APPENDIX A

WHEN May a Litigant Invoke the Constitution?

In the United States, participants in political debates regularly invoke the Constitution as an authoritative ground for political arguments. Even if we restrict the interrogative WHEN to legislative or executive officials, the answer is sweeping, for much governmental work inevitably involves constitutional interpretation. Moreover, as the American political system has developed, for better or worse (see Part III concerning the interrogative, WHO May Authoritatively Interpret the Constitution?), judges have taken a special role as constitutional interpreters. And NAACP v. Button (1963; p. ___, available at www.princeton.edu/aci) held that the First and Fourteenth amendments protect the rights of individuals and groups to use the courts to try to redress what they see as political wrongs.

The narrower question of this Appendix is: WHEN may a *litigant*, a person suing or being sued in a court, invoke the Constitution as legally protecting his or her rights or interests? To answer that sort of query we must focus on the rules that judges, especially justices of the U.S. Supreme Court, have created to regulate access to their authority to interpret the Constitution.

Besides its rather narrow original jurisdiction to hear cases in the first instance, the Supreme Court combines three appellate functions that might conceivably have been separated among different courts or, in some respects, not given to courts at all. (1) It serves as the nation's *highest court of appeals*, with the capacity to assure substantive uniformity and procedural consistency in the judicial application of federal law. (2) It operates as the ultimate *judicial* interpreter of federal legislation, deciding, if litigation arises, what Congress meant to say in its efforts to formulate public policy. And (3) it has assumed the role of final *court* of constitutional review, ascertaining the conformity of many, though not all, legally contested governmental actions with the justices' interpretations of the Constitution. Here, as in earlier chapters, we remind readers that not all public policies can be challenged in courts and that the justices will not automatically pass judgment on all policies that can be so challenged.

Although these three functions may overlap to a greater or lesser extent depending on the case, the first two functions occupy the largest portion of the Court's workload and often do not concern constitutional interpretation. The third role, however, involves the Court in the most, and the most heated, public controversies about the legitimacy of specific public polices as well as the reach of its own authority. And it is access to this third function that the Court has sought most assiduously to control through devices connected to the interrogative WHEN.

Two forces—one of practical political power and the other of normative political theory—combine to require judges to pay a marked degree of deference to the decisions of elected officials. Nevertheless, it is important to understand that the rules judges have constructed around the jurisdictional clauses of the constitutional document and congressional statutes insure that whatever the correct response to the issue of deference may be, decisions about how to respond or whether to respond at all remain firmly under the control of judges.

One can compare judicial power to diplomacy in international relations. Judges share power with legislative and executive officials who not only react to pressures from the electorate but also have their own—often strongly held—ideas about what the Constitution means and what policies the nation needs. Furthermore, those officials may have weapons—the power to spend or not spend money, to confirm or not confirm new judges, or to propose amendments to the constitutional text, for example—with which to combat the Court.[1]

Nowhere are the prudential aspects of judicial power more evident than when the Supreme Court decides whether to interpret the Constitution. Once the justices choose to interpret it, they frequently confront serious clashes among the logical imperatives of: (1) the Constitution simply as a text containing a body of legal rules and principles, (2) the Constitution as the expression of normative political theories, and (3) the Constitution as a means of coping with the compelling demands of practical government. Sometimes it may be wiser—and more often it may seem wiser—to leave resolution of these competing demands to other officials.

The Supreme Court's procedures allow it some control over timing, even of decisions on controversies it has agreed to hear. The justices can carry a case over for argument in the next term or even two terms, announce their decision many months after oral argument, remand the case to the trial court for clarification of the record, or decide the dispute on procedural rather than substantive grounds. The justices have a rule, not always followed, of deciding constitutional questions only if no other course is open.

There are other, more complex, means of control. But to understand those, one must know something of the sinuosities of federal jurisdiction and judicial organization.

I. FEDERAL JURISDICTION

A. General

Most succinctly, the term "jurisdiction" means the authority to say what the law is. Obviously, that is an enormous power, but it is not unlimited. Chapter 4 noted that judges lack a self-starter and have only limited jurisdiction to hear and decide cases. Article III of the constitutional document, as modified by the Eleventh Amendment, provides an outline of federal jurisdiction. The two organizing factors are the nature of the controversy and the status of the parties to the dispute.

1. *Nature of the Controversy.* The case must involve:

a. Interpretation of the U.S. Constitution or a federal statute or treaty;

b. Admiralty or maritime law.

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[1]For a discussion, see Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), espec. ch. 2.

2. *Status of the Parties.* One of the parties must be:

c. The United States government or any of its offices or officers;

d. A diplomatic or consular representative of a foreign nation;

e. A state government suing:

(i) Another state;

(ii) A citizen of another state;

(iii) A foreign government or its subjects;

f. A citizen of one state suing a citizen of another state;

g. An American citizen suing a foreign government or a citizen of a foreign nation;

h. A citizen of one state suing a citizen of his own state where both claim land under grants of different states.

Any one of elements (a) through (h) provides a basis for federal jurisdiction, which (subject to congressional regulations and judge-made rules) federal courts may exercise.

B. Mandatory Jurisdiction

Article III says that "the judicial power shall extend" to all of these kinds of cases "in law and equity." This sentence is imperative in mood, and Justice Story in Martin v. Hunter's Lessee (1816; p. ___, available at www.princeton.edu/aci) and some later commentators[2] have claimed that Congress was obliged to establish lower federal courts and confer jurisdiction upon them. Nevertheless, the working principle of federal judges has been that, except for the original jurisdiction of the Supreme Court, the authority to hear cases flows to federal courts not directly from Article III but indirectly through congressional statutes.[3]

In creating national courts, Congress did not give federal judges anything like full authority over these sorts of cases until after the Civil War, and even today it has not completely

[2]Julius Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), pp. 246–47. Judge Henry J. Friendly disagreed: *Federal Jurisdiction* (New York: Columbia University Press, 1973), p. 2.

[3]See espec. Cary v. Curtis (1845): "[T]he organization of the judicial power, definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their actions and authority, have been, and of right must be, the work of the legislature."

filled in Article III's outline. Moreover, Congress has granted federal courts *exclusive* jurisdiction in only a few areas—either geographic (such as the District of Columbia) or topical (such as interpretation of congressional statutes regulating bankruptcy, patents, taxes, and most aspects of federal criminal law). A private citizen who initiates a lawsuit raising a federal question typically has a choice of beginning in a state or federal court.

C. Law and Equity

The phrase "in law and equity" refers to different kinds of litigation. The principal difference between courts of law and equity lies in the nature of the remedies they offer. *Law* mainly provides *compensatory* justice. For private litigants, monetary damages will be the usual remedy, jail sentences or fines if the government secures a criminal conviction. *Equity*, on the other hand, provides *preventive* justice. It can order a defendant not to act, to cease acting, or to undo the effects of previous action. Its most common remedy is the injunction, an order directed to a named person or persons, possibly including public officials, forbidding them from certain behavior. Sometimes an injunction is quite simple, as when it prohibits an official from enforcing a particular statute. Sometimes, it can be complicated, as when it in effect requires state officials to redraw the lines of electoral districts to conform to the doctrine of "one person, one vote."

In the Judiciary Act of 1789, Congress accomplished a sweeping innovation by establishing one set of federal courts to function both as courts of law and equity.[4] For a time, however, law powers and equity powers were still conceived as separate: "federal courts had a law side and an equity side, and a case had to be on one side or the other; it could not be on both."[5] The Federal Rules of Civil Procedure, adopted in 1938, completed the merger of law and equity in federal courts. This dual capacity not only requires fewer judges, it also allows litigants to combine proceedings—for example, to file a single suit for an injunction to prevent further injury as well as for money to compensate for past injury. Most states have copied this reform, though many only in this century.

D. Cases and Controversies

Article III limits federal jurisdiction to "cases" and "controversies." These are words of art, technical terms that refer to a real dispute (as distinguished from a friendly quarrel or an academic debate) between two parties in which one has injured a legally protected right (or zone of interests) of the other or is threatening that right (or zone of interests) with immediate injury. Repeatedly, the Court has said that federal judges may not answer hypothetical questions or make decisions that will have no practical effect. The requirement that there be a "case" or

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[4]Recall Brutus's fear during the debates on ratification that Article III's delegation of both these kinds of jurisdiction to the Supreme Court would give that tribunal almost unlimited power. ("Letters of Brutus," No. 11 [1788]; reprinted above, p. ___.)

[5]Douglas Laycock, *Modern American Remedies* (3d ed.; New York: Aspen Law & Business, 2002), p. 370.

"controversy" is the reason that justices give for refusing to render advisory opinions. Related is the requirement that disputes be "ripe" for resolution (not "moot").

II. THE ORGANIZATION OF FEDERAL COURTS

Federal jurisdiction is divided into two kinds: *original*, authority to hear and decide cases as a court of first instance, that is, to hold trials; and *appellate*, authority to review decisions of lower courts. Article III specifies that the Supreme Court shall have original jurisdiction in cases involving foreign diplomats and those to which a state is a party. "In all 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."

A. Legislative Courts

There is an important difference between courts Congress has established under Article III and those it has created under powers given under Article I—for example, to govern territories. The latter are "special" or "legislative" courts.[6] They have limited jurisdiction, and their judges may serve for specific terms rather than during "good behavior." The best known legislative tribunals are the Tax Court, which hears appeals from the Internal Revenue Service, and the Court of Military Appeals, which reviews courts martial. Congress has specified that litigants may, under certain circumstances, ask "regular" federal courts to review decisions of these legislative tribunals.

B. Constitutional Courts

In Europe the term "constitutional courts" refers to special tribunals whose jurisdiction is pretty much limited to constitutional interpretation. (Other courts usually lack authority to interpret and apply the Constitution in cases that come before them.) On the other hand, in the United States the term constitutional courts refers to the tribunals Congress has created under Article III. Judges who staff these courts must be nominated by the President, confirmed by the Senate, and may be removed only by impeachment and conviction. Their jurisdiction is limited to the kinds of cases and controversies described above. Congress has vested most federal jurisdiction in three layers of courts: district courts, courts of appeals, and the Supreme Court.

1. *District Courts.* Most federal civil and criminal cases begin at this level. There are currently 94 such courts in the United States, at least one in each state, the District of Columbia, and Puerto Rico. Usually a single judge presides, though several dozen may be attached to a given court. Here trials are held and juries deliberate. Over 325,000 cases a year are filed in these courts. Many of these cases, however, are settled between the parties without trial and, in criminal cases, by "plea bargains" between defendants and U.S. Attorneys. Nevertheless, dockets are typically crowded and civil suits may take considerable time to come to trial.

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[6]See John Marshall's opinion for the Court in American Ins. Co. v. Canter (1828); and discussion in *Hart and Wechsler's The Federal Courts and the Federal System* (5th ed.; New York, NY: The Foundation Press, 2003).

In a nontechnical sense, district courts also sit as appellate tribunals when they hear petitions for habeas corpus from prisoners convicted in state courts. Normally, a person convicted in a state court who wishes to appeal must first utilize the review provided by state law. Afterward, the prisoner may ask the U.S. Supreme Court to take the case. If this effort fails, there is yet another chance: a petition to a federal district court for habeas corpus, alleging a federal constitutional flaw in the state trial.

The district judge must then examine the record and pass on the merits of the case. These petitions are usually frivolous, but occasionally a judge finds serious error and frees the prisoner. The losing side in the district court may appeal to the appropriate U.S. court of appeals, and the loser there may seek review by the Supreme Court.[7]

Some cases reprinted in this book have been appeals from three-judge district courts. These are special tribunals convened to hear a particular controversy; they have no life beyond the case that called them into existence. To prevent a single federal judge from issuing an injunction against enforcement of a state statute, Congress in 1911 required such suits to be heard by a three-judge district court, at least one of whose members had to be a judge from the court of appeals. In 1937, Congress imposed a similar requirement on suits against enforcement of federal statutes; and other regulations authorized such tribunals in other kinds of disputes, such as those under the Sherman Antitrust Act.

Three-judge courts caused a great strain on judicial energies. In 1976 Congress eliminated these tribunals except for a few situations such as apportionment cases or enforcement of the Civil Rights Acts of 1964 and 1965. As in the past, the loser in these courts can obtain review by direct appeal to the Supreme Court.

2. *Courts of Appeal.* Litigants who lose in federal district courts have one appeal as a matter of right. Congress has divided the areas served by district courts into twelve circuits, each headed by a court of appeals. (In addition, there is a Federal Circuit, which hears appeals in certain specified subject areas.) One of these circuits includes only the District of Columbia, but the others, which are numbered, sweep across the country in a fashion that reflects bargains among legislators as much as fully rational divisions of territory.

Currently, 167 judges staff the circuit courts.[8] Only six are assigned to the First Circuit but 28 to the Ninth, indicating wide disparities in caseloads. Normally three judges, assigned by

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[7]Under Chief Justice Rehnquist, the Court severely restricted the access of state prisoners to federal courts through habeas corpus. For a sharply critical analysis, see Larry W. Yackle, *Reclaiming the Federal Courts* (Cambridge: Harvard University Press, 1994).

[8]The number of federal district and circuit court of appeals judges increases dramatically if one counts the retired jurists who take "senior status," that is, formally retire but make themselves available to sit to help with burgeoning dockets.

the chief judge of the circuit, hear each case, though in rare instances the entire court sits *en banc.* Almost all cases are appeals from district courts, though the Court of Appeals for the District of Columbia also reviews orders of some federal administrative agencies.

Until the 1890s, justices of the Supreme Court "rode circuit" during part of the year and sat as trial judges. They still carry the title of circuit judges, and each is assigned to at least one circuit. Some justices try to visit their assigned areas but rarely can they hear cases there. Justices, however, may sit as circuit judges in their own chambers in Washington to hear cases that require immediate action. Usually these involve petitions to "stay" (delay the effect of) lower court orders until the full Supreme Court can decide the cases.

3. *The Supreme Court.* The Supreme Court sits at the apex of a twin system of courts. The justices have appellate jurisdiction over all cases from U.S. courts of appeals and some legislative tribunals, as well as those decisions of the highest state courts involving federal questions.

Jurisdiction over state courts, however, does not extend to interpreting state law. Federal courts generally take state laws to mean what the highest state court says they mean.[9] Even, for example, if a state constitution repeats verbatim the wording of a provision of the U.S. constitutional text, federal courts will take the state constitution to mean what the highest state court says it means rather than what the U.S. Supreme Court has said the same provision of the federal text means. If no state court has yet interpreted a state statute or constitutional provision, federal judges either will not decide the issue until state courts have had an opportunity to interpret it or, if an immediate ruling is necessary, will follow state interpretations of similar acts or clauses. This deference, however, does not in any way imply that the justices will not exercise their own judgment about the conformity of state enactments with the Constitution, statutes, or treaties of the United States.

The Supreme Court also has some original jurisdiction. Most of these cases concern disputes between states over such matters as boundaries and allocations of water resources. The Court usually appoints a "special master" to hold hearings, collect evidence, and present recommendations. The final decision, however, belongs to the justices themselves.

C. The Appellate Jurisdiction of the Supreme Court

Cases come to the Court for review in one of three ways: *certification, appeal*, or *certiorari.*

1. *Certification.* Under this seldom used procedure, a court of appeals or the Court of Claims "certifies" to the Supreme Court that a case poses an issue of such difficulty that the lower court needs instruction. Only questions of law, not of fact, can be certified. The Supreme Court may, however, require a court of appeals (though not the Court of Claims) to send the record of the case up so that the justices can decide the basic dispute rather than merely answer a

[9]But see Bush v. Gore (2000; reprinted above, p. ___).

legal question out of context.

2. *Appeal.* At one time, the Court was obliged to hear a wide range of cases that losing litigants would ask it to review. That form of appellate jurisdiction was called "mandatory." The losing litigant had a choice but, supposedly, the justices did not. At least since the 1940s, however, the Court had been treating the decision to hear an appeal as a matter of discretion. And, in recent decades, most especially in 1988,[10] Congress has whittled away at "mandatory jurisdiction," replacing it with "discretionary jurisdiction," that is, leaving it to the justices to decide whether they should hear such cases—what in fact the Court had been doing.

3. *Certiorari.* Petitions for a writ of certiorari form the main avenue to the Court's appellate jurisdiction. Unless their circumstances fit the now constricted categories of appeals, losers in courts of appeals or the highest state courts, providing they raise federal questions, who want the Supreme Court to review their cases must petition for certiorari. The Court has been receiving nearly 8,000 such petitions a year and has been granting fewer than 90.

Chapter 4 described in more detail the way the Court handles requests. Granting or denying the writ is completely within the Court's discretion. It takes a vote of only four justices to grant, although a majority of the justices may later "DIG" the writ—that is, "dismiss" it as "improvidently granted." Denial of "cert" means that the lower court's decision stands; but, because of the wide variety of reasons that might be involved, the Court's refusal to review is not a decision on the merits and has no value as a precedent.

Rule 10 of the Supreme Court Rules explicitly states that "certiorari is not a matter of right, but of judicial discretion ... [and] will be granted only for compelling reasons." That Rule then outlines *some* of the circumstances the justices consider important in evaluating petitions:

> (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;
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> (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;
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> (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.

These considerations are hardly exhaustive. Furthermore, several studies have demonstrated that

[10]Pub. L. 100–352 (1988), amending 28 U.S. Code §§ 1251ff, espec. § 1254.

the justices often ignore these factors and seem quite concerned with others.[11]

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[11]See espec. Joseph Tanenhaus et al., "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in Glendon A. Schubert, ed., *Judicial Decision–Making* (New York: The Free Press, 1963); S. Sidney Ulmer et al., "The Decision to Grant or Deny Certiorari," 6 *Law & Soc.Rev.* 637 (1972); and the spate of articles by Fowler Harper and co-authors that appeared in the *U.Pa.L.Rev.* from 1950–55. See also Melinda Gann Hall, "Docket Control as an Influence on Judicial Voting," 10 *Justice Sys. J.* 243 (1985); H. W. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991); and Doris Marie Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980).