A Primer on Supreme Court Procedures

by Thomas E. Baker

PREVIEW of United States Supreme Court Cases, pages 475–485.

A "primer" is an elementary text that covers the basic elements of a subject, and that is what this essay is meant to be: a brief introduction and an overview of the jurisdiction, practices, and procedures of the Supreme Court of the United States. It is intended for the intelligent novice who wants to understand how the Supreme Court operates.

The Supreme Court of the United States is the most powerful judicial body in the world. The manifestation of this power is the doctrine of **judicial review**. The phrase "judicial review" is but a shorthand expression for the role the Court plays as the final authority on most, although not all, issues of the constitutionality of governmental acts. It "reviews" these acts to ensure that they conform to the Constitution. The Court engages in judicial review not only of the constitutionality of legislation, both state and federal, but also of the actions of chief executives, state and federal, as well as decisions of other courts, both state and federal. The Court exercises its constitutional authority when it validates as well as when it invalidates what some governmental actor has done.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), arguably is the most important case in all of constitutional law because that famous opinion by the great Chief Justice John Marshall established the doctrine of judicial review as a fundamental principle of American constitutionalism. The Constitution is law and "it is emphatically the province and duty of the judicial department to say what the law is." The "very essence of judicial duty" is to follow the higher law of the Constitution—the written law ratified by the sovereign people—over a mere statute—enacted by the people's representatives in Congress. The Constitution is the law for the government. The Constitution trumps a statute, so judges must prefer and enforce the Constitution over a statute. Shortly after this landmark decision, other decisions completed the dominance of the Supreme Court in constitutional matters. Acts of state legislatures were declared unconstitutional, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); state criminal proceedings were made subject to Supreme Court review, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); and final decisions of the highest courts of the states were deemed reviewable in the Supreme Court under the Constitution, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

The practice of judicial review is so deeply engrained in the American system that it is difficult for us to conceive of our legal system without it. Our federal and state governmental powers are limited by the Constitution for the purpose of preserving individual liberty, and federal powers are further limited to preserve the powers of state governments. The Supreme Court exercises the ultimate authority in enforcing these limitations. The concept of judicial review is itself a unique American invention. Indeed, most other Western democracies still do not have American-style judicial review, although there is a modern trend abroad toward greater judicial authority and independence. It also is important to remember that

(Continued on Page 476)

Thomas E. Baker is a professor at the Florida International University College of Law, Miami, Florida, where he teaches the honors section of constitutional law. This article is adapted—with the express written permission of West, a Thomson business—from Thomas E. Baker, *Constitutional Analysis in a Nutshell* (2d ed., 2004).

the law of the Constitution applies to judges on lower federal courts and on state courts. Consequently, judges on those courts wield the power of judicial review to strike down acts of government as being unconstitutional, although their decisions are subject to the hierarchy of appellate review and the limitations of *stare decisis* or precedent, i.e, their interpretations of the Constitution are reviewable ultimately in the Supreme Court and they must follow the Supreme Court's decisions.

The doctrine of judicial review—and the Supreme Court as an institution—both have their share of critics and defenders. There is considerable disagreement over whether the justices do exercise the proper judicial self-restraint or whether judicial review has devolved into a kind of judicial supremacy that Chief Justice Marshall could not have imagined. Conservative constitutional scholars on the political right and liberal constitutional scholars on the political left have tried to make the case that the country would be better off without judicial review, given what they see as the boundless *hubris* of the Supreme Court, although conservatives and liberals point to different lines of cases as examples of what they consider to be the Court's villainy. These commentators go so far as to advocate that the Constitution be amended to relocate the ultimate final authority to interpret the Constitution in the Congress. There is no question that particular exercises of judicial review in particular decisions have been and will continue to be highly controversial, occasionally historically so, but even the most controversial decisions have their supporters. Perhaps there is no better exemplar of this phenomenon than the recent decision that determined the outcome of the presidential election of 2000, *Bush v. Gore*, 531 U.S. 98 (2000). Thus, the debate over the proper exercise of the awesome power of judicial review continues unabated.

Start with the text of the Constitution. "The judicial Power of the United States" is created and defined in Article III of the Constitution, which extends only to a "**case or controversy**." The paired terms are used interchangeably, although strictly speaking a "case" is more comprehensive than a "controversy" in that the latter includes only suits of a civil nature while the former also includes criminal prosecutions. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937). A "case or controversy" generally must be one that is appropriate for judicial determination, namely, a real, live dispute as opposed to a hypothetical or academic disagreement. It must concern legal relations and real parties and carry adverse legal consequences as opposed to being merely advisory of the law in the abstract; it must be substantial and more than *de minimis*; and it must be capable of being resolved fully and effectively by some judicial relief or judgment. These limitations help divide law from politics: they keep judges in their place; they protect the Court and preserve the Constitution.

The constitutional requirement for a case or controversy prevents the Supreme Court from issuing an **advisory opinion** merely to act like a lawyer giving legal advice to a client; rather, the justices may only act formally like a court to resolve real disputes presented by adverse parties. The primary concern is to limit courts to their proper role of traditional dispute-resolution and to avoid premature, abstract, and political decisions. *Muskrat v. United States*, 219 U.S. 346 (1911). Likewise, collusive lawsuits or feigned cases, in which the litigants are in cahoots with each other to accomplish the same result, do not present a constitutional case or controversy. *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971). Some famous decisions have been "**test cases**," however, in which both opposing parties have advocated for a constitutional resolution in favor of their side on some contentious and momentous issue of the day.

The whole idea of **standing** is that the right person should bring the lawsuit so the courts may provide an appropriate judicial remedy. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). First, the person must have sustained some injury in fact, not merely a fanciful, abstract, generalized, or hypothetical worry or concern that everyone has in common. Second, the injury must be fairly traceable to what the other party to the lawsuit did or did not do, i.e., the other party must have caused the injury. Third, the injury must be one that the court can remedy, i.e., the injury must be judicially redressable. The underlying constitutional principle is that the federal courts must be reserved for resolving real, live disputes that matter to someone, and the judicial branch should not invade the policy-making province of coordinate political branches. In the garden-variety civil lawsuit, the plaintiff sues the defendant who crashed

into the plaintiff's car and asks for money damages; injury, causation, and redressability are obvious and there is no guesswork about who should bring suit. In so-called public law cases that allege constitutional injuries arising from governmental policies and programs, standing can become rather metaphysical and as controverted as the merits of the case.

Generally, taxpayers do not have standing to raise general issues involving federal spending programs merely because they pay taxes. Because of the small and indefinite interest they have in the case, they simply are not sufficient stakeholders. *Frothingham v. Mellon*, 262 U.S. 447 (1923). The states likewise cannot bring such a suit as *parens patria* of its own citizens, since the United States government represents all its citizens. *Massachusetts v. Melon*, 262 U.S. 447 (1923). A state might sue the United States in its own right, however. *Missouri v. Holland*, 252 U.S. 416 (1920). And one state may sue another state. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). There is an exception that federal taxpayers do have standing to challenge governmental spending as a violation of the Establishment Clause of the First Amendment, because that is a specific constitutional limitation on the taxing and spending power. *Flast v. Cohen*, 392 U.S. 83 (1968). But this exception is itself limited to the Establishment Clause limitation on the Taxing and Spending Clause. Members of Congress who vote against a measure that is enacted over their opposition do not have standing to go into court and ask for a do-over. *Raines v. Byrd*, 521 U.S. 811 (1997). Some individual citizen who meets the requisite injury, causation, and redressability prongs can usually be found to bring suit. *Clinton v. New York*, 524 U.S. 417 (1998). But the Supreme Court has remarked that the fact that no one may have standing to sue is not reason alone to afford someone standing who does not otherwise qualify. *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

There are some other prudential, court-created rules on standing that have more play in the joints and provide judges with some discretion to allow the case to go forward. Generally, a third party cannot bring a lawsuit to vindicate the constitutional rights of another person, unless the third party is in a special relationship with the other person and there is some good reason that the other person cannot practically bring suit. For example, a physician will be allowed to challenge a state law that allegedly burdens female patients' right to seek an abortion. *Singleton v. Wulff*, 428 U.S. 106 (1976). In free speech cases, the substantial overbreadth doctrine allows a court to strike down a statute that might be constitutional as applied to the party before the court if the court believes that the statute on its face will chill substantial free speech of others. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). An association or organization can have standing to sue in its own right or can have standing to represent its members who would themselves have standing, so long as the nature of the claim and the relief sought do not require the individual members to participate. *Warth v. Seldin*, 422 U.S. 490 (1975). For example, a union might have associational standing to represent the rights of its members. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986).

A case or controversy must satisfy the **ripeness** doctrine. Ripeness, as the metaphor suggests, is a matter of timing. The doctrine serves to avoid premature adjudication and the entanglement of the courts in abstract disagreements that may or may not mature into a genuine case or controversy. It further defines a posture of judicial deference vis-à-vis the elected branches and other agencies of government. Potentially important constitutional cases usually present nettlesome legal issues that are best decided in the context of a fully developed factual record without the courts having to speculate what might happen and without having to fill in gaps with judicial guesswork. The Court will wait and see what happens and then will decide the issue with the benefit of hindsight. *International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222 (1954).

If the ripeness doctrine is about a lawsuit brought too early, the **mootness** doctrine is about a lawsuit brought too late. If events subsequent to the filing of a lawsuit in effect resolve the dispute, the case must be dismissed as moot, at the trial level or on appeal, and even in the Supreme Court itself. Various subsequent events might moot a case. If the parties settle the matter, the controversy is no longer alive. If the challenged statute or regulation expires or is repealed, the controversy is over. Any change in circumstances that has the practi-

(Continued on Page 478)

cal effect of ending the dispute is grounds for declaring the lawsuit moot. *DeFunis v. Odegaard*, 416 U.S. 312 (1974) is a dramatic example. The case presented the important issue whether affirmative action policies in state university admissions programs violated the Fourteenth Amendment. By the time the case was fully briefed and orally argued in the Supreme Court, however, the plaintiff bringing the challenge was enrolled in his last quarter of law school, and the university represented to the Court that he would not be prevented from completing his degree program. The Supreme Court dismissed the case as moot and did not reach the merits of this important issue, an issue that roiled in the lower courts for three decades.

But when there are inexorable time factors and the case would inevitably be mooted by the time the issue was finally decided, the Supreme Court will go ahead and decide the case, because the issue is capable of repetition, yet otherwise evading judicial review. In the famous abortion case, for example, human gestation takes only nine months compared to the considerably more lengthy time required to try a case, take an appeal, and petition for Supreme Court review; furthermore, an individual woman might become pregnant again in the future. *Roe v. Wade*, 410 U.S. 113 (1973).

In the scheme of the Constitution, the judicial branch is not supposed to deal with certain themes of government, for example, the procedures for amending the Constitution in Article V, the clause that guarantees to each state a republican form of government in Article IV, and the whole field of foreign relations, which is not addressed in so many words in the Constitution but which is understood to be an inherent aspect of external sovereignty under the primary control and responsibility of the president. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

This nonjusticiability or **political question** doctrine essentially is a principle of constitutional interpretation and a feature of judicial self-restraint that deems some matters to be wholly committed to Congress (or the executive branch) and therefore off limits to the judicial branch because of the separation of powers. This doctrine does not place all issues or all cases that are somehow related to politics off limits to the courts—it is not the "political issue" doctrine. The modern case that redefined the doctrine held that an equal protection challenge to the malapportionment of a state legislature was justiciable even though it dealt with the election of the legislature. *Baker v. Carr*, 369 U.S. 186 (1962). The holding was predictable once it was understood that the separation of powers was not in play. The case was about the Fourteenth Amendment and the state legislature and had nothing to do with the Congress or the president and their relationship with the judicial branch, which is the core of the doctrine. There are several complementary formulations of the political question doctrine, each one being a reason for the court to dismiss the lawsuit without reaching the merits of the case: (1) a constitutional commitment of the issue to a coordinate branch; (2) a lack of judicially manageable standards; (3) an initial policy determination calling for nonjudicial discretion; (4) the impossibility of deciding the case without disrespecting the other branches; (5) an unusual need to adhere to the political decision already made; and (6) the potential for embarrassment from multiple conflicting pronouncements by the different branches. These factors are rather abstract and the contemporary Supreme Court seems quite reluctant to apply them to find that an issue is a political question and nonjusticiable.

The corollary to the political question doctrine, which maintains the constitutional primacy of the courts, is that in the final analysis it is up the court to decide whether one of these six formulations applies to commit the issue to a coordinate branch and to determine the scope of that constitutional commitment. The Supreme Court thus remains the ultimate interpreter of the Constitution that determines for itself what issues the Constitution commits to the Congress or the executive without review in the courts. *Powell v. McCormack*, 395 U.S. 486 (1969).

As a practical matter, if the Supreme Court determines that a case presents a nonjusticiable political question, that determination has the ultimate effect of leaving in place the decision of the coordinate political branch and that branch's underlying interpretation of its own constitutional powers. For example, the Supreme Court held that the procedures the Senate had followed in an impeachment trial of a federal judge, including a Senate rule by which a committee heard evidence

and reported to the full Senate, were within the scope of the constitutional commitment of Article I, Section 3, Clause 6: "The Senate shall have the sole Power to try all Impeachments." Thus, the Supreme Court's refusal to decide the merits allowed the Senate to determine its own procedures without being subject to review in the courts. *Nixon v. United States*, 506 U.S. 224 (1993).

All these various doctrines originating in the case or controversy requirement have the effect of opening or closing the door to the federal courts to litigants and their constitutional questions. How an individual justice applies these doctrines has a lot to do with the justice's vision of the proper role of the third branch.

The Supreme Court is the only federal court that is created by the Constitution itself; every other federal court is created by statute and can be abolished by statute. U.S. Const., art. III, § 1. Like all the other federal courts, the Supreme Court is a court of **limited subject-matter jurisdiction:** there are only certain kinds of cases it can hear and decide under the Constitution. Congress has enacted **jurisdictional statutes** for the Supreme Court. Under the Constitution and these statutes, the Supreme Court has limited original jurisdiction, which is exercised rarely, and appellate subject matter jurisdiction, which is almost always exercised by the discretionary writ of *certiorari*.

Cases can be filed directly under the Supreme Court's **original jurisdiction** to sit as a trial court only in the most limited circumstances. In theory, the original jurisdiction of the Supreme Court provided in the Constitution is self-executing and needs no statutory implementation, but because there has always been a statute on the subject, that theory has never really been tested. U.S. Const., art. III, § 2, cl. 2; 28 U.S.C. § 1251. The most common type of case filed in the Supreme Court's original jurisdiction involves a dispute between two states, for example, a boundary dispute or a suit over water rights in an interstate river. *Virginia v. Maryland*, 124 S.Ct. 598 (2003). Here the Court's jurisdiction is original and exclusive; therefore, it is the only court that can hear the case. The Supreme Court itself does not hold a trial; instead, the matter usually is referred to a special master, a retired judge or a distinguished lawyer, who conducts a hearing and then makes recommendations how to resolve the dispute. In some other specified classes of cases, including controversies between the United States and a state, the Supreme Court's jurisdiction is original but not exclusive so that the Court can and usually does merely stand by and allow the matter to be resolved in the first instance in a lower federal court. *California v. Nevada*, 447 U.S. 125 (1980). Consequently, the original jurisdiction cases do not amount to a large or an important part of the Court's docket today.

Under Article III, Section 2, Clause 2, Congress has the power to make exceptions to the **appellate jurisdiction** of the Supreme Court, unlike the original jurisdiction. The Supreme Court understands this power to mean that a statute that grants specified appellate jurisdiction necessarily implies an exception of any and all jurisdiction not specified. By providing for certain types of appeals in a statute, the Congress impliedly negates all other types not mentioned. Congress may go so far as to repeal an appellate jurisdiction after a case has been briefed and argued but before it has been decided, and the Court must then dismiss the case for want of subject matter jurisdiction. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). Congress's power does not go so far, however, as to reopen and redetermine cases that have been fully and finally resolved by the federal courts because that would intrude on the third branch and violate the separation of powers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

Constitutional issues arise in cases in federal and state trial courts throughout the country. Once a case involving a constitutional issue begins, it follows the established procedures of that court system for all cases. Typically, there is **trial** before a judge and jury with testimony from witnesses and other evidence, and then a final judgment is entered followed by one **appeal as-of-right**, with written briefs and an oral argument about the law before a panel of judges sitting on an intermediate court of appeals. There is no guarantee, however, that the constitutional issue will be decided by the Supreme Court of the United States. Our High Court has a limited jurisdiction and in most instances the discretion whether to hear and decide a case.

Cases arrive at the Supreme Court of the United States from the highest court of the state, usually called a supreme court, but called a court of appeals in a few states. If under state procedures

(Continued on Page 480)

the case is not within the jurisdiction of the highest state court but contains a constitutional issue, it can go directly to the Supreme Court from the lower state court that has the final authority to rule on the issue. See 28 U.S.C. § 1257(a); *Brown v. Texas*, 443 U.S. 47 (1979). Most federal cases come up from the United States courts of appeals, the federal intermediate appellate courts, but some cases come up from the United States district courts, the federal trial courts. See 28 U.S.C. §§ 1253 & 1254. There are three procedures under which a case may move from a lower federal court or a state's highest court to the Supreme Court of the United States.

The first of these procedures is "**certification**"—a technically possible though highly improbable procedure under which the United States court of appeals, one of the regional courts that hear appeals as-of-right in the federal system, can state a particular legal issue and ask the Supreme Court for a binding decision on the issue. The Supreme Court can then answer the question or call the entire case up for review or refuse to do anything. Although this procedure is still "on the books," it is almost never used. See 28 U.S.C. § 1254(2); *Wisniewski v. United States*, 353 U.S. 901 (1957). The same statute does provide, however, for the extraordinary procedure of the Supreme Court taking a case up for review before the United States court of appeals has had the opportunity to rule, a procedure that the Supreme Court is somewhat more willing to use, albeit in rare and historic cases when an expeditious and final decision is a matter of imperative public importance, and an intermediate appeal would serve no judicial purpose. See 28 U.S.C. § 1254 (1); Sup. Ct. R. 11. The Supreme Court bypassed the court of appeals to bring up *United States v. Nixon*, 418 U.S. 683 (1974), and then ruled that President Nixon had to obey a district court subpoena of tape recordings of his White House conversations, a ruling that directly led to his resignation under threat of impeachment by the House of Representatives.

Earlier jurisdictional statutes elaborately distinguished between the two other procedures for obtaining Supreme Court review. First, some cases were heard by "**appeal**"—using the word in a narrow, technical legal sense to mean a guaranteed statutory right to have the merits decided and the lower court decision reviewed. Second, some cases were heard by the Court granting a "***writ of certiorari***"—by which the losing litigant in the court below asks permission and the Supreme Court exercises its discretion to grant review. Some of the older opinions will sometimes make this distinction. One other distinction under the former statutory scheme was that every affirmance and reversal of an appeal was a decision on the merits and carried some precedential effect. Even so, in reality the justices managed to avoid deciding a considerable proportion of appealed cases on jurisdictional grounds, such as a dismissal for want of a substantial federal question, a procedural conclusion to be rid of the case even though it technically satisfied the statutory criteria.

In 1988, responding to this reality and to the justices' entreaties for more formal control over their docket, Congress all but did away with Supreme Court appeals. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. Appeals are still technically a matter of right only in cases decided by a three-judge district court, which is nearly an extinct creature of the federal court system, now pretty much limited by statute to trying challenges to the constitutionality of the apportionment of congressional districts and statewide legislative districts. 28 U.S.C. §§ 1253 & 2284(a). Consequently, true appeals—cases which the Supreme Court is obliged to hear and decide—arise rather infrequently and now show up on the Supreme Court's docket mostly on the 10-year census-and-redistricting cycle. *Easley v. Cromartie*, 532 U.S. 234 (2001). Congress rarely, but occasionally, will include a particular designated grant of jurisdiction in a controversial statute that is sure to be challenged on constitutional grounds, such as the federal anti-flag burning act of 1989, which provides for an automatic appeal from the federal trial court directly to the Supreme Court, bypassing the intermediate appeal. *United States v. Eichman*, 496 U.S. 310 (1990).

Today, most of the cases the Supreme Court hears and decides, whether from a lower federal court or the highest court of the state, are there only because the Court in its discretion has granted a petition for a writ of *certiorari*. 28 U.S.C. §§ 1254 & 1257. The justices' discretion over their docket is virtually complete and they have delegated considerable responsibility to their **law clerks**, the best and the brightest of recent law school graduates who serve a one-year apprenticeship, usually after having spent a year in the chambers of a fed-

eral appeals court judge. Each justice typically has four law clerks. The petition and a response, called a brief in opposition ("Opp"), are filed with the Court, and a law clerk from one of the chambers in the "**cert pool**" writes a short memorandum to recommend whether or not the case is "**certworthy**." That memo is then circulated to all of the chambers along with the petition and opp. On the current Court, all of the justices except Justice Stevens participate in the cert pool; in his chambers, he and his law clerks go through all the petitions. Any individual justice can place a petition on the "**discuss list**" for a vote at their **conference** to discuss petitions, but most cases do not even make it to the discuss list. Grants and denials are published on the **orders list**. The "Conference" also is what the justices call themselves when they act corporately to deal with administrative matters. Under the Supreme Court's official rules, discretionary review will be granted "only for compelling reasons" in cases that present an "important matter" of federal law or a "conflict" of decisions among the lower federal courts or the state courts of last resort. Sup. Ct. R. 10. Consequently, 99 out of 100 cases are denied review inside the Skinnerian black-box of *certiorari*.

Two other procedures have grown up around these jurisdictions. The Court will "dismiss as improvidently granted" ("**DIG**") a case after full briefing and sometimes oral argument when the justices change their minds and conclude that the petition should not have been granted in the first place. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). And in some cases, the Court will dispose of a case after reviewing only the petition for *certiorari* and the brief in opposition and without full briefing or oral argument; sometimes the Court simply will decide to grant review, summarily vacate the judgment, and remand ("**GVR**") a case without an opinion for further consideration in light of an intervening Supreme Court decision; sometimes the Court will issue a brief *per curiam* opinion reversing (or rarely affirming) the result below, frequently over a dissent complaining about the truncated appellate procedure. *Terrell v. Morris*, 493 U.S. 1 (1989).

Throughout its history, the Supreme Court has admitted an institutional reluctance to pass on the constitutional validity of a duly enacted statute even when the case technically falls within its subject matter jurisdiction. Not the convenience of the parties nor the importance to the public nor the public policy preferences of the justices are controlling. In his famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936), Justice Brandeis codified a series of prudential rules under which the Supreme Court has avoided making an unnecessary or inappropriate constitutional ruling. He identified several categories of avoidance: a friendly or collusive suit, advisory opinions, issues not yet ripe for decision, the party bringing suit lacks standing, the lack of full and final judgment rendering the appeal interlocutory, and moot cases. These categories have already been addressed. Three other rules of judicial self-restraint deserve further amplification here.

First, there is an appellate procedural requirement that the Supreme Court has in common with all other appellate courts and that applies to constitutional issues as well as to other issues on appeal, namely, the **contemporaneous objection rule** of procedure. Constitutional law issues must be formally and legally preserved as error to be appealable by a higher court. Thus, a timely and proper objection must be made at trial to afford the trial court an immediate opportunity to avoid the alleged error and to signal the importance the party attaches to the question. Likewise, the issue must be presented on the first appeal as-of-right, again to offer that intermediate court the opportunity to remedy the error. This practice systematically reduces the need and demand for constitutional decisions by the Supreme Court and is a matter of deference towards the lower courts in the judicial hierarchy as well. The writ of *certiorari* itself allows the Supreme Court complete control to select which of the issues presented in the petition will be granted review, even so far as when the Court actually redrafts and restates the issue or issues to be briefed and argued by the parties.

Second, the Court will not consider a constitutional issue if the case has been disposed of in the lower court on some **nonconstitutional ground** that is sufficient to justify the final decision. The nonconstitutional ground can be procedural or substantive. The nonconstitutional ground must be independent and adequate. It must be independent of the federal constitutional ground and not be entwined with it either explicitly or implicitly. It must be adequate in the sense of being *bona fide* and broad enough to sustain the judgment

(Continued on Page 482)

and dispose of the case, i.e., of sufficient legal significance to decide the case and to justify the Supreme Court's declining to reach the federal constitutional issue.

In cases from the highest court of a state, the **independent and adequate state ground** doctrine shows due respect for the state court and avoids the risk of rendering unnecessary or advisory opinions in matters of federal constitutional law. Consequently, in *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court announced the prudential rule that a state supreme court must clearly state in its opinion that it is deciding a case on an independent and adequate state law ground, and then the United States Supreme Court will not hear or decide the case. Otherwise, without the plain statement, the federal constitutional issue will be deemed still in play and subject to judicial review by the Supreme Court. In close and difficult cases, the Supreme Court still may remand the case to the state supreme court for clarification of the basis of its decision.

The independent and adequate state ground doctrine highlights the importance of the Supremacy Clause and the principles of our federalism. The interpretations of the United States Constitution by the United States Supreme Court establish the floor below which the state courts cannot go in protecting individual rights, but state supreme courts can raise the ceiling and afford greater protections by interpreting state rights under the state constitution. For example, once the United States Supreme Court determined that commercial speech was protected by the First Amendment, a state supreme court could not reinterpret the First Amendment or some provision of the state constitution to say it somehow was not protected. That is the floor. However, once the United States Supreme Court ruled that obscene material was not protected by the First Amendment, a state supreme court could still interpret its state constitutional rights of conscience to protect obscene material. That would be raising the ceiling.

Third, one of the most significant of the prudential rules of self-restraint in the exercise of judicial review obliges the Supreme Court, in effect, to interpret the congressional statute being challenged in a way that makes it constitutional and valid. Faced with a statute that is ambiguous, as is often the case, the deciding court sometimes must choose between a broader interpretation that would make it unconstitutional and invalid versus a narrower interpretation that would render it constitutional and valid. It is obviously better for the administration of justice to choose the narrower interpretation when it is reasonable and appropriate. The Court should not go out of its way to declare statutes unconstitutional. It should not assume that the Congress intended to pass a statute that would be unconstitutional rather than one that would pass constitutional muster. Indeed, the assumption is just the opposite: whenever an otherwise acceptable construction of a statute would raise serious constitutional problems, the Supreme Court will interpret the statute and give it a reading that avoids such problems unless that reading is contrary to the plain intent of Congress. *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001). This mechanism of interpreting statutes in a constitutional manner is a matter of deference to the legislative branch that is commonly used by the federal courts with regard to federal statutes and by the high courts of the states concerning their own state statutes.

There is, however, one quite important limitation on this judicial technique: the inexorable principle that the Supreme Court of the United States may use this technique only with respect to federal statutes. It cannot interpret state and local statutes to render them constitutional. Rather, the Supreme Court must accept the state statute as it has been duly interpreted by the state court. The Supreme Court has no authority to narrow a state statute to make it constitutional. This principle necessarily results in some decisions by the Supreme Court declaring state statutes and local ordinances unconstitutional in situations in which, if the statute were federal, the Court could simply give the law a narrower interpretation and avoid having to strike it down.

This may be part of the reason that in the 200-plus years the Supreme Court has been reviewing statutes it has struck down in order of magnitude more local and state laws (approximately 1,000) than federal statutes (approximately 150) as being unconstitutional. Recall that Justice Holmes believed that the United States would not come to an end if the Supreme Court lost its power to strike down acts of Congress, but he did believe

that the Union would be imperiled if the Supreme Court could not strike down unconstitutional state laws.

Federalism and the concept of state sovereignty oblige this approach to state and local laws on the part of federal courts. The state court is the final authority on the meaning of its own state laws. No provision in the Constitution authorizes any part of the federal government to determine for a state what its law is. So too the Supreme Court of the United States has no authority whatsoever to change the definitive interpretation of state law by a state high court. The Supreme Court may, indeed it must, evaluate the constitutional validity of the state law by accepting how the state law has been interpreted by the state court.

Thus, the clichéd threat, "I will take this case all the way to the Supreme Court!" may be literally possible, but the odds are greatly against obtaining a Supreme Court ruling on the merits of any case. In the vast majority of cases brought before them, the only thing the justices officially conclude and formally announce is that they will not hear or decide the issues. "The petition for a writ of *certiorari* to the court below is denied" is the lawyers' parlance. "*Certiorari*" was the name the common law gave a writ from a higher court to a lower court ordering that the record in a case be sent up for review. This is why news accounts can be very misleading when they obliquely report that the Supreme Court "approved" of some ruling by some lower court, when all that the justices have done is to deny review without more, although occasionally members of the Court dissent from the denial to complain that the petition should be granted and the case fully reviewed. *Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940 (1978) (Stevens, J.) By tradition, it takes four justices to agree to hear a case—this is called the **Rule of Four**. Thus, a minority gets to set the agenda. There is a $300 filing fee for paid cases, but the fee is waived for poor petitioners proceeding *in forma pauperis*, who outnumber the paying petitioners 3 to 1, and for the U.S. government, which understandably is a frequent litigant in the Supreme Court. 28 U.S.C. § 1915.

The Supreme Court always sits *en banc*, that is, all the justices participate and decide every case, although some procedural matters, such as emergency stays, are handled preliminarily by the **circuit justice** for the relevant region of the country. In rare cases, an individual justice will recuse and not participate in a case because of some personal connection with the parties or the issues. There are nine justices—although the number of justices has been changed no fewer than seven times by congressional statutes and has varied between five and 10 members—who are appointed by the president, with the advice and consent of the Senate. U.S. Const., art. II, § 2, cl. 2, 28 U.S.C. § 1. A quorum of six justices is required. When a quorum does not exist, a statute provides that the case can be decided by the *en banc* court of appeals for the circuit, or alternatively set over for the next Term if a quorum is likely, or affirmed if a quorum is not likely. 29 U.S.C. § 2109. In the Supreme Court, a tie goes to the respondent: when an even number of justices are equally divided, the particular case is affirmed without becoming any kind of precedent. Justices serve "during good behaviour"—effectively until they retire or die—and they are protected against having their salaries diminished while they serve. U.S. Const., art. III, § 1. The House of Representatives can impeach and the Senate can remove a justice upon conviction of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. I, §§ 2 & 3, art. II, § 4. Early in our history, however, impeachment became what Thomas Jefferson called "a mere scarecrow." It would be unthinkable today for Congress to impeach and remove a justice based on some ruling or a judicial opinion.

The Supreme Court's annual **term** begins the first Monday in October and continues usually through the end of June. The term is divided between two-week "**sittings**," when the justices hear arguments and deliver opinions, and alternating "**recesses**," when they review petitions and work at writing their opinions. The Supreme Court's annual docket consists of more than 8,000 cases. Each October term, the Court hears oral arguments (usually 30 minutes per side) and reads **briefs** (something of a misnomer for book-length written arguments filed by lawyers) and reviews the **lower court records** in fewer than 100 cases—in recent terms right around 80 cases. **Decisions** are announced from the bench throughout the term.

All documents and briefs are matters of public record. **Oral arguments**, conversational debates between the lawyers for the parties and the jus-

(Continued on Page 484)

tices, are conducted in public. The decisions are announced in open court and then published. The only secret procedures are the justices' conference—when the nine meet without any others present to discuss and vote on cases—and their confidential individual work in chambers. The justices are aided by their law clerks in the arduous task of preparing opinions: researching the law, checking the lower court record, studying briefs and legal authorities, and exchanging memoranda with each other to argue points of law and to suggest changes in drafts. Not infrequently, these back-and-forth discussions and negotiations can be extensive and can result in one or more of the justices rethinking an earlier vote, thus shifting the ultimate outcome 180 degrees in a closely decided case.

For the argued cases, the justices write detailed, scholarly **opinions**. The chief justice—or the most senior justice in the majority when the chief justice is in the minority—assigns the responsibility of preparing a draft opinion for the Court. Individual justices, however, are free to write separate opinions and frequently do so, expressing their own views in a case. More often than not, some of the justices will write concurring opinions, explaining why they agree with the outcome but for different reasons from the majority, and others will file dissenting opinions, explaining why they think the majority is wholly mistaken. A full set of opinions in a major decision can run well over a hundred pages and a volume of ***U.S. Reports,*** the official reporter of Supreme Court decisions, annually runs 1,000-plus pages. Thus, each year another ponderous Talmudic volume is added to the shelves of published interpretations of our great charter.

It is a solemn moment, full of drama and importance, when the Marshall of the Supreme Court intones:

> Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

But each and every case has followed a prescribed jurisdictional and procedural path to get to that moment. Each and every case tells a story about real flesh-and-blood people, a genuine case or controversy over the wrongs they have suffered and the rights they seek to remedy. What the Supreme Court decides will determine the rule in their particular case and settle the general rule of law that is the Constitution for the entire nation. Still, decisions depending on the interpretation of a federal statute can always be changed simply by Congress revising the statute, and even in constitutional matters there have been five instances in history when the Constitution itself was amended to trump Supreme Court decisions. Whether the Court denies review or grants review and goes on to decide the merits, there is no further appeal in any court, however. Justice Jackson once aptly described the High Court's place atop the judicial hierarchy: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Suggested Further Readings

The literature on the Supreme Court is vast. See generally Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography* 179-85 (William S. Hein & Co., 2001). The lawyer's bible on High Court procedure is Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* (BNA Books, 8th ed., 2002). Every statistic you can imagine—and some you cannot—are contained in Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium—Data, Decisions & Developments* (Congressional Quarterly, Inc., 3d ed., 2003). Three excellent all-purpose sources on the Supreme Court and constitutional law, likely to be found in the reference section of the public library, are Joan Biskupic and Elder Witt, *Guide to the U.S. Supreme Court* (Congressional Quarterly, Inc., 3d ed. 1996); Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman, and William M. Wiecek, eds., *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 1992); Leonard W. Levy, Kenneth L. Karst, and Adam Winkler, eds., *Encyclopedia of the American Constitution* (Macmillan Reference USA, 2d ed. 2000). Finally, for an accessible and highly informative textbook that reads more like a novel, take a look at David M. O'Brien, *Storm Center—the Supreme Court in American Politics* (W.W. Norton & Co., 6th ed., 2003).

Point your Internet browser to these on-line sites for more useful information on the Supreme

Court and related links: *Preview of United States Supreme Court Cases* (www.abanet.org/publiced/preview/home.html); *Supreme Court of the United States* (www.supremecourtus.gov) (official homepage); *Federal Judicial Center* (www.fjc.gov/) (think tank of the federal courts); *Administrative Office of U.S. Courts* (www.uscourts.gov) (administrative arm of the federal courts); *FindLaw* (www.findlaw.com/10fedgov/judicial/supreme_court/index.html) (briefs, arguments, opinions, background); *Legal Information Institute* (supct.law.cornell.edu/supct/) (Cornell University Legal Information Institute); *Oyez* (www.oyez.org/oyez/frontpage) (multimedia site); *C-SPAN* (www.c-span.org/resources/judiciary.asp) (resources on the judiciary); *SCOTUSblog* (www.goldsteinhowe.com/blog/) (Court insider's blog); *Washington Post* (www.washingtonpost.com/wp-dyn/nation/courts/supremecourt/) (Supreme Court info); CNN (www.cnn.com/LAW/scotus/archive/) (Supreme Court info); *National Constitution Center* (www.constitutioncenter.org) (information on the Constitution).