unconstitutional government action. The challenger sues for damages, or declaratory or injunctive relief.

Several habeas corpus cases are contained in this book. Habeas corpus is a challenge to allegedly illegal imprisonment (or other detention). It is structured, technically, as a civil suit against the executive officials in charge of the detention facility. (This is so despite the fact that many habeas cases are post-conviction challenges to procedures in an underlying criminal prosecution leading to a sentence of imprisonment.) While habeas cases could be a ninth category unto themselves, we think they also fall into this eighth pattern.

Illustrative examples: *Youngstown Sheet & Tube Co. v. Sawyer*, *Dames & Moore v. Regan*, *Nixon v. Fitzgerald*, *Myers v. United States*, *Humphreys’ Executor v. United States* (Chapter 3); *Marbury v. Madison* (Chapter 5); *Lujan v. Defenders of Wildlife* (Chapter 6); *Brown v. Board of Education* (Chapter 8); *Clark v. Community for Creative Nonviolence*, *Garcetti v. Ceballos* (Chapter 9).

In addition, any of the habeas corpus cases, such as: *Ex parte Milligan*, *Hamdi v. Rumsfeld* (Chapter 3); *Ex parte McCardle* (Chapter 5).

### **Exercises: Patterns of Constitutional Cases**

1. Based on what you know about *NFIB v. Sebelius* (the Affordable Care Act case) — either from having studied it in Chapter 1 or read about it in the news — see if you can categorize the case as fitting one of the eight patterns.
2. As you read the various cases in this book, try to place them in one of the eight patterns.

## **D. Litigation Procedure in Constitutional Cases**

### **1. In General**

Generally speaking, constitutional claims are handled procedurally in the same manner as any other claim of substantive or procedural rights. What makes a claim

“constitutional” is the source of the legal argument asserted: Constitutional claims are based on arguments from the Constitution. To be sure, constitutional cases can raise some issues that fall outside familiar patterns. For example, certain special rules arise when federal or state governmental actors are parties to litigation — such as rules relating to “sovereign immunity.” (See, e.g., Chapter 1 (Eleventh Amendment); Chapter 3 (Executive Privilege or Immunity).) In addition, some constitutional claims raise special problems of “justiciability.” (See Chapter 6.) But for the most part, the familiar rules of civil or criminal procedure that you study in those procedural courses also govern constitutional cases.

In many of the constitutional law cases that you read in this book, it is worth giving some thought to the underlying procedural steps that would have occurred before the case got to the Supreme Court. For example, if a case was dismissed on a Rule 12(b)(6) motion in the district court before working its way up to the Supreme Court, the facts of the case recited in the Supreme Court opinion should be derived from the allegations of the complaint — following basic civil procedure, at that stage of the litigation, the facts alleged in the complaint must be assumed true for purposes of making legal rulings on them. Similarly, where a case is dismissed at the summary judgment stage and reaches the Supreme Court on appeal, the source of facts for the Court’s opinion should be those presented at the summary judgment hearing: the affidavits of witnesses (not their live testimony), with any attached discovery materials, such as deposition transcripts and responses to discovery requests.

It is also useful to be aware of appellate procedure, since virtually all the cases in this book are appellate opinions. Certain appellate procedures are generic and may be familiar to you from Civil Procedure, while others are particular to the Supreme Court of the United States. Some of these are described in subsections 4 through 7, below.

## 2. The Court System

The federal court system, and most state court systems, consist of a three-level hierarchy with trial courts at the bottom, intermediate appellate courts in the middle, and a supreme court at the top.<sup>3</sup> The chart in Figure 3 shows this system.

The federal court system, as depicted in Figure 3, is established in part by the U.S. Constitution, and in part by federal statutes. (State courts are set up by state constitutions and statutes.) Five provisions of the Constitution speak to the structure of the courts. Here are the first two:

[The Congress shall have power . . . ] To constitute tribunals inferior to the Supreme Court [Art. I, § 8, cl. 9]

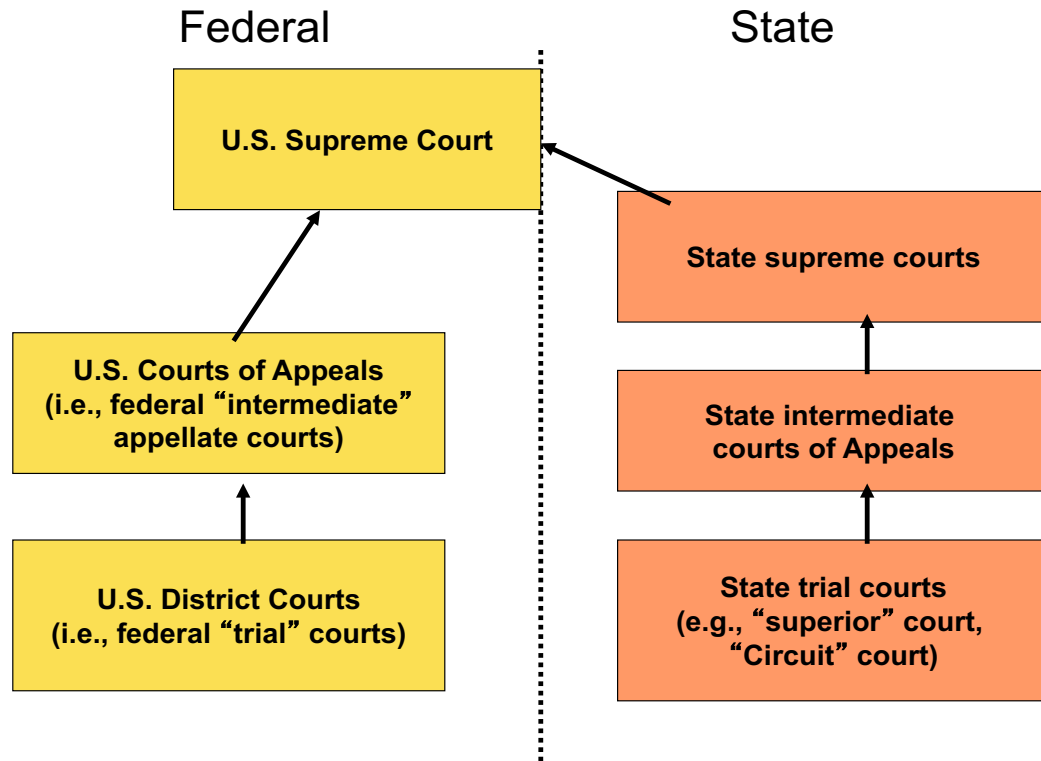
The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts,

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<sup>3</sup>. The court systems of several smaller states (as well as the District of Columbia, a federal enclave governed ultimately by Congress) have only trial courts and an ultimate appellate (i.e., supreme) court.

shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. [Art. III, § 1]

**Figure 3. Hierarchy of Court Systems of the United States**



These two provisions tell us, among other things, that the Constitution itself establishes only a (the) Supreme Court. Lower federal courts “may” be established by Congress. The third provision (Art. III, § 2, cl. 1) sets out the jurisdiction of the federal courts (i.e., their power to hear and decide cases):

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The fourth provision (Art. III, § 2, cl. 2) sets out the Supreme Court’s jurisdiction in

particular:

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Note that the Constitution gives Congress power over the jurisdiction of the lower courts (it can create them from scratch and so presumably can limit their jurisdiction), and over the Supreme Court's appellate jurisdiction (the "exceptions and regulations" clause, discussed in Chapter 5). The remaining provision relating at all to court structure is the "appointments clause," Art. II, which provides that federal judges and justices are to be appointed by the president "with the advice and consent of the Senate." The Constitution says nothing about the number of justices to be appointed to the Supreme Court, which by implication, and as confirmed by historical precedent, is left to the control of Congress. (The First Congress enacted the Judiciary Act of 1789, which established six seats on the Supreme Court.<sup>4</sup>)

Although there have always been lower federal courts,<sup>5</sup> it appears to have been the framers' assumption that state courts would handle a substantial amount of federal judicial business.<sup>6</sup> This assumption is implicit in the above-quoted constitutional provisions. The Supreme Court has very limited "original jurisdiction" — extending only to "cases affecting ambassadors and other public ministers and consuls" (i.e., emissaries of foreign governments), and cases "in which a state shall be a party." Original jurisdiction is the power of a court to act as the initial judicial forum, in which the case originates; this typically includes the basic fact-finding and trial-supervision functions that we associate with "trial courts." In contrast, "appellate" courts review cases initiated in lower courts of original jurisdiction, and essentially supervise their legal rulings. If the Supreme Court was and is to be primarily an "appellate" court, and if the Constitution

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<sup>4</sup>. Judiciary Act of 1789, § 1, 1 Stat. 73 (Sep. 24, 1789).

<sup>5</sup>. The Judiciary Act of 1789 created a system of lower federal courts. Each of the 11 states that had ratified the constitution as of September 1789 was formed into a federal district with one federal district judge (except for Virginia and Massachusetts, which had two districts each). The 13 districts were grouped into three circuits. The Circuit Courts were comprised of the district judge plus two Supreme Court justices riding circuit — traveling to the Circuit court locations to hear cases. Circuit court jurisdiction included both appeals from the district courts as well as original jurisdiction (i.e., trial) in major felony cases and civil cases involving larger dollar amounts. Judiciary Act of 1789, §§ 2-5, 1 Stat. 73 (Sep. 24, 1789).

<sup>6</sup>. See THE FEDERALIST, No. 82 (Hamilton) (Rossiter ed. 1961), at 493 ("[I]n every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the [cases] to which those acts gave birth."). The 1789 Judiciary Act gave federal courts exclusive jurisdiction only in admiralty and federal criminal cases, and implied that state courts would be deciding federal questions: hence, the need to establish U. S. Supreme Court review of such cases in section 25.

merely allows, but does not require, Congress to create lower federal courts, then by implication, state trial courts could be expected to act as courts of original jurisdiction for many federal cases. Indeed, even today, state courts have “concurrent jurisdiction” (concurrent with the federal courts) over many, perhaps most, federal law claims and defenses.

Congress expressly provided for the U.S. Supreme Court having ultimate appellate authority over all judicial decisions on questions of federal law. Under Section 25 of the 1789 Judiciary Act, the Supreme Court was empowered to review cases whose resolution required an interpretation of a federal statute or treaty, or of the U.S. Constitution. (The text of this provision, and the leading case interpreting it, *Martin v. Hunters’ Lessee*, are presented in Chapter 5.) A slightly revised version of this provision is now found at 28 U.S.C. § 1257.

### 3. Initiating the Constitutional Case

Constitutional law cases virtually always begin in a “trial court” of a state or the federal court system.<sup>7</sup> The function of trial courts is to make the first-line resolution of the case, while compiling whatever evidence the parties choose to present and resolving disputes in the evidence. Trial courts are usually presided over by a single trial judge — the federal district judge, in federal courts. On rare occasions, a few of which can be found in this book, the federal district court will sit as a “three judge court.”<sup>8</sup>

If the case is a criminal prosecution or a civil enforcement action by the government (patterns 1 and 2, above), the government initiates the case and the constitutional argument, if any, is raised as a defense. If the case is initiated by a private party, against another private party or a state or state official (patterns 3 and 4), the constitutional issue most likely arises as a defense: that the claim is based on an unconstitutional statute (or is preempted by federal law — see Chapter 2).

In all the other constitutional cases (patterns 5 through 8) the party making the constitutional claim initiates a civil suit as the plaintiff (or “petitioner,” in a habeas corpus case). The constitutional right becomes the basis, in essence, for a “cause of action” in the complaint.

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<sup>7</sup>. One noteworthy exception is *Marbury v. Madison*, in which Marbury, invoking the Supreme Court’s original jurisdiction, initiated his case in the Supreme Court. Less noteworthy, but more common, are categories of cases that are heard by administrative tribunals that can be appealed directly to intermediate appellate courts.

<sup>8</sup>. While three-judge district courts are unusual, they crop up a bit more frequently in constitutional cases. From 1948 to 1976, for example, a three-judge district court had to be convened whenever a party sought to enjoin a state statute on grounds of unconstitutionality. See 28 U.S.C. § 2281 (repealed). Under current law, a three-judge court is required to hear a constitutional challenge to a legislative reapportionment of congressional voting districts. See 28 U.S.C. § 2284. A handful of substantive federal laws include a provision that a constitutional challenge to the law must be heard by a three judge district court; such was the case, for example, in *Reno v. ACLU* (Chapter 9), a challenge to the Communications Decency Act of 1996. See 104-104, Title V, Subtitle C, § 561, 110 Stat. 142 (1996).

Who are the defendants in this latter group of constitutional cases (patterns 5 through 8)? That depends on a number of factors. The basic principle of any civil suit, which applies to constitutional cases as well, is that a plaintiff wants to sue defendants who (a) have at least some responsibility for causing the harm to the plaintiff, and (b) have the means to supply the remedy sought by the plaintiff. “Means” could be money if the desired remedy is monetary damages. But in many constitutional cases, the desired remedy is declaratory or injunctive relief: a declaration that a law is unconstitutional, or an order to an executive official to act or refrain from acting. A defendant with “means” to supply the latter remedies is an official or agency with legal authority to order the doing of (or refraining from) the act.<sup>9</sup>

The ins and outs of naming defendants in constitutional litigation can get complex, and take up a significant chunk of an advanced course that might be called “Constitutional [or Civil Rights] Litigation.” We will make just two points here.

First, to the extent that there is any “law” about who should be named as defendants in constitutional cases, it consists of a narrow set of rules about who *cannot* be sued — not necessarily who *should be* sued. These rules are called “immunity” rules, and include the doctrine of “sovereign immunity” as well as individual “official immunity.” Generally speaking, a sovereign government — federal or state — cannot be sued without its consent. This greatly limits the ability of a plaintiff in patterns 5 through 8 cases to name “the United States” or “the State of Alabama” as defendants. On the other hand, agencies of a government do not necessarily have this sovereign immunity, and many government officials can be sued for their official acts (though there are some exceptions). In sum, the rules of “appropriate defendants” in constitutional cases might be understood as “whoever is responsible and does not have immunity.”

Second, the choices by attorneys in naming one or more defendants from this category may be driven largely by intuition. Legal rules about what government officials to sue — who is responsible for an alleged constitutional violation — are frequently unclear. This tends to prompt lawyers who draft complaints in patterns 5 through 8 cases to “throw the names up against the wall and see who sticks.” Thus, it is common in patterns 5 through 8 litigation to see many officials and agencies named as defendants in a single case.

Constitutional cases are generally litigated in trial courts under the rules of procedure and evidence that govern ordinary litigation. Where the specific factual narrative of the parties’ dispute may bear heavily on the constitutional issues, a constitutional case will look the same as any other civil or criminal case. But many constitutional cases are focused far more on the legal issue than on the disputed narrative facts that might dominate in ordinary litigation. If the constitutional claim is that Congress lacks the authority to prohibit the possession of a gun in a school zone, the argument will revolve around the meaning of the commerce clause and perhaps on some questions of statutory interpretation or legislative history of the law; the story of Alfonso

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<sup>9</sup>. For reasons explained below, subsection D. 8 (“Remedies”), legislators are rarely if ever appropriate defendants in cases challenging the constitutionality of the laws they have enacted.

Lopez, and what he was doing with a gun near a school, becomes somewhat tangential background. (See *United States v. Lopez*, Chapter 1.) In a case dominated by the legal issues, the case facts will have, at most, a persuasive impact as an exemplar of what is at stake in a particular constitutional controversy.

When the facts underlying a constitutional case are sociological in nature, how are those facts introduced into the case? For example, in the Affordable Care Act litigation (*NFIB v. Sebelius*), the court recited extensive background facts about the health care system; in *United States v. Morrison*, there were extensive background facts about violence against women; and in *ACLU v. Reno*, there was an extensive factual record about internet use and what sort of parental controls on web browsing was technologically feasible. Ambiguities in the rules of procedure and evidence lead to an ambiguous answer to the question of how these facts enter the lawsuit. In some cases, the parties present them as evidence to the trial court, through documents and “expert witness” testimony. In other cases, the courts seem willing to consider background information supplied in the legislative findings that led up to enactment of a law, or even in briefs submitted by parties to the appellate courts.

#### 4. Appeals

A “final judgment” by a federal district court — a ruling that disposes of all of the issues in the case such that there is nothing left to decide on the “merits”(the core substantive claims of the case) — is appealable to the United States Court of Appeals. See 28 U.S.C. § 1291.<sup>10</sup>

The federal system has one level of “intermediate” appellate court, known as the United States Court of Appeals and divided into thirteen Circuits: the First through Eleventh and District of Columbia Circuits have geographically defined authority over the District Courts in their respective circuits; the Federal Circuit has authority over appeals from the U.S. Court of Claims and other specialized federal courts. An appeal from a U.S. district court to one of these Circuit Courts of Appeals is “an appeal as of right” — that is to say, the losing litigant has a right to take this appeal, and the Court of Appeals must hear it (assuming it has jurisdiction). In contrast, as will be seen, there is generally no right to have one’s appeal heard by the U.S. Supreme Court. Most state court systems have an analogous court structure.<sup>11</sup>

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<sup>10</sup>. In very limited circumstances, an appeal can be taken from something other than a final judgment — called an “interlocutory” decision. See 28 U.S.C. § 1292.

<sup>11</sup>. In the modern “administrative state” (our present governmental structure which comprises numerous administrative agencies at both the federal and state levels), many adjudications begin in administrative agency hearings rather than in a trial court. The administrative hearing may function in many ways like a court — with a neutral hearing officer or “administrative law judge” taking evidence and resolving factual disputes. Such administrative hearings are created by statutes. While there is probably a constitutional right to have many of these kinds of cases heard by a court, judicial review of an agency hearing decision might go first to a district court or directly to an appellate court — depending on the procedure specified in the applicable statute.



Appellate courts typically do not consider new evidence, but instead confine their consideration of case facts to those developed by the trial court — they consider only evidence that is “in the record” created by the trial court. If for some reason there are grounds to allow the introduction of new evidence, the case must be sent back (“remanded”) to the trial court to hear the new evidence. In short, trial courts are evidence-taking courts, appellate courts are not.

Appellate courts follow a few broad principles to determine whether or not to give deference to the decisions of lower courts. Deferential review means that the trial court’s decision will be upheld if it is debatably correct, meaning that if the decision is reasonable it will be upheld, even if the appellate judges would have decided differently had they sat as the trial judge. Findings of fact are reviewed deferentially: a trial court’s determination of a disputed factual issue will be reversed on appeal only if it is “clearly erroneous.” Discretionary rulings by trial courts (these include decisions about whether to admit or exclude evidence and decisions about case management) are also reviewed deferentially and will be reversed on appeal only if they constitute an “abuse of discretion” — a standard that means something like an “unreasonable” decision.

Non-deferential review means that there is no presumption of correctness afforded to the lower court decision, and no need to give any particular weight to the lower court ruling. The reviewing court in such situations allows itself free rein to substitute its judgment for that of the lower court. Rulings on legal principles are reviewed non-deferentially. This standard is typically called “de novo” review, meaning “from the start.” Appellate courts, thus, take a fresh look at a question of law on appeal. Most constitutional issues decided by the Supreme Court are questions of law, on which the Court gives non-deferential review to the lower court decisions, though there may be certain underlying factual issues that the Supreme Court supposedly reviews deferentially.

## **5. Reaching the Supreme Court**

When it comes to getting one’s case reviewed by the Supreme Court, the plain fact is that “many have tried, but few are chosen.” The Supreme Court has discretionary review authority — it can pick and choose cases from among those in which litigants seek Supreme Court review. The Supreme Court exercises its discretion to grant review very sparingly. Each year, the Court grants review in 90 or so cases out of several thousand appeals and petitions.<sup>12</sup> It hears around 75 to 80 oral arguments, and issues a

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<sup>12</sup>. About 9,000 cases are filed seeking review in the Supreme Court annually. About 7,000 of these are “in forma pauperis,” that is, by parties whose lack of financial means meets the requirement for a waiver of the filing fee. Although the Court does not break down the data in this way, it is probably the case that most of these 7,000 cases consist of routine federal criminal appeals and perhaps some “pro se” cases (parties unrepresented by lawyers). The Court grants review in only about 10 to 15, or about 0.18%, of these 7,000 in forma pauperis cases.

An additional 2000 or so cases are filed by parties who pay filing fees. These “fee paying” cases are more likely than the in forma pauperis group to be winnowed down by lawyers advising their clients about the unlikelihood of a grant of review. A lawyer who would charge a fee to prepare a cert petition should advise his client if, in her opinion, the case is not “cert worthy” and highly likely to result in a denial of review. As a result, a higher proportion of these fees-paid cases are likely to

slightly lesser number of decisions based on full opinions.

Under current procedures, cases most commonly reach the Supreme Court on a “writ of certiorari,” after they have been decided by one of the federal courts of appeals, 28 U.S.C. § 1254(1), or a state appellate court. 28 U.S.C. § 1257(a). Certiorari (known as “cert” to its friends) is a process historically derived from the common law for *discretionary* appellate review of a case. As Supreme Court Rule 10 states, “Review on a writ of certiorari is not a matter of right, but of judicial discretion.” Writs of certiorari are technically issued by the Supreme Court to the court that issued the most recent judgment in the case. Hence, in a full opinion (not, typically, an edited casebook version), you will see a sentence like this, following the case caption:

*On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

This means that the Supreme Court has ordered the Fourth Circuit to transfer the authority to issue judgments in the case, together with the physical court records, to the Supreme Court. Where the case has worked its way up through the state system, the Supreme Court issues the writ of certiorari to the “the highest court of a state in which a decision could be had.” 28 U.S.C. § 1257(a). Typically, this means the Supreme Court reviews a decision of the state supreme court. But states with three-tiered court systems typically afford their state supreme courts discretionary review power much like the U.S. Supreme Court, so there may be cases in which the U.S. Supreme Court grants certiorari in a case where a decision was rendered by the state’s intermediate appellate court, but the state’s supreme court denied review. The above-quoted language from § 1257(a) has been construed to cover this situation.

In unusual circumstances, a “direct appeal” may be taken to the Supreme Court (skipping the intermediate appellate courts) from the judgment of a district court. Direct appeals to the Supreme Court are provided in cases where a three-judge district court has been convened, 28 U.S.C. § 1253, and, until 1988, in cases where the district court had struck down an Act of Congress as unconstitutional. 28 U.S.C. § 1252 (repealed 1988).<sup>13</sup> (“Direct appeals” from certain state court decisions also used to be allowed.) Cases also can reach the Supreme Court via the Court’s original jurisdiction, in which the Court acts as a factfinding or trial court rather than an appellate court, but these are quite rare.<sup>14</sup>

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meet the Court’s criteria for granting review. The Court grants review in around 70 to 80, or about 3%, of the 2,000 “fee paying” cases filed. *See* [www.uscourts.gov/Statistics/JudicialBusiness.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness.aspx).

<sup>13</sup>. Technically speaking, a direct appeal (in contrast to a writ of certiorari) is not a discretionary procedure; by traditional understanding, appeals are mandatory on the reviewing court — provided they have jurisdiction. Under long-standing practice, the Supreme Court has finessed the mandatory nature of appeals by making them depend on a finding of “probable jurisdiction” (a decision that is discretionary in practice). For this reason, in the handful of direct appeal cases where the Court decides to grant review (some of which are found in this book), it does so by “noting” that it has “probable jurisdiction.”

<sup>14</sup>. Article III, § 2, cl. 2, quoted above, provides that the Supreme Court has original jurisdiction only in cases involving foreign emissaries or in which a state is a party. Congress has further specified that the Court must take original jurisdiction only where the suit is “between two or

The key points to remember about the Supreme Court’s docket, then, are that: (1) review of a case in the Supreme Court is fundamentally a matter of the Court’s discretion; (2) most requests for Supreme Court review are sought by filing a petition for writ of certiorari; and (3) most requests for Supreme Court review are turned down. A litigant must, therefore, take on quite a challenge to persuade the Supreme Court to grant review. Supreme Court Rule 10 lays out the criteria for the persuasive case a litigant must make if review is to be granted:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

A petition for a writ of certiorari does not focus on why the petitioner should win the case, but rather why the case is important enough — and meets the criteria for — discretionary Supreme Court review. The same criteria apply when the review mechanism is direct appeal, rather than certiorari.<sup>15</sup> The affirmative vote of four justices is required to grant review.

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more states.” 28 U.S.C. § 1251(a). Otherwise, the Court has “original but not exclusive jurisdiction” of cases by or against (but not between) one or more states and cases involving foreign emissaries. 28 U.S.C. § 1251(b). This means that the Court may decline original jurisdiction in § 1251(b) cases. See Supreme Court Rule 17(3) (requiring motion for leave to file original case in Supreme Court).

A fourth route to the Supreme Court, exceedingly unusual, occurs when the Court grants a Court of Appeals’ request to decide a case or issue by “certification” — which essentially means that the appellate court passes the case along to the Supreme Court without deciding it. 28 U.S.C. § 1254(2).

<sup>15</sup>. On direct appeal, the appellant files a “jurisdictional statement” that must “follow, insofar as practicable, the form for a petition for writ of certiorari[.]” Supreme Court Rule 18(3).

If certiorari (or appellate jurisdiction) is denied, the judgment or order of the lower court stands. If certiorari is granted, the fun begins. The Court sets a briefing schedule. Lawyers and groups from around the country with an interest in the case and the issues it raises are likely to join the act by filing *amicus curiae* (“friend of the court”) briefs, arguing aspects of the case on behalf of one side or the other, or perhaps advocating some neutral or middle ground. Often, the litigants themselves will recruit *amicus* support by soliciting helpful *amicus* briefs from allied organizations, or experts on one or more issues raised in the case. The Court tends to be fairly liberal about granting permission to “*amici*” to file briefs. In particularly momentous cases, dozens of *amicus* briefs may be filed. (In the recent health care litigation, there were over 100 *amicus* briefs.)

One extremely important document in addition to the briefs is the “joint appendix,” a summary of key documents from the lower court record, compiled specially for the Supreme Court by the litigants. The Court receives the “full record” on appeal. In a conceptual sense, “the record” comprises the universe of facts and procedural history that the Supreme Court (like the intermediate appellate courts before it) will consider: as we have said, appellate courts do not conduct independent fact-finding. In a physical sense, “the record” includes all of the written and recorded matter that comprises the case file, from its very beginning in the trial court, including all pleadings, motions and briefs filed with the lower courts; all evidence submitted; and all transcripts of hearings and proceedings in the lower courts. The full (physical) record is typically so voluminous that important items can be easy to overlook. The Court thus requires the “joint appendix” to include certain “relevant” matter, such as the lower court docket and the decision under review, plus “any other parts of the record that the parties particularly wish to bring to the court’s attention.” Supreme Court Rule 26(1). As the name implies, this is supposed to be a “joint” document. (“The parties are encouraged to agree on the contents of the joint appendix.” *Id.*, Rule 26(2).) When Supreme Court opinions recite case facts and procedural history, they will often cite to the “JA” or “joint appendix.”

The Court hears oral arguments over the course of a nine-month term beginning in October and ending in June the following year. At the end of each week of oral argument, the justices meet in conference to decide the cases argued that week. A preliminary vote is taken to determine whether there is a majority judgment and which justices are in the majority. The senior justice voting in the majority — the Chief Justice or, if the Chief is in the dissent, the longest-serving associate justice — will assign the writing of the majority opinion to one of the majority justices (including herself). Over the next several weeks or months, the justices draft opinions in the case and circulate them internally. Because the initial vote is not binding, justices can (and not infrequently, do) change their minds during this time. The justices’ deliberative process continues via informal conversations between justices and discussions about draft opinions circulated before the final decision is solidified.

A judgment of the Supreme Court requires an agreement of five justices. The “judgment” is the outcome with respect to the decision below, but is not in itself a statement of legal principles or reasons for the judgment. The different types of appellate court judgment indicators (affirmed, reversed, vacated) are described below, in section

## D.7.

An “opinion” is a statement of legal principles and reasons in support of a judgment (or would-be judgment, in the case of dissenting opinions). An opinion becomes the “opinion of the court” or “majority opinion” only if it gains the assent of a majority of justices (five, assuming the Court’s current nine positions are all occupied).<sup>16</sup> In some instances, five or more justices agree on a judgment without any five agreeing on the supporting legal principles and reasoning; the judgment will issue, but the lead opinion — the one with the largest number of votes among those in voting for the majority judgment (four or perhaps three) — is in this situation called a “plurality” opinion and not deemed a precedent accorded full precedential effect.

Even in the usual case, where five or more justices agree to a single majority opinion, additional opinions may be issued by individual or groups of justices:

- A “**concurring opinion**” or “**concurrence**” is a separate opinion issued by a justice who signs onto the reasoning of the majority opinion but feels the need to add some further explanation or qualification.
- An opinion “**concurring in the judgment**” is the opinion of a justice who agrees with the majority (or plurality) result only — i.e., the judgment — but not the key legal principles and reasons. A justice “concurring in the judgment” does *not* sign onto the majority (or plurality) opinion.
- A “**dissenting opinion**” or “**dissent**” is one that disagrees with *both* the *opinion* of the majority (or plurality) *and* the *judgment* of the court.
- Where a decision has multiple aspects, individual judges might mix and match these possibilities: e.g., “**concurring in part, dissenting in part,**” or “**concurring in the judgment in part, dissenting in part.**”

Frequently, one or more justices will join the separate opinions (concurrence, concurrence in the judgment, or dissent) written by other justices. All this information is conveyed in summary form in tag lines at the outset of the opinions; but in order to find the detailed bases for agreements and disagreements among the justices, some of which can be quite subtle, you have to read the opinions.

Majority opinions sometimes suffer from their need to attract support from multiple justices. Since they must bring together the views of at least five typically strong-minded and independent individuals, majority opinions must at times reflect compromises that affect writing style and even clarity. Separate opinions sometimes come across as clearer and stronger, given that the author is freed from the constraints of coalition-building and editing-by-committee.

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<sup>16</sup>. The Constitution says nothing about the number of justices to constitute the Supreme Court. That number has been set by Congress, at various points through U.S. history, at 5, 6, 9 and 10. It has stood at nine for well over a century. In theory, if there were two unfilled vacancies, the Court could decide a case with a majority of four.

## 6. A Note on Party Designations and Case Captions

Party designations vary from court to court. In civil cases, as you know, the party initiating the suit is the plaintiff, and the party being sued is the defendant.<sup>17</sup> Case captions often use the same terms in criminal cases — with the prosecution being referred to formally as the “plaintiff.”

Habeas corpus cases are different. Habeas is a “petition,” for a “writ.” The complaining party, the one who initiates the habeas case, is thus the “petitioner,” and the opposing party is the “respondent.”

Appellate courts also use different terminology, reflecting the parties’ roles with respect to the appellate procedures. In the federal system, the party who loses in the district court and takes the appeal to the intermediate court of appeals is the “appellant,” and the party opposing the appeal (the winner below) is the “appellee” (or, in some state court systems, the “respondent”).

In the U.S. Supreme Court, party designations depend on the procedure used. In the minority of cases that reach the Supreme Court on direct appeal, the party initiating the appeal is, again, the “appellant” and the opposing party the “respondent.” But in the more frequently employed certiorari procedure, the party seeking review of the lower court decision is the “petitioner,” and the opposing party the “respondent.” It is customary for the Court to refer to the parties with those labels in its opinions.<sup>18</sup>

Case captions also follow a set pattern. In the district court, captions are structured as Plaintiff v. Defendant. Where there are multiple parties, it is typical for most purposes to shorten case names to include only the first named plaintiff and the first named defendant. (Electronic case databases are inconsistent in their practice on this; and brief-writers in the Supreme Court are given the option whether or not to list the names of all parties.)

In the U.S. Court of Appeals, the case caption from the district court is retained, with the addition of the appeal designations. In other words, the plaintiff is named first, whether he is the appellant or the appellee. The caption will look something like this:

(1) *Ann Smith, Plaintiff-Appellant v. John Jones, Defendant-Appellee*

(2) *Jane Doe, Plaintiff-Appellee v. Richard Roe, Defendant-Appellant*

In the first example, the plaintiff lost in the trial court; in the second example, the plaintiff won.

Captioning practice changes in the U.S. Supreme Court. There, the petitioner is

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<sup>17</sup>. Specialty courts may use different terminology, like “libellant” in admiralty court.

<sup>18</sup>. In sections 22 and 29 of the 1789 Judiciary Act, a “writ of error” was expressly identified as the mechanism for seeking Supreme Court review of lower federal and state court decisions. The writ of error was displaced by the writ of certiorari in 1891. The party seeking the writ of error was referred to as “the plaintiff in error” in many older cases. That phrase is meant to convey not that the plaintiff was mistaken, but that he was bringing an action for a writ of error.

always named first, even if he was the defendant in the trial court. If Ann Smith wins in the Court of Appeals, in example (1) above, and Jones petitions for cert, the caption will be:

*John Jones, Petitioner v. Ann Smith, Respondent*

In this way, *Smith v. Jones* in the lower courts becomes *Jones v. Smith* in the Supreme Court — but it's the same case.

### **Exercise: Party Designations and Case Captions**

*United States v. Lopez*, 514 U.S. 549 (1995), was a federal criminal prosecution in which the defendant challenged the constitutionality of the criminal statute in question, the Gun Free School Zones Act. Can you make an educated guess, based on the case caption, what the ruling was in the Court of Appeals?

## **7. Proceedings on Remand**

Cases don't end in the Supreme Court.<sup>19</sup> Technically speaking, authority to issue final binding judgments over litigants lies with the trial court — the court exercising “original” jurisdiction. Appellate courts therefore act on the parties only indirectly, by issuing instructions to trial courts. Appellate opinions, therefore, typically conclude with some sort of instructional phrase or sentence directed to a lower court. There are three basic forms of judgment issued by appellate courts, including the U.S. Supreme Court:

- **“Affirmed”**: the judgment of the lower court is approved and adopted (again, its judgment only, and not its principles or reasoning).
- **“Reversed”**: the judgment of the lower court is rejected and the opposite judgment adopted.
- **“Vacated”**: the judgment of the lower court is erased, and the lower court is directed to re-decide the case with the guidance of the new Supreme Court decision.

Usually, one of these three judgment indicators will come at the end of the majority opinion. Where a judgment has multiple aspects to it, the Supreme Court judgment might be different for the different parts: e.g., “Reversed in part, affirmed in part.” Where the instructions to the lower court are particularly complex, the wrap-up might be phrased as an instruction to undertake “further proceedings consistent with this opinion” or similar language.

Sometimes the judgment tag will be “reversed and remanded” or “vacated and remanded” (though never, apparently, “affirmed and remanded”). The word “remanded” probably goes without saying, but it does have a technical meaning that is worth understanding. The power to issue a judgment in a case, called the “mandate,” is passed up the appellate ladder as the parties appeal the case to successively higher levels of court. An appellate court's judgment power is limited to issuing orders to the immediately lower court. If a case reaches the Supreme Court, it will, in issuing its judgment, pass the mandate back down one level to the Court of Appeals or state

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<sup>19</sup>. The only exception to this is when the Supreme Court exercises original jurisdiction.

appellate court from whence it came, with instructions as to what that lower court is to do. Ultimately, the mandate returns to the court of original jurisdiction — the trial court — which alone has the power to issue a judgment that acts directly on the parties. The word used to describe an appellate court passing the mandate back down the appellate ladder is “remand.”

Because the final judgment in any case is always issued by the court in which the case was originally filed, that means a Supreme Court decision is not technically the very end of the case. That is so even where the Supreme Court decision resolves all merits issues: the case will still be returned back through the intermediate appellate court to the original trial court for final disposition, even if no substantive rulings remain to be made. Where the Supreme Court decides all the merits issues in a way that leaves no further substantive rulings, the proceedings on remand will be terse and purely formal.

But in many cases, the Supreme Court’s decision does *not* resolve all merits issues. In some cases, the Court will expressly decide that one or more claims should go forward. In other cases, the Court will have granted review on only of some substantive issues but not others; even a ruling resulting in the claims being dismissed by the Supreme Court might not, in such a case, end all of the claims on the merits. Thus a party who loses in the Supreme Court might still go on and win her case on the merits in the lower courts. Or, the parties might settle the remaining claims following a Supreme Court decision. From the parties’ vantage point, then, a Supreme Court decision may not be the final act of the drama.

## **8. Remedies and the Impact of Unconstitutionality Rulings**

Many Supreme Court decisions conclude with a decision that a government action or statute is “unconstitutional.” But few, if any, say exactly what that means in practice. What happens to the government officials who have acted unconstitutionally? What happens to a law that is “declared” unconstitutional? The phrase “strike down” is used in the popular press, in academic commentary, and even in some judicial opinions to describe a ruling that a law is unconstitutional, but what exactly does that mean?

Somewhat surprisingly, the answers to these questions are not as clear as you might think they should be. A critical starting point is to consider the pattern of the constitutional case. Let’s first consider patterns 1 through 4 (listed above). In these patterns, the constitutional right is asserted as a defense to legal action (a civil suit or criminal prosecution). The defendant’s argument is that the law under which the plaintiff or prosecutor has initiated the suit (or criminal prosecution) is unconstitutional. A favorable ruling requires that the court dismiss the case, or at least the unconstitutional part of it.

In patterns 5 through 8, where the constitutional right is the basis for the plaintiff’s claim, the result of an “unconstitutionality” ruling depends on the remedy sought by the constitutional claimant. While the specific details can be more complicated in particular cases, as a general matter the parties in pattern 5 through 8 cases will be seeking one or more of three types of “relief” or remedy: money damages, injunction (or “coercive” court order), or declaratory judgment.



In a money damages case (pattern 8), the plaintiff has suffered physical or pecuniary losses due to conduct allegedly violating the Constitution. The constitutional issue is whether the Constitution in fact recognizes the right in question. “Constitutional tort” claims — the most common form of this case — are typically covered in an upper level Constitutional or Civil Rights Litigation course.<sup>20</sup> This casebook contains only a handful of money damages cases, all of them involving allegedly wrongful employment discharges.<sup>21</sup> The key point is that the recognition of the constitutional right allows the damage claim to go forward.

Most pattern 5 through 8 cases seek injunction-type remedies or declaratory relief. An injunction is a court order requiring the defendant to do something or refrain from doing something. Given that these cases challenge unconstitutional acts or the enforcement of unconstitutional laws, an injunction is an apt remedy. The Court might order an executive official to cease and desist from its unconstitutional seizure of private steel mills, for example; or to refrain from investigating or prosecuting violators of a law found to be unconstitutional.<sup>22</sup>

The problem with injunctions is that they are strong medicine — arguably, they are the most aggressive and far-reaching judicial remedy. In the constitutional setting, an injunction represents a direct judicial command to an official of a state or of a coordinate branch of the federal government. Aside from the appearance of disrespect to other governmental units or agents that such orders entail, injunctions can be problematic to enforce. Violation of an injunction is typically treated as a contempt of court, and is punishable by fines or imprisonment. Think about the potential embarrassment of a district judge ordering the arrest of a cabinet official for contempt. The potential for government officials to disregard injunctions and face judicial enforcement efforts is the stuff of constitutional crises. At a minimum, it is fair to say that injunctive relief directed at a state government raises federalism concerns, and when issued to a co-equal branch of the federal government raises separation of powers concerns.

One response to the above concerns might be to say that government officials can be counted on to respect the judgments of the courts and comply with them voluntarily. But if that’s true, then perhaps the strong medicine of injunctive relief isn’t needed to begin with. Hence the declaratory judgment. Declaratory relief is “non-coercive” — it declares the rights of the parties without ordering anyone to do (or not do) anything. The hope is that the losing parties will comply voluntarily. If a law is declared unconstitutional by means of a declaratory judgment, the assumption is that the relevant

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<sup>20</sup>. See, e.g., SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION (Carolina Academic Press, 2011).

<sup>21</sup>. See *Nixon v. Fitzgerald*, *Myers v. United States*, *Humphreys’ Executor v. United States* (Chapter 3); *Garcetti v. Ceballos* (Chapter 11).

<sup>22</sup>. In a habeas corpus case, the traditional remedy is a court order directed to the executive official to release the prisoner from custody (or transfer him from one custodial authority to another, or to order a new trial).

state or federal officials will not thereafter attempt to enforce that law. If they do, the case will wind up back in court, and the party who won the declaratory judgment will be able to assert that declaratory judgment as a defense to the government enforcement action. Declaratory judgments thus put off the potential constitutional showdown between the court and the possibly recalcitrant official to some later day.

Finally, it's important to consider just whose rights are affected by a decision, and how. Clearly, a constitutional remedy decides the rights of the parties to the specific case — that, after all, is the fundamental nature and purpose of adjudication. In some cases, the parties can represent a broad swathe of society, at least in theory. If the defendant is a cabinet secretary in charge of nationwide enforcement of a statute, and the plaintiffs represent a nationwide class in a pattern 7 case, the judgment would be nationwide in its impact. But relatively few constitutional cases are class actions, and many involve only a small number of named parties. In the more typical case, an unconstitutionality ruling will affect the rights of parties not before the court indirectly, through the mechanism of precedent. If it is unconstitutional to prosecute Alfonso Lopez for possession of a gun in a school zone on the ground that the Gun Free School Zones Act exceeds Congress's power under the commerce clause (*United States v. Lopez*, Chapter 1), then it is likewise unconstitutional to prosecute Jane Smith, John Jones, etc., under that statute. If such a subsequent prosecution were brought, the trial court would be obligated to dismiss the case on the ground that the Supreme Court's *Lopez* decision is a binding precedent. One would hope, therefore, that the prosecutor would not file such a case, but would instead respect the Supreme Court's decision.

But what if the unconstitutionality ruling was made by a lower court in a case that never reached the Supreme Court — perhaps because it was settled by the parties before the Supreme Court could decide, or because the Supreme Court denied review? The situation arises less frequently than you might suppose, because the Supreme Court is likely to grant review of cases where a federal law has been struck down on federal constitutional grounds by a lower court.<sup>23</sup> Still, there will be windows of time before the Supreme Court decides to hear such a case. What are the government's obligations to treat a lower court's unconstitutionality ruling as a binding precedent?<sup>24</sup> One would think that the obligation of government officials outside the judicial branch should be no

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<sup>23</sup>. Because federal laws apply throughout the nation, the need for uniformity of judicial application of that law is more pressing: having a single federal law that is enforceable in some districts or circuits and unconstitutional (and thus unenforceable) in others, creates an unstable situation that the Supreme Court will not tolerate for long. State laws can present a different situation. If a state law is one found in many states around the country, the need for uniformity — and thus, a definitive Supreme Court ruling — will be comparable to the need for national uniformity in application of a single federal law. (It would be doctrinally unstable to have similar abortion laws, for example, deemed enforceable in some federal circuits but not others.) In contrast, when a state law is somewhat unique, the U.S. Supreme Court justices may feel less urgency in addressing a particular circuit court's constitutional ruling.

<sup>24</sup>. Similarly, what are the obligations of the officials of one state to adhere to a lower federal court ruling striking down a very similar law in another state?

greater than that of a court: if the Fourth Circuit has struck down the Gun Free School Zones Act, federal prosecutors in the Fifth, Sixth, and other circuits could still prosecute these cases — perhaps the other circuits would uphold the law. Until the Supreme Court has decided a case, the obligation of government officials to obey a lower court ruling as to others than the parties to the judgment may boil down to a policy decision whether or not to enforce the supposedly unconstitutional law prior to a Supreme Court determination.

What about the obligation of governmental actors to obey decisions of the Supreme Court? Even that question does not generate clear-cut answers. We discuss that question further in Chapters 3 and 5.

What manifestly has *not* occurred when a court — even the Supreme Court — “strikes down” a law as unconstitutional is the formal repeal of that law. Repeal is a legislative act that removes a law from the books. The repealed law ceases to exist as a law. But a law declared unconstitutional by the Supreme Court is not removed from the books. As the above discussion suggests, non-judicial constitutional actors may in practice treat the unconstitutional law as a nullity. They may, in other words, treat it as though it were repealed. If they tried to enforce it, a subsequent court would be obligated to treat the Supreme Court’s unconstitutionality ruling as binding precedent, and render judgment accordingly. But the unconstitutional law continues to exist. This can be significant *if the Supreme Court later overrules its earlier decision*. Assuming the Gun Free School Zones Act has not been repealed by Congress, if the Supreme Court were to overrule its own *Lopez* decision, the formerly unconstitutional law would be valid and enforceable once again, without further legislative action.

This last point follows from the relationship of remedies to defendants. As discussed above, the appropriate defendant in any pattern 5 through 8 constitutional cases is an individual or entity who has both caused the wrong and has the means to make it right. If an executive official’s conduct is unconstitutional, a remedy aimed at that official to prevent, deter, or punish that conduct normally suffices. If the problem is that an underlying statute is unconstitutional, a remedy preventing enforcement of that law — again, aimed at the executive official who enforces the law — normally suffices. Since executive officials don’t enact laws, they cannot be ordered to repeal them (or enact a new, constitutional substitute for the unconstitutional law); hence, the normal constitutional remedy is not the repeal of an unconstitutional law. In theory, perhaps, Congress or a state legislature could be named as a defendant in a case challenging an unconstitutional law enacted by that body; but the remedy — ordering the repeal of the law, say — is almost inconceivable coming from a court.<sup>25</sup> In any event, the Supreme

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<sup>25</sup>. Consider the difficulties. First, in the federal system, where the President’s signature is required for legislation, the order would have to direct both the Congress and the President to legislate. Second, what would the order to the legislature look like? Would all members have to vote in conformity with the Court order, or just a majority? If the latter, which legislators would be allowed to vote against the Court order? Third, if there were multiple ways to fix the unconstitutional legislation, how would the law be drafted? Would the Court direct the drafting? The separation of powers and federalism problems in such a scenario are so challenging that a court will always opt for the less problematic approach of blocking enforcement of the unconstitutional law and leaving the

Court has held that federal and state legislators are absolutely immune from suit for their legislative activities.<sup>26</sup>

### **Exercise: Remedies**

What would the state of the law on abortion be if the Supreme Court overruled its decision in *Roe v. Wade*?

## **E. Reading Supreme Court Opinions: Form and Format**

Supreme Court opinions can present some technical challenges to readers unfamiliar with their form and format, while also providing some useful information, if you know where to look for it. In this section we'll discuss these issues, starting with how Supreme Court opinions appear in their original "print" versions (both paper and electronic) and then explaining how we present the cases in this book.

### **1. Un-Edited or Original Print Supreme Court Opinions**

Let's start by looking at the very first and last lines framing the opinion of the Court. A short statement identifying the opinion writers and joiners immediately precedes the opinion of the Court. The last line of the opinion indicates the judgment of the Court. The more detailed, case specific aspects of the judgment — who wins on what issues, and what are the implications for the case and the parties — are sometimes summarized by the Court in a concluding paragraph, but often they are not: in most cases, you have to read the opinion, and in particular the procedural background of the case, in order to figure this out.

But recall that the judgment in itself is the result of the case without the underlying reasoning. The reasoning leading to the judgment — which creates the doctrinal rules — is found in the body of the majority opinion.

The majority opinion of a modern Supreme Court case typically adheres to the following format. A short introduction states the overall legal issue and perhaps (not always) indicates the judgment and even briefly summarizes the fundamental reasoning. Then follows a series of numbered sections, using traditional outline numbering: roman I, II, III etc. for major sections; A, B and C, for subsections, and 1, 2 and 3 for sub-subsections. Obviously, these vary depending on complexity of the case. Typically, section I states the facts giving rise to the case, followed by the procedural history of the suit leading up to the Supreme Court's decision to hear the case. In cases involving complex statutory frameworks or legislative proceedings, these may also be covered in a

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legislature free to try again if it wishes.

<sup>26</sup>. The "speech or debate" clause, Art. I, § 6, provides that "for any speech or debate in either House, [the Senators and Representatives] shall not be questioned in any other place." This provision has been interpreted to afford absolute immunity from suit for legislative activities; and a similar principle has been found for state and local legislators. *See* *Kilbourn v. Thompson*, 103 U.S. 168, 202–04 (1881) (members of Congress); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1997) (state and local legislators).

background section. Where these background materials are lengthy or complex, they may take up a couple of sections. The main body of the opinion follows: this is the legal analysis. There is no fixed rule for organizing this part of the opinion. In some cases, each issue in a case gets a separate roman numeral; in others, the roman numerals are steps in the analysis. The key point is that, for stylistic reasons that appear to be lost to history, the Court does not typically provide helpful descriptive headings for any of its sections. The tradition is simply to number its sections, outline-style.

Dissenting opinions are often presented as full blown alternatives to the majority opinion, perhaps including a recitation of the case facts and even procedural history. This is particularly noteworthy when the dissent places a markedly different spin on the case background, illustrating how seemingly objective facts can look very different depending on one's view of the case. Concurrences may also give this full treatment, though that is less common.

Some opinions of the Court are identified as “per curiam” (Latin for “by the court”) rather than by name of the authoring justice. This practice of declining to name the opinion's author is sometimes used in important and controversial cases to suggest that the court wishes to speak as a whole, or perhaps to shield the author behind a cloak of anonymity. “Per curiam” might also be used for the opposite reason: because the decision is rendered in such a short, summary fashion that no one justice takes pride of authorship.

## **2. Case Citations and Case Envelopes**

Supreme Court opinions are published in a variety of places. These outlets (we assume and hope) print the main text verbatim, but they vary in the “envelope” material they add. So the appearance of the case can be different depending on where you find it. There are two official prints of Supreme Court opinions issued by the government. “Slip opinions” are small booklets (or electronic reproductions on PDF files) that are made available when the decision is issued. Eventually these are compiled into official bound volumes called the United States Reports.

Here, we have to pause to acknowledge the transitional period of legal publication we find ourselves in. Those of us who went to law school before the mid-1990s relied heavily on paper books to read judicial opinions. An entire traditional system of legal citation is based on printed books. Thus, the official citation for Supreme Court cases refers to the United States Reports by page and volume number: “301 U.S. 1 (1937)” tells you to find the first page of the case (*NLRB v. Jones & Laughlin Steel Corp.*, as it happens) at page 1 of volume 301 of the U.S. Reports, and also tells you that the decision was issued in 1937. This citation system is sensible and meaningful in a world of books, but somewhat arbitrary in a world of on-line databases, where any unique code number would be enough. But because the page-and-volume system does generate a unique code for each case, it works well enough with electronic databases, and is unlikely to be deserted soon.

Until 1875, the official Supreme Court reports volumes were indexed by an abbreviation of the last name of the Reporter of Decisions, an official charged with

overseeing the publication of Supreme Court decisions. These older cases were subsequently renumbered as volumes of the “U.S.” reports going all the way back to one. Current “Bluebook” form (i.e., the generally accepted citation form) gives the U.S. report volume followed by the abbreviated-name-of-the-reporter volume when citing pre-1875 cases. Example: *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Volume 17 of the U.S. Reports is the same as volume 4 of the reports during Henry Wheaton’s tenure as Reporter of Decisions.

Various unofficial, commercial case reporters, such as S. Ct. (West Publishing Company’s Supreme Court Reports), and L. Ed. 2d (Lawyers’ Edition, Second Series, now owned by LEXIS/NEXIS), also publish Supreme Court opinions. Because they are faster to press than the U.S. Reports, their page cites are established earlier. U.S. Reports bound volumes, with their official “U.S.” pagination, can lag a year or two behind the issuance of the decision. During that time, it is customary to cite the case “\_\_\_ U.S. \_\_\_” followed by a citation to S. Ct. or L. Ed. 2d.

The “envelope” information that precedes the actual opinions varies depending on the publisher. The official U.S. Reports, both in their slip opinions and bound volumes, begin with something called the “syllabus,” which is an abstract or summary of the issues presented to, and conclusions reached by the Court. The syllabus is compiled by the Reporter of Decisions of the Supreme Court, and is intended as a convenience; but it is not authored by the justices and not formally part of the opinion of the Court. Older volumes of the U.S. Reports also provided summaries of arguments of counsel presented at oral argument, compiled by the Reporter of Decisions from his notes of the oral argument. These are not presented as Q and A transcripts, but look a lot like briefs or opinions, with embedded legal citations. These can be quite lengthy, and when reading older cases in their original forms, it is important to be aware whether you are reading the summary of arguments or the justices’ opinions. The U.S. Reports, in addition to the case caption giving the parties’ names, also set out the Supreme Court’s docket number assigned to the case, the dates of oral argument and decision, and an indication of the review-granting mechanism (e.g., “On Writ of Certiorari to the Eleventh Circuit”).

The unofficial commercial publishers provide additional envelope information. First, they provide a short case abstract of their own (shorter than, and presented before, the syllabus). They next provide a series of “headnotes,” in which they extract what they deem to be key legal points from the opinion and index them to the topical headings of their legal research products. They also identify the lawyers and organizations who filed briefs on behalf of the parties or amici, and those who presented the oral arguments in the Court.

### **3. Edited Supreme Court Opinions in This Book**

To streamline your study of Constitutional Law, we follow the practice of all law casebook authors by heavily editing the opinions we reproduce in these pages. As a general matter, we have cut out at least 50–60% of the material in any given case.

In doing this editing, our goal is to make sure that the key elements of the majority reasoning, and the key points of disagreement among the justices (if any) are

presented with reasonable clarity and completeness. But it is good for you to know in general the kinds of things we have removed. Our editorial cuts can be grouped into five broad categories:

1. *Citations*. Supreme Court opinions are filled with citations, often long strings of them. We have cut most citations from the opinions, retaining only those to cases included in our textbook and other cases that are important to the particular area of doctrine.

2. *Prolivity*. We're just going to come out and say this: Supreme Court opinions are rarely concise. Casebook editors save a lot of space simply by deleting wordiness and redundancy from the opinions, without sacrificing meaning.

3. *Low-priority precedents*. A lot of space in Supreme Court decisions is devoted to lengthy discussions of precedents whose importance has receded over time. These are not particularly meaningful to students who will not be asked to read those cited precedents in a general Constitutional Law course.

4. *Tangential matter*. A lot of detail that may be pertinent to an in-depth study of a particular case is tangential in a course devoted to the broad themes and doctrines of constitutional law. This includes highly technical details of facts, underlying statutes or narrow doctrines, as well as side- or threshold issues that do not go to the core doctrinal holding of a case.

5. *Separate opinions*. Concurrences and dissents are retained to the extent that they expose flaws in or important counter-arguments to the majority opinion. We also include those that illustrate doctrinal controversies of historical or contemporary importance, or prefigure shifts in the prevailing judicial outlook. These points can often come across clearly even in significantly abridged separate opinions, since the majority opinion can be relied on to lay out the facts and set up the basic issues. Separate opinions that do not serve one of the foregoing functions are cut entirely.

Why are we telling you all this? It's not simply that we want you to be informed consumers, though that is certainly part of our motivation. It's also that you should know that these edited cases are not exactly what the real cases look like, and are not necessarily the best exemplars on which to model your own legal writing. At a minimum, in writing briefs and legal memoranda, you will want to include citations in places we've often cut them out — whenever you quote something and whenever you make an assertion about what the law is. You may also need to spend more time explaining the facts and holdings of controlling precedents than you will see done in these pages.

Where the factual and procedural background is particularly lengthy relative to the rest of the edited version of the case, we supply an abridgment in brackets. Where we have cut material from the opinion, we indicate that with ellipses. Outline headers from the original opinions (roman numerals, letters, Arabic numbers) are retained where that seems to be helpful, to indicate a change of topic, to distinguish points agreed or disagreed on by the justices, or to break up a long edited version of an opinion. Otherwise, we cut them.

A unique feature of our book is that we provide the voting breakdown of each

case at the beginning of the opinion. We identify the writers of the majority and separate opinions in bold italics, and indicate opinion “joiners” in ordinary roman type. We do this to help you develop a sense of the jurisprudence of many of the justices and to help put you in a position to assess the consistency of individual justices’ views from case to case. Because the Supreme Court is often described in terms of time periods defined by the tenure of the successive Chief Justices (e.g., “the Warren Court,” “the Rehnquist Court”), we identify the Chief Justice in each case with the parenthetical “(CJ).” We list opinion writers first, and the joining justices in order of seniority.

## **F. Reading Supreme Court Opinions: Substance**

Up to this point, we have been giving you a lot of background and context. Now we’re ready to address the foreground: What is going on substantively in the constitutional law cases you will read in this course? In this section, we will identify and summarize some of the major themes and concepts that underlie constitutional arguments and the legal analysis of constitutional problems. These ideas recur throughout the book and will be useful to you in understanding the cases.

*So, what should you look for when you read the cases?* The mastery of any skill or area of knowledge requires recognizing that there are multiple, increasingly deep levels at which the skill or knowledge can be understood — and then trying to understand and eventually master those levels. We think it’s useful to identify four levels of depth at which you can understand constitutional law in general, and Supreme Court decisions in particular. Your ability to make sophisticated constitutional law arguments will be greatly enhanced the better you perceive and can function at each of the four levels. Of possibly more immediate concern (we get it!), functioning competently at levels 1 and 2 will get you into the B range gradewise; getting an A is likely to require some comfort on your part in articulating your understandings at levels 3 and 4.

We’ll explain each of these levels in a moment, but first let’s agree on what it means to “understand” or “function competently” at each of these levels. It is all too common for students to read a case in a casebook, think silently about it, decide “I get this” and then move on to the next piece of the assignment. That’s not what we mean by understanding or functioning competently. At a minimum, you have to be able to restate the key concept of the case in your own words in a way that another person (someone with at least your level of legal training) can understand. To test your understanding of a concept, you should try to explain it to a classmate. Better yet, explain it in writing in a sentence or a paragraph. Even better, do both. This “say it/write it” test is a great first step in understanding new ideas. To *master* the concept, however, you need to take a further step and *apply* it: use the concept to solve a hypothetical problem or to make an argument in a new case. We give you opportunities and suggestions for testing yourself in this way throughout the book.

### **1. Level 1: Holdings**

Level 1 requires that you read a case and articulate its holding. Identifying the “holding” of a case can be challenging. Many law students (and lawyers) mistakenly believe that a holding is simply an abstract legal rule derived from a case. This



understanding is not accurate. A holding is a rule-statement that incorporates three elements: the abstract legal rule, the key case fact(s), and the case result. Here's an example:

### **Holding of United States v. Lopez**

#### **Abstract rule:**

- “Lopez stands for the proposition that commerce power does not extend to regulation of non-economic activities that are not an essential part of a larger economic regulation.”

#### **Holding:**

– Facts/rule/result

- “Lopez held that mere possession of a gun in a school zone fell outside the commerce power because it was non-economic activity that was not an essential part of a larger economic regulation. Therefore, the GFSZA was unconstitutional.”

The version called “abstract rule” is not wrong — as far as it goes. But it’s not a holding, because it is missing the factual and result elements. The version called “holding” has the case facts (boiled down to their essence, “mere possession of a gun in a school zone”); the legal rule (“non-economic activity that is not an essential part of a larger economic regulation falls outside the commerce power”); and the result (GFSZA is unconstitutional).

Note that you cannot understand or articulate the holding unless you understand the key facts of the case! Indeed, the holding of a case can be varied, spun, or distinguished by adding or omitting case facts.

## **2. Level 2: Reasoning/Argument**

The Court’s explanation of, and justification for, its holding takes up most of the space in the cases and most of our time when reading the cases. This is where the Court lays out and applies the nitty-gritty details of the “black letter” law: the background legal principles, and the legal tests and frameworks used to decide the case. One of the big challenges in studying judicial opinions of any sort is to sift through this part of the case for indications of the arguments that the court found persuasive or determinative, and those the court rejected.

While far from a fail-safe guide to all judicial opinions, the IRAC (“issue-rule-analysis/application-conclusion”) structure that characterizes much legal writing can help you decode many opinions. Often, opinions will identify the legal issue under consideration, and then proceed to the “rule” framework — the broad background principles and settled black-letter doctrine, sometimes is laid out at great length — before getting down to the “analysis” or application of the legal rule framework to the facts of the case at hand. Sometimes the analysis will be framed as a response to the losing side’s arguments; in other cases, rebuttals to rejected arguments will follow the analysis as further justification for the result.

There's no substitute for getting immersed in this part of the case as you read, but there is a pitfall associated with doing so. It's tiring. Even professors and practicing lawyers can get worn down by lengthy opinions, and the details of arguments can lead you to lose sight of the big picture. But whatever you do, don't lose sight of the holding.

### **3. Level 3: Broad Themes**

This third level of understanding demands that you go beyond the “black letter” rules and holdings of the cases and try to grapple with the way judicial opinions reveal the judges' mentality, their approach to judging, and their techniques of argument. This level might include what is sometimes referred to as “judicial philosophy,” although the term “philosophy” implies a more systematic, consistent and developed set of ideas than what most judges actually rely on to guide their thinking.

You could probably come up with other lists than ours, but we want to suggest five broad themes that come up again and again in the judicial opinions in these cases, from *Marbury v. Madison* (1803), the oldest case in this book to *NFIB v. Sebelius* (2012), the most recent. These five themes are sometimes deployed as principles that guide how one or more justices believe the case should be decided. Sometimes, however, they are used more opportunistically as rhetorical ploys. Other times they surface as mere intuitions that underlie a more developed argument. Despite these different usages, identifying and watching for these themes will help you be a better analyzer of opinions.

The five themes are: (1) deference; (2) democracy; (3) neutral principles; (4) the nature of rules (bright lines, balancing tests, and slippery slopes); and (5) modes of constitutional interpretation. Each of these themes requires some further explanation: We will go into the details in section G, below. For now, the key point is that these themes are generic and repeated forms of argument that recur explicitly in numerous opinions.

### **4. Level 4: Between the Lines Decision Factors**

It is simply not possible to gain a thorough understanding of a Supreme Court decision without trying to discern the deepest level of analysis, the subtle and sometimes hidden or between-the-lines factors that ultimately drive many decisions. At the same time, we caution you against addressing this level of analysis by glibly asserting that judges are only “result-oriented” and simply decide cases based on their personal values or political affiliations. Those concerns are not irrelevant, but reality is more complicated.

A more nuanced way to think about these issues is to start with the realization that judges are part of the government. They are appointed to use the processes of adjudication to help govern the state or the nation. That task imposes practical responsibilities on them. We want them to recognize that their decisions have practical impact; indeed, it would be a poor judge who viewed every case as some sort of theoretical abstraction with no regard to practical consequences.

With this realization in mind, we can identify a few broad categories of factors that might influence judges' decisions in any particular case. As a model of judicial decisionmaking, we suggest that all of these factors are present in every case; but that their relative weights in the mind of a given judge will vary from case to case.

Consequently, your ability to predict how a given judge will decide a case will not be well served by assuming an unrealistic degree of consistency: e.g., that this judge *always* follows precedent, or *always* decides in favor of the Democratic party's position.

A final challenge to analyzing cases at this fourth level is that the judges are not always explicit about these factors. Particularly where revealing a motivation would make the judge seem inconsistent, intellectually dishonest, result-oriented, or political, the "level 4" motivation is likely to be buried beneath or couched in "level 3" language.

The "Between the Lines" decision factors worth watching for are these:

**Precedent/stare decisis.** The policy of faithfulness to precedents (see Section H, below) is clearly an important decisional factor in many, if not most cases. Stare decisis provides a universally accepted "neutral principle" for deciding cases, and it engages the reasoning process at the very heart of our legal system (both in practice and in legal education). It is how judges are "supposed to" decide cases. For these reasons, it is all too easy to overestimate its influence in any given Supreme Court constitutional case.

Obviously, if the Court overrules its precedent in deciding a case, other factors predominated in that decision. But let's set that circumstance aside, and examine cases where the Court says it is following precedent.

Was precedent a decisive factor? Assuming so is problematic, for several reasons. (1) Distinguishing or otherwise getting around precedents is not all that hard. (2) No reviewing Court sits over the Supreme Court's shoulder to make the justices adhere faithfully to precedents. (3) In many fields of constitutional law, the precedents are thin on the ground — the issue in question just hasn't arisen all that much, if at all. (4) Other decisional factors are often more compelling.

It is, however, fair to say that when judges don't really care much about the practical or political issues raised in a case, precedent is more likely to be a predominant factor, particularly when there are not compelling lines of precedent pointing to a different outcome.

**Institutional factors.** The prestige of the Court is important to its authority. The judicial branch is famously the "least dangerous" (i.e., practically weakest) of the three branches of the federal government, lacking "sword" or "purse" (armed force or budgetary authority), in the words of the Federalist Papers. The judicial branch often depends on voluntary cooperation of other branches of government for the enforcement of its judgments. An important part of its prestige is to appear to be above the fray of partisan politics. Making (or appearing to make) decisions based on non-partisan legal principles may be crucial to maintaining this prestige, and can be a constraining and, at times, determining factor in a decision. (In this sense, stare decisis is a particularly notable type of institutional factor.) The Court may need to shape decisions in ways that avoid entering political controversies or partisan confrontations with other government actors or with public opinion.

**Workable rules.** The Supreme Court should be, and usually is, highly conscious of its role of setting legal policy for the courts of the nation. Its members therefore are attentive to the need to create workable legal rules. For example, to hold that a person's

speech may never under any circumstances be restricted under the First Amendment (“Congress shall make no law . . . abridging the freedom of speech”) is to create a frankly unworkable rule. Social order could not be maintained under such a rule, and the Court’s interest in creating workable rules forecloses any such interpretation of the First Amendment.

**Other practical concerns.** Your professor is likely to stress the importance of the historical context of any given case. That’s because pragmatic factors stemming from social reality or the unfolding of historical events can be heavily influential on the justices’ decisionmaking. It would be naïve to think that the hard-pressed military position of the U.S. and its allies in 1942 was irrelevant to the Court’s decisions to sustain the military authorities in cases like *Korematsu* and *Quirin* (Chapter 3). Awareness that a return to a pre-1937 understanding of the Commerce Clause would mean dismantling hundreds of billions of dollars of federal programs is likely to make today’s justices reluctant to attempt to impose such a thing by judicial fiat.

**Individual factors.** Factors about the justices as individuals also may influence their decisionmaking. Like all of us, justices are likely to be influenced by their own “judicial philosophy” or set of values and approaches to constitutional adjudication. And although we cautioned against undue cynicism in assuming that partisan politics is always a dominant factor, it would be equally mistaken to go the other way and assume a justice’s partisan political affiliations never affect their decisions. These political affiliations might result from political activities prior to assuming the bench, loyalty to the appointing President, bitterness against a party opposing the justice’s nomination in the Senate, or other things. Even more personal factors can deeply influence judges, as human beings: their personal experiences or history, their sex or race, or their interpersonal relationships on the Court. Finally, a justice’s own sense of her place in the Court’s and nation’s history might influence her decisionmaking. A justice might not want to go down in history as the deciding vote for X or against Y.

These “level 4 factors” may or may not predominate in any given case, and their influence is likely to vary from case to case, justice to justice, and even within the jurisprudence of a particular justice. The factors also vary a great deal in how plainly they emerge in the written opinion, or how much instead they are hidden behind more “judicial” language.

## G. Level 3 Broad Themes

In this section, we return to the five “broad themes” identified at what we have called the third level of depth in reading Supreme Court cases.

### 1. Deference

Constitutional cases all involve judicial review of a government action that is claimed to have exceeded the limits of government power. Embedded within every government action is a decision of some kind. So judicial review always entails second-guessing another government actor’s decision.

Whenever one decisionmaker reviews the decision of another, the question

logically arises, how much deference should be given to the earlier decisionmaker? We see this in all areas of life, and of law. Decisions that are non-deferential allow the reviewing court to completely second-guess the original decisionmaker: the question might be framed as “what would I do if I were in this person’s shoes faced with this decision?” Non-deferential review is about identifying mistaken decisions and correcting them.

Deferential review, in contrast, poses the question differently. Rather than ask “how do I think the decision should have been made,” a deferential reviewer asks “could a reasonable person make that decision, even if I personally might have decided differently?” Deferential review affords a range of discretion and judgment to the decisionmaker, and is more tolerant of mistaken decisions. In close calls, the decision will stand; only clear mistakes will be corrected.

In constitutional law, the degree of deference to be given other governmental decisionmakers is continually debated. The question of whether minimal (deferential) or strict (non-deferential) scrutiny should be applied in reviewing legislative acts challenged under the doctrines of equal protection, due process, or the First Amendment are questions about degrees of deference. The Justices repeatedly recite their duty to defer to legislative judgments about policy, but these bland statements rarely decide the question presented (and are frequently followed by words like “but in this case . . .”).

## **2. Democracy**

Courts in constitutional cases are typically asked to override the decisions, and thus by extension, the policy judgments, of the so-called “political” branches of government: those run by elected officials. Congress consists entirely of members who must stand for election and re-election at regular intervals. The executive branch is filled with people who may not have been elected to their posts, but are ultimately answerable to the President, who is elected and whose own re-election chances could suffer if his or her policies are distasteful to the people.

Federal judges are not elected. They have life tenure and salary security. Their positions have been intentionally insulated from direct democratic accountability. Judges are acutely aware of this, and we see them again and again forswearing any power to make policy judgments or implement their personal values the way that elected officials would be entitled to. Judges express this in several ways. When they argue against finding a constitutional right, they frequently tell the losing claimant that his remedy lies in getting the laws changed through the democratic process. When they argue against their colleagues’ “judicial activism,” they make sure to point out that the democratic process can and should be allowed to resolve the question without judicial interference.

Yet, we all know, or quickly discern in our law school careers, that judges make policy judgments all the time. We know, too, that when they accuse one another of usurping the legislative role of policymaking, they are sometimes being disingenuous. But it is a mistake to jump from that perception to the view that there is nothing real about judges’ anxiety about the “undemocratic” quality of their decisions. In some cases, or some doctrinal areas, judges feel very confident and empowered by constitutional law

to impose their views; in other cases and doctrinal areas, they feel themselves to be on thin ice. One of your tasks in this course is to begin to develop your own intuitions about which is which.

### 3. Neutral Principles

The term “neutral principles” captures an idea embedded in the very logic of adjudication in our legal culture.<sup>27</sup> It is closely related to the democracy theme. Since judges are not supposed to be free to implement their personal values or policy choices, their decisions to override the actions of the political branches must be based on a “neutral” constitutional principle; that is, one that is justified without reference to disputed political values. Some would say that a neutral principle must be one that has bipartisan or non-partisan consensus. (E.g., the First Amendment prohibits the government from jailing a person for criticizing the President.) Others would say that a neutral principle is one that we would find acceptable even when applied by a judge whose political values differ from ours. According to this definition of neutral principles, if “liberty” in the due process includes what a liberal judge deems to be fundamental rights (e.g., the right of a woman to terminate a pregnancy), then it should also include what a conservative judge deems to be fundamental rights (e.g., the right of an employer to terminate an employee for trying to unionize).

The appeal of neutral principles is that they, in theory, generate a consistent and predictable set of constitutional decisions without regard to whether the judges are “liberal” or “conservative.” They are, in other words, the opposite of “result-oriented” judging. Much of constitutional theorizing involves a quest for sufficiently neutral principles to support controversial decisions.

### 4. The Nature of Rules: Balancing Tests, Bright Lines, Slippery Slopes

Ultimately, Supreme Court decisions struggle to formulate rules that can be applied in future cases. By their nature, rules present certain logical or structural difficulties, and Supreme Court justices often argue with one another through their opinions about the *structure* of the rule to be established by the case.

Three issues that commonly come up in rule-structure debates are ideas about “balancing tests,” “bright lines,” and “slippery slopes.” A “balancing test” is a concept employed when the Court acknowledges, and tries to accommodate, valid interests on both sides of the issue. For instance, in *Frisby v. Schultz* (Chapter 9), where anti-abortion protesters picketed in front of a doctor’s house, the interest in free speech was balanced against the interest in the privacy of the home. Balancing tests try to accommodate both interests. The levels of scrutiny in Equal Protection and Due Process cases embody

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<sup>27</sup> The phrase is attributed to Professor Herbert Wechsler, who wrote a highly controversial law review article *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), arguing that the decision in *Brown v. Board of Education* was not supported by a neutral principle. While that argument has not stood up well against the test of time, the phrase “neutral principles” expresses an idea of lasting theoretical importance.

balancing tests, because they weigh the government's interest underlying the law against the intrusion on a fundamental right or the invasiveness of certain class-based distinctions.

"Bright line" rules are the foil of balancing tests. Debates frequently occur because one bloc of justices prefers a bright line rule, and the other prefers a balancing test. A bright line rule creates a categorical distinction and generates a yes-or-no result depending on how the facts fit the category. For example, Commerce Clause analysis (superficially) follows a "bright line" approach: If a subject of regulation meets the definition of "interstate commerce," Congress has the power to enact the law; if it is not interstate commerce, Congress does not have that power (at least not under the Commerce Clause). In the *Frisby* example, then, a bright line approach (not adopted by the Court) might have been to hold "no picketing in front of a person's home, ever."

Both approaches have pros and cons. Bright line rules are easy to articulate, and *seem* to generate clear yes-or-no answers. On the other hand, bright line rules are inflexible, and when the need is great enough, the rule is likely to be bent or abandoned. Also, bright lines are illusory: they seem "bright" in the abstract but can become very dim, gray, and debatable in specific cases. Look, for example, at the disagreements over whether something is "interstate commerce."

Balancing tests, on the other hand, are flexible and pragmatic. They don't pretend to be crystal clear, and they are highly adaptable to individual cases. However, they can be mushy and indeterminate. Critics claim, with some justification, that balancing tests can be used to reach any result, thus giving too much discretion to judges. Balancing tests also are challenged on semantic grounds: if a "test" is something that generates a clear answer, balancing tests, to critics, are not really "tests" at all but merely ways to structure an analysis or argument.

Few justices consistently prefer one type of rule over another. Justice Hugo Black is probably the most salient "bright line rule" jurist (he and Justice William O. Douglas tended to prefer bright lines in free speech cases). For the most part, though, justices tend to pick and choose, sometimes based on the logic of the problem presented (e.g., bright lines seem to make sense in determining the scope of Congress's enumerated powers), but sometimes more opportunistically, based on which tools are more likely to generate the outcome the justice prefers.

A "slippery slope" is an argument that a rule, which might be relatively unobjectionable when applied to the facts of the case at hand, will inevitably lead to unacceptable results in future cases. Slippery slope arguments sometimes go by other names, such as "parade of horrors," "Pandora's box," "can of worms," or "we don't want to go there." This problem of an unacceptable potential consequences is endemic to judging, because judges (particularly appellate judges) have to balance two competing sets of concerns in every case: the demand to do justice in the case immediately at hand and the need to think about the implications of setting a precedent. The precedent-setting factor is particularly strong at the Supreme Court level, since that court sets legal policy for the entire nation.

Slippery slope arguments can easily be exaggerated, by overstating both the

horror of the future case and the ease of sliding into it. Balancing tests have an inherently self-limiting quality, because the countervailing interest can be given greater weight in the next case to stop a “slide” down the slippery slope. Even in cases using bright line rules, it may be possible to create principled “stopping points” without abandoning the rule. As Justice Ginsburg said in *NFIB v. Sebelius*, just because you see a slippery slope doesn’t mean you have to ski all the way to the bottom.

It is not always clear what rule structure is at stake in a particular case, and sometimes, the structure can be manipulated by changing how one frames the rule. The key point is to be able to recognize these arguments when you see them in judicial opinions.

### **Exercise: Rule Structures**

Choose a constitutional case or principle and try to state it as a bright line rule and recast it as a balancing test. Then try to create a slippery slope argument for or against the rule.

## **5. Modes of Constitutional Argument**

There are several modes of constitutional argument that you will see used in the cases presented in this book.<sup>28</sup> Some jurists and legal commentators associate some of these modes of interpretation with normative (i.e., moral, philosophical, or values-based) theories about judicial review. However, few — if any — judges have been thoroughly consistent in adopting and adhering to a particular interpretive method in constitutional cases. Far more common is the tendency of judges to “mix and match” — relying on one mode in one case, and switching in another. Not infrequently, more than one mode of interpretation will be used in a single opinion — perhaps because the author finds that an eclectic approach will cover the bases more thoroughly. At times, this switching of interpretive modes reflects opportunism. Perhaps more frequently one mode is (or seems) better suited to addressing a particular type of constitutional problem. When reading Supreme Court cases, it can be useful to be aware of the different modes of constitutional interpretation to see how they are deployed in argument. You should also consider whether, in a given case, a justice is using a particular interpretive method as a tool, or if he or she is going further and arguing that his or her preferred mode of interpretation is normatively superior.

**1. Textual.** Some constitutional arguments assert that there is a clearly correct understanding of an applicable provision of the Constitution’s text that determines the answer to a particular constitutional question. There are times when this seems plainly true. Consider Article II, § 1, cl. 5 (“No person . . . shall be eligible to the office of President . . . who shall not have attained the age of 35 years”). This provision rather clearly tells us that a 29-year-old candidate for President is disqualified. At the other end of this spectrum of determinacy, however, is something like Article II, § 2, cl. 1 (“The

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<sup>28</sup> The classic exposition of the various “modalities” of constitutional interpretation and argument is found in PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991). The typology here departs from Bobbitt’s significantly, though there is necessarily some overlap.



President shall be commander in chief of the Army and Navy”). This text may be a starting point, but hardly in itself answers the question whether President Bush had the inherent constitutional authority to order the trial of suspected terrorists by military tribunal. In the middle is language that is somewhat determinate: for example, the inference that state judges have the power and duty to apply federal law. (See provisions quoted and discussed in Sections D. 2 and D. 3, above.) Constitutional arguments often are arguments over whether the text (sometimes supplemented by other interpretive methods) is or is not sufficient to answer the question presented.

**2. Historical.** Historical arguments look at the actions of non-judicial constitutional actors (see section B. 2, above) as precedents that shed light on constitutional meaning. If Congress has always acted on the assumption that it may determine the number of Supreme Court justices, and no other branch of government has challenged that view, then the Constitution’s silence on the proper number of justices can be taken to mean that Congress indeed has that power. In this way, historical practice provides a “gloss” or interpretive explanation on the meaning of the Constitution. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). In such arguments, the actions of constitutional actors closer in time to the drafting of the Constitution are often treated as more significant historical precedents on the theory that they were closer to the “original understanding,” which is, in this view, presumed to be binding when knowable.

**3. Structural.** Some constitutional arguments draw inferences from the “structure” of the Constitution — its overall gist, or logical inferences derived from key elements. The “anti-commandeering rule” of *Printz v. United States* (Chapter 1) that Congress cannot order state executive officials to enforce federal law, is a “structural postulate” that is said to flow from the retention of the states as sovereign entities within the federal system. There is no specific textual indication of this particular rule, and the historical precedents were debatable.

**4. Policy.** Policy-based arguments use the policy objectives as the guiding principle to decide a case and interpret constitutional text accordingly, typically by assigning policy objectives to open-textured language in the constitution. (By “open-textured,” we mean language broad enough to accommodate a relatively wide array of substantive interpretations.) For example, a policy of promoting national security may be associated with the Article II “commander in chief” clause and used to justify the trial of suspected terrorists by military tribunals created by the President. The First Amendment may be said to support a policy of unrestrained political debate, which in turn is used to justify striking down limits on corporate spending in election campaigns. Such policy-based arguments may overlap with “structural” arguments or use structural arguments as a starting point.

**5. Fundamental rights.** Fundamental rights arguments are like policy arguments and overlap with them to a degree. Fundamental rights arguments assign broad principles to “open-textured” constitutional language, but the principles tend to revolve around broader normative concepts such as equality, justice, freedom from racial discrimination, and privacy. These kinds of arguments typically arise in individual rights cases.

**6. Originalism versus non-originalism.** An “originalist” argument asserts that the Constitution must be interpreted according to some version of original understanding of the Constitution. The precise arguments embraced by originalism have shifted significantly over time. We identify three important variants here. An “original intent” approach looks at the intent of the framers or ratifiers of the Constitution. For example, such an argument might assert that, if integrated public schools or same sex marriage were not specifically intended by the framers or ratifiers of the Fourteenth Amendment to be included in the concepts of due process or equal protection, we should not interpret the Fourteenth Amendment to embrace those practices today. A “textualist” variant focuses on “original public meaning” rather than original intent. In this view, the relevant understanding is not that of the framers, but that of the people who ratified the relevant text. Since it is the ratifier’s understandings that matter, the best way to understand the original meaning is not to look to the subjective intent of the framers, but to the objective meaning the words had at the time of the ratification of the Constitution (or amendment), because these are the meanings that would have been ascertainable to the ratifiers.

Yet another group of originalists use what they call a “text and principles” approach. These originalists agree that the original meaning of the constitution is binding, but resist the efforts of other originalists to read the Constitution as embodying only rules. The Constitution, these originalists argue, also embraces standards. Fidelity to original meaning thus requires ascertaining the level of abstraction at which a particular provision was intended to be applied. For example, if the original purpose of the Equal Protection clause was to embrace a broad principle of equal citizenship, than what is protected under the clause must change over time as necessary to ensure that that promise continues to be fulfilled.

“Non-originalists” differ from originalists in that they do not source their arguments in fidelity to original meaning, however defined. Instead, advocates of this position argue for a “living Constitution” whose interpretation evolves to incorporate changes in contemporary fundamental values. A non-originalist might argue that racially segregated schools violate contemporary norms of equality and therefore are unconstitutional, whatever mid-19th century politicians may have believed. Note that non-originalists and text and principle originalists will often reach the same result in particular cases, but will just do so for different reasons. Note also that it is *not* always the case that non-originalist arguments are more protective of individual rights. (See Justice Scalia’s dissent in *Hamdi v. Rumsfeld* (Chapter 3) for an arguable example of originalism being more rights-protective.)

**7. Formalism versus “functionalism.”** Formalistic constitutional arguments are premised on the view that the Constitution presents a set of well-defined concepts, procedures, and structures that generate clear answers to constitutional problems. Formalistic arguments tend to eschew subtle distinctions and favor bright line rules over balancing tests. They tend to extol the virtues of rigidity over flexibility. A classic example of a formalistic argument is Justice Black’s opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer* (Chapter 3), in which he argued that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” The underlying premise is that the distinction between executive and legislative functions

is clear and well-defined; that seizing a steel mill is clearly a legislative act; and that the President is flatly prohibited from exercising legislative powers. The virtue of a formalistic argument is its simplicity and clarity, and the predictability of results generated by its application. But the drawback of such arguments is their tendency to break down at the margins, in close cases. Their simplicity, clarity, and predictability, therefore, often are illusory. How clear are any of the three underlying premises in the *Youngstown* example, after all?

A classic functionalist approach was that taken by Justice Jackson in his *Youngstown* concurrence: “The actual art of governing under our Constitution does not, and cannot,” Jackson wrote, “conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context.” Functionalist arguments embrace ambiguity and seek to craft flexible solutions to constitutional problems. They tend to favor answering difficult constitutional questions on a case-by-case basis, often by employing balancing tests. They try to accommodate competing interests and make room for innovative structures and processes where not expressly prohibited by the Constitution. The virtue of a functionalist approach is realism, but its drawback is a lack of consistency or predictability. Functionalist “rules” are excessively malleable. Note that formalist and functionalist approaches are not necessarily always in opposition, and at times can reach the same conclusion. For example, Black and Jackson agreed that the President’s seizure of the steel mills was unconstitutional.

**8. A note on “judicial activism.”** The term “judicial activism” is frequently bandied about by commentators and even some judges. We consider this term to be too imprecise and politically loaded to constitute a meaningful category of constitutional argument. The underlying idea seems to be that judges who substitute their own value choices for what the Constitution “requires” are judicial activists and therefore bad judges. The label initially was strongly associated with judges or decisions using open-textured constitutional text (such as that of the Equal Protection clause) to reach “liberal” results on social issues. As such, it frequently was contrasted with ideas about “strict construction” or judicial deference, both of which hold that when the Constitution is unclear, the Court should not intervene. The terminology arose in an era where constraining judicial power in constitutional cases usually tilted in a politically conservative direction. But, the liberal/conservative connotations make little sense in historical contexts where political conservatives advocate using broad interpretations of open-textured constitutional text to strike down laws supported by political liberals. (Some observers characterize the *Lochner* era, as well as the Rehnquist and Roberts Courts, in this way.) To the extent that the terms have any useful meaning, that meaning is better captured by the idea of deference (or lack thereof) to democratic institutions. (See sections G. 1 and G. 2, above.)

### **Exercise: Modes of Constitutional Argument**

Separation of powers arguments frequently pit “formalistic” against “functionalistic” arguments. As you read Chapter 3, try to answer following questions (or go back if you’ve already read Chapter 3):

1. Can you categorize the Douglas and Frankfurter opinions in *Youngstown* as formalistic or functionalistic?

2. Identify the opinions you read (or have read) in Chapters 3 and 4 as formalistic or functionalistic.

## H. Precedent and Stare Decisis

The court systems of the United States have a small number of well-defined rules regarding precedent. The primary distinction drawn in these rules is whether a precedent is “binding” or merely “persuasive.” A court is free to disregard merely persuasive authority if it finds the reasoning of the precedent to be unpersuasive. But a court must follow binding authority, unless the precedent can be “distinguished,” which means showing that it is factually different in a way that matters to the legal rule and result.

Trial court decisions bind only the parties to that particular case, and are never binding precedents in later cases. In the federal system, intermediate appellate decisions are binding within the circuit that issued the decision. For example, a decision by the U.S. Court of Appeals for the Seventh Circuit is binding on future Seventh Circuit panels and binding on all the district courts within the Seventh Circuit (the various federal judicial districts in the states of Wisconsin, Illinois, and Indiana). But the Seventh Circuit’s decisions are merely persuasive authority for district courts and appellate courts outside the Seventh Circuit.

Decisions by the U.S. Supreme Court are binding authority on all federal and state courts in the United States. However — and this is a key point — the Supreme Court’s decisions are not binding in subsequent Supreme Court cases: that Court is always at liberty to overrule itself, meaning that its prior decisions are merely “persuasive” authority in subsequent Supreme Court cases.

How persuasive is persuasive? The answer to that question is encapsulated in the doctrine of “stare decisis,” a Latin phrase meaning “to stand by what has been decided.” Stare decisis is a prudential doctrine rather than a legal requirement. It is justified on a few key, related grounds. Adhering to precedent promotes the institutional stability of the Supreme Court, promotes stability and predictability of the law, and reduces the disruptions that might be created by changes to the law among the people and institutions who conform their behavior to the law as interpreted by the Supreme Court. As Chief Justice Roberts recently summarized the doctrine:

Fidelity to precedent — the policy of stare decisis — is vital to the proper exercise of the judicial function. “Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a “special justification.”

At the same time, stare decisis is neither an “inexorable command,” nor “a mechanical formula of adherence to the latest decision,” especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the

Government could wiretap ordinary criminal suspects without first obtaining warrants.

Stare decisis is instead a “principle of policy.” When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them decided *right*. . . .

[S]tare decisis not an end in itself. It is instead “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” Its greatest purpose is to serve a constitutional ideal — the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.<sup>29</sup>

In sum, stare decisis means that there is a very strong presumption in favor of following precedents, but the presumption is not absolute. Stare decisis is one factor that guides Supreme Court decisionmaking; it is an important factor that is sometimes, but not always determinative. A crucial aspect of legal argument is developing a feel for when a precedent will be followed and when, instead, there is an opening to challenge it.

The Roberts quotation also suggests that stare decisis not as strong in constitutional cases. This is an allusion to the Court’s policy, stated expressly elsewhere, that stare decisis “has special force” in statutory interpretation, as opposed to constitutional, cases. This is because Congress can (in theory) overrule the Supreme Court’s interpretation of a statute simply by amending the statute. Consequently, if a statutory interpretation decision needs correcting, the Court can rely in part on Congress to make the correction. When Congress fails to do so, letting a statutory interpretation decision by the Supreme Court stand undisturbed for many years, the Court often construes that inaction as a tacit endorsement of the decision’s correctness, thus providing further reason not to overrule it judicially.

It is extremely important to understand that stare decisis does not simply present the stark decision either to overrule or follow a precedent. Things are more complicated. As you will learn (or have learned already), a core element of your legal training is to develop an ability to *distinguish* precedents from the case at hand. Courts can thus work around precedents without overruling them. Precedents can be narrowly interpreted, misinterpreted, “limited to their facts,” “eroded” (their scope and legal force weakened), or even practically (though not formally) overruled.

## I. The Role of Statutes in Constitutional Cases

Although constitutional cases can involve judicial review of any governmental action, the paradigm example of judicial review is a constitutional challenge to a statute. Most of the cases in this book follow that pattern. This requires you to gain some comfort and familiarity in reading statutes and understanding how courts interpret them.

When law schools emerged in the late nineteenth century, the prevailing ideology

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<sup>29</sup>. *Citizens United v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring).

in most law schools was that courts held a privileged position in the making and interpretation of law. Modern law schools have never fully overcome those origins: the dominant teaching texts remain casebooks dominated by edited cases, as though “law” comes primarily from judges. This is wrong as a matter of sociological fact, and it is dubious in terms of democratic theory. Most law comes from elected legislatures, in the form of statutes.

## 1. Reading Statutes

Statutes can be tedious to read. They lack the narratives of litigated cases, are typically written in awkward language, and are formatted in ways that discourage casual browsing. They break lengthy grammatical sentences into sections and subsections on separate lines. They contain often cumbersome definitions, and are filled with cross-references that prevent them from being read and understood sequentially.

Despite these issues, and the fact that your study of law tends to shunt statutes to the background, it is essential for you as a lawyer to recognize that statutes are the main source of law in our system, and to learn to love them — or at least not dislike them to the point where you can’t bring yourself to read them.

When reading a statute, a good practice is to assume that you’ll have to read it through at least twice. In the first read-through, you should skim to identify the key elements: (1) who is the regulated party; (2) what is the act required or prohibited of the regulated party; (3) what is the consequence of doing the prohibited thing or failing to do the required thing.

When you have identified these three elements, go back and read the statute again more thoroughly to pick up the details and nuances. Here, you will be trying to distinguish more important from less important language. It’s a good idea to assume all of the language in a statute has a reason for being there. But some of the words are more important than others, particularly in the context of the case at hand. Suppose you are reading a statute that adds the phrase “in interstate commerce” as a “jurisdictional element” to invoke the commerce power as the basis for enacting the statute (see *Lopez* and *Morrison* in Chapter 1); if the case does not involve a Commerce Clause challenge, that language probably does not bear on the relevant analysis.

Another technique for reading statutes is to try to “chunk” or “group” statutory terms. A long list of related or synonymous terms is probably intended to create a single broad category, and might be reducible to its gist. In *Reno v. ACLU* (Chapter 9), for instance, the statute prohibited a “comment, request, suggestion, proposal, image, or other communication” of an “indecent” nature to a minor. The listed synonyms were all types of “communication” or “message,” with the list consisting of illustrative examples. In other instances, however, word lists might be intended to be exhaustive.

## 2. Facial versus As-Applied Challenges

There are two basic types of constitutional challenges to statutes: “facial” challenges and “as-applied” challenges. It is important to understand the distinction, because courts approach the two types of challenges differently.

A “facial challenge” is a claim that the law is unconstitutional “on its face.” As the Court has defined this term, a facial challenge argues that the statute is unconstitutional in all its applications, i.e., in the case at hand and all potential cases.

On the other hand, if the Court can conceive of some constitutional applications of the statute, it will not strike down the law as unconstitutional on its face. In this situation, the challenger might succeed with an “as-applied” challenge. This is an argument that the statute is unconstitutional as applied to the particular facts and circumstances of the case.

In *NFIB v. Sebelius* (the Affordable Care Act case discussed in Chapter 1), the Court considered a facial challenge to the “individual mandate.” The argument was that the requirement that individuals either purchase health insurance or pay a tax was unconstitutional with respect to everyone covered by that provision of the statute. An “as-applied” challenge, in contrast, might have argued that the statute was unconstitutional only as applied to healthy people who have signed a sworn document that they will never seek emergency room treatment without paying for it.

A significant modification of this doctrine is used in free speech cases. Where a statute is “substantially overbroad” — that is, where it is unconstitutional in many though not all of its applications — it can be subject to a facial challenge. *Reno v. ACLU* (Chapter 9) is an example. There, provisions of an internet censorship law were struck down as substantially overbroad based on a facial challenge, even though it could have been constitutionally applied to prohibit the communication of certain obscene matter.

### **3. The Doctrine of Constitutional Avoidance**

The doctrine of “constitutional avoidance” is a principle of statutory interpretation according to which courts will try to interpret a statute to avoid constitutional problems with it. Under this doctrine, if a statute challenged on constitutional grounds can “reasonably” be interpreted in a way that would maintain its constitutionality, the Court should adopt that interpretation. However, the interpretation that preserves constitutionality must be both plausible in light of the language of the statute, and also consistent with the intent of the statute’s drafters.

#### **Exercises**

1. This exercise is called the “Interpretive Treasure Hunt through the United States Constitution.” Read the entire Constitution of the United States, and then identify the provision or provisions that do the following:

- a) empower the Senate to confirm judicial nominees.
- b) empower Congress to override a presidential veto of legislation.
- c) authorize Congress to abolish the slave trade.
- d) give federal judges life tenure.
- e) provide that a federal law can supersede a state law.
- f) grant former slaves the right to vote.

- g) authorize states to raise the legal drinking age to 21.
- h) prohibit states from raising the voting age above 18.
- i) give rise to the argument that a same-sex couple legally married in a state recognizing same-sex marriages can move to another state and have their marriage legally recognized.

2. Not all provisions of the Constitution are enforceable in court; put another way, not all constitutional provisions create a legal rule of decision on which legal cases are decided by courts. Try to identify at least two such provisions.

3. For each of the problems below, identify all the provisions of the Constitution that seem applicable and construct an argument to resolve the constitutional question. Do not refer to any legal authorities outside the Constitution itself. You may, however, include arguments based on your knowledge of history, the “intent of the framers” and similar matters which you believe shed light on your interpretation of the constitutional text.

a) In 2001, then-president George W. Bush issued an order to establish “military tribunals” to try suspected terrorists outside of Article III federal courts. Was that order constitutional?

b) Senate Rule 22 in effect authorizes the “filibuster,” a procedure in which a bill can be effectively denied a vote of the full Senate unless 3/5 of the members of the Senate vote for “cloture” (to end debate). This procedure has been employed numerous times in the Senate’s history to block bills and presidential nominees when 2/5 or more members of the Senate band together to oppose cloture. Is the filibuster constitutional?

c) The Minimal Essential Coverage Provision of the 2010 Patient Protection and Affordable Care Act requires every U.S. citizen to maintain a minimum level of health insurance by 2014 or else pay a tax penalty. Is the provision constitutional?