to offer their views on "the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which 'do not give a cognizance of them to the tribunals of the country.'"

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

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

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

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

SUPREME COURT DECISION MAKING

Article III of the Constitution establishes "the judicial power of the United States" in "one Supreme Court." Initially staffed by six justices, since 1869 the Supreme Court's size has been set by Congress at nine—eight associate justices and the Chief Justice

Table 1.1 Caseload in the United States Supreme Court, 1930–2003

Term	Total Cases on Docket	Cases Decided with Opinion*
1929–1930	981	156
1939–1940	1,078	151
1949–1950	1,441	122
1959–1960	2,143	132
1969–1970	4,172	126
1979–1980	4,781	155
1989–1990	5,746	146
1990–1991	6,316	125
1994–1995	8,100	94
1999–2000	8,445	81
2002–2003	9,406	84

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

of the United States. Also by statute, the Court's annual term opens on the first Monday in October and concludes when the justices have disposed of all argued cases, usually in late June or very early July.

Access to the Supreme Court. Having a case decided by a state or lower federal court by no means assures the losing litigant of review eventually by the United States Supreme Court. The justices reject many more cases for review than they decide—indeed, so many more that most of what the Supreme Court does is to say "no." In recent terms, the justices have annually denied review in over 7,000 cases and have given plenary treatment (consisting of oral argument and a signed opinion, as explained below) to fewer than 100. Another several dozen other cases may be decided summarily. About 1,100 cases may be carried over for action the following term. Indeed, despite an enlarged docket, the number of decided cases has actually fallen. (See Table 1.1.) Moreover, prisoner appeals, most of which are assigned to the "miscellaneous" docket for indigents (where fees and other requirements are waived), are routinely granted review at a far lower rate than cases on the "paid" docket. For example, only 19 of 6,958 were granted review and decided (plenarily or summarily) from the former category in 2001–2002, as compared with 139 of the 2,210 paid cases.

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

(1) *Agenda Setting.* Petitions for review from litigants and their counsel who lost in the court below arrive in the form of documents called **briefs** that demonstrate why the Court should accept the case for decision. Litigants and their counsel who won in the court below file briefs in opposition, explaining why the Court should not grant review. A minimum of four justices must vote to accept the case. This is the so-called **rule of four.** Deciding what to decide is therefore an important stage in the judicial process. At this and other stages in Supreme Court decision making, the United States government is represented by the **solicitor general,** the

third-ranking official in the Department of Justice. Thus, when an agency of the national government such as the Federal Election Commission has lost a case in a court of appeals, it is the solicitor general who makes the call whether to seek review in the Supreme Court.

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

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

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

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

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

(4) *Conference.* Wednesday and Friday are **conference** days—the time set apart primarily for confidential discussion and decision of cases argued during the week. "As soon as we come off the bench Wednesday afternoon . . . ," Chief Justice Rehnquist has explained,

> we go into private "conference" in a room adjoining the chambers of the Chief Justice. At our Wednesday afternoon meeting we deliberate and vote on the . . . cases which we heard argued the preceding Monday. The Chief Justice begins the discussion of each case with a summary of the facts, his analysis of the law, and an announcement of his proposed vote (that is, whether to affirm, reverse, modify, etc.). The discussion then passes to the senior Associate Justice who does likewise. It then goes on down the line to the junior Associate Justice. When the discussion of one case is concluded, the discussion of the next one is immediately taken up, until all the argued cases on the agenda for that particular Conference have been disposed of.

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

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

In contrast to a norm of consensus in the nineteenth century and early twentieth century Supreme Court that discouraged published dissents (even when justices disagreed with a decision), in only about a quarter of the decisions each term today is the Court unanimous. In the rest dissenters file one or more opinions explaining their differences with the majority. According to Chief Justice Hughes, a **dissent** is "an appeal to the brooding spirit of the law, to the intelligence of a future day, when

a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Justices may also write a **concurring opinion** to indicate their acceptance of the majority decision but either an unwillingness to adopt all the reasoning contained in the opinion of the Court or a desire to say something additional.

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

SOURCE MATERIALS

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

Supreme Court Decisions. The reported decisions and opinions of the Supreme Court form the basic material for the study of constitutional law. They appear in several printed editions and formats and are accessible on the Internet.

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

1789–1800 Dallas	(1–4 Dall., 1–4 U.S.)
1801–1815 Cranch	(1–9 Cr., 5–13 U.S.)
1816–1827 Wheaton	(1–12 Wheat., 14–25 U.S.)
1828–1842 Peters	(1–16 Pet., 26–41 U.S.)
1843–1860 Howard	(1–24 How., 42–65 U.S.)
1861–1862 Black	(1–2 Bl., 66–67 U.S.)
1863–1874 Wallace	(1–23 Wall., 68–90 U.S.)
1875–	(91–U.S.)

(2) *United States Supreme Court Reports, Lawyers' Edition* (until 1996 published by Lawyers' Cooperative Publishing Company; now published by Lexis-Nexis). The

KEY TERMS

federal courts
state courts
jurisdiction
Article III courts
Article I courts
original jurisdiction
appellate jurisdiction
federal question
diversity jurisdiction
magistrate judges
certiorari
appeal
direct appeal
Ashwander rules
case or controversy
ripeness
advisory opinion
standing
nonjusticiable
political question doctrine
judicial activists
judicial restraintists
briefs
rule of four
solicitor general
amicus curiae
oral argument
conference
opinion of the Court
plurality opinion
dissent
concurring opinion
law clerks
briefing a case
petitioner
respondent
appellant
appellee
affirming
reversing
remand

QUERIES

1. Review Table 1.1 on page 31. What do the data suggest about the importance of state and lower federal courts in helping to shape American constitutional law?

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

3. Between 1800 and the 1940s, nonunanimous Supreme Court decisions were the exception, not the rule. Rarely did a published dissent appear in as many as 25 percent of the cases, and the dissent rate usually hovered near 10 percent. The pattern in the past 60 years has been sharply different. Nonunanimous decisions are the rule, not the exception. Published dissents routinely appear in at least half the decisions. What factors might account for this change? Is the Court helped or hurt by dissenting opinions?

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

SELECTED READINGS

BARROW, DEBORAH J., GARY ZUK, and GERARD S. GRYSKI. *The Federal Judiciary and Institutional Change.* Ann Arbor: University of Michigan Press, 1996.

EPSTEIN, LEE, JEFFREY A. SEGAL, and HAROLD J. SPAETH. "The Norm of Consensus on the U.S. Supreme Court." 45 *American Journal of Political Science* 362 (2001).