

2014

# Jumpstart Constitutional Law: Reading and Understanding Constitutional Law Cases

Jethro K. Lieberman  
*New York Law School*

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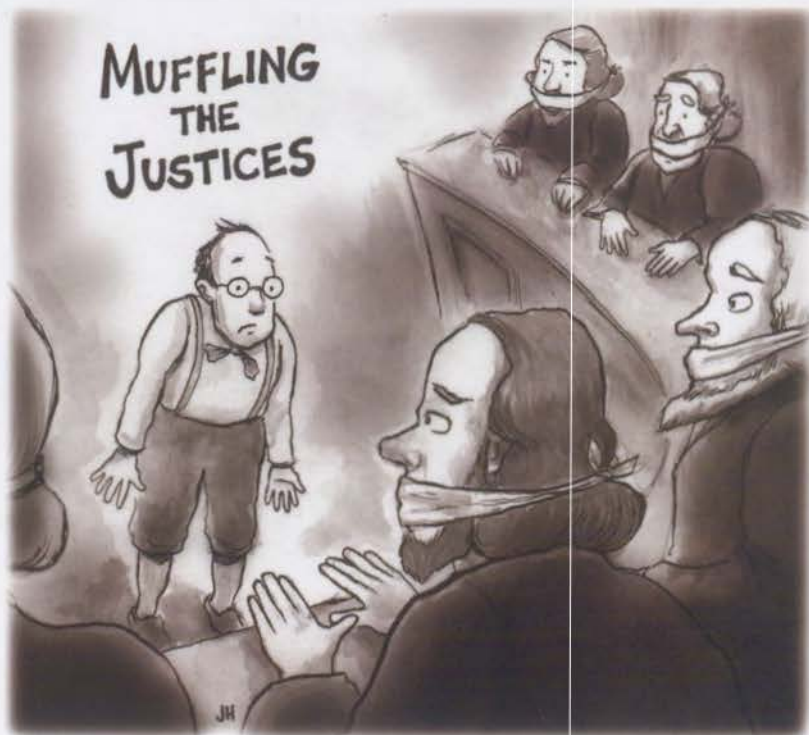
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# JUMPSTART CONSTITUTIONAL LAW

*Reading and Understanding  
Constitutional Law Cases*

**JETHRO K. LIEBERMAN**



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# JUMPSTART CONSTITUTIONAL LAW

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Constitutional Law Cases

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**JUMPSTART**

# JUMPSTART CONSTITUTIONAL LAW

Reading and Understanding  
Constitutional Law Cases

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*For Hannah and Ezekiel, students to be*



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# Preface

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*Jumpstart Constitutional Law* provides you with a straightforward approach to learning American constitutional law. It is intended to give you a framework for understanding constitutional law generally and to acquaint you with the relatively few underlying issues and questions that are or could be common to all the cases you will be studying.

That there are common issues may not seem obvious at first. In most constitutional law courses, for example, you are likely to read cases dealing with substantive issues such as the safety features of trucks driven from state to state and a minimum age for drinking. In truck cases, which arise under the Commerce Clause found in Article I, Section 8, of the Constitution, the Supreme Court said the clause prohibits states from acting, even though they said that they were mandating safety devices to protect people from being injured on the highways. In the drinking-age case, which arose under the Spending Clause (also in Article I, Section 8), Congress told the states that unless they adopt the age limit that Congress wants, even though the states think it unnecessary, they will forfeit a portion of federal construction project funds they are otherwise entitled to receive. At first glance, the two kinds of cases seem to have little or nothing to do with each other. In the typical truck case, a state wishes to impose a safety standard, but is told it may not, even though Congress has not acted. In the drinking-age case, a state seeks to resist a federal drinking-age limit, but is told it must adopt it if the state wishes the funds, even though Congress has no power to set an age limit directly. And yet the underlying questions in both types of cases are essentially the same: how far does a particular federal power extend under some clauses in the Constitution?

*Jumpstart Constitutional Law* deals with these underlying commonalities to provide a road map for spotting and understanding the relatively few fundamental principles that underlie almost any constitutional case.

The order of presentation in this book will not likely mirror the order in which you will encounter these concepts in your course. Every course is different. Your professors have different priorities and use different casebooks, and there is, in any event, no logical necessity for organizing constitutional issues in any particular way.

Opinions excerpted in this book come from the U.S. Supreme Court, which is the usual source for studying constitutional principles in required



constitutional law courses. The passages excerpted here are not identical to those in your casebook or in the cases themselves. That's because the Court's constitutional decisions are frequently lengthy (sometimes more than 100 pages), and cases in this book are limited to about a page. So although the language of the excerpted cases throughout this book is taken directly from Supreme Court cases, the excerpts are highly compressed. Much has been omitted. Only key statements are reproduced, and gaps are not indicated. Sometimes substitute words or phrases are used, and these are indicated with brackets. Occasionally, spelling has been modernized.

Only the majority opinion and some of the justices' arguments are presented here. Many of these cases, as you will see when you study them in constitutional law, were closely decided, some by a 5–4 vote. You may find yourself disagreeing with the conclusion that the majority reached in one or more of these cases. When you read the cases in your course, you should certainly delve into the reasoning and conclusion of the dissenters.

Many of the important constitutional words and phrases are defined in the Legal Terms section at the end of this book. The first time a legal term is mentioned in the text, it is **bold-faced** so that you will know that you can turn to the Legal Terms section for a concise definition or description.

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Jethro K. Lieberman  
May 2013

# JUMPSTART CONSTITUTIONAL LAW

Reading and Understanding  
Constitutional Law Cases

# Introduction

## What Is Constitutional Law?

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### A. THE PROBLEM WITH CONSTITUTIONAL LAW

The basic subject of most first-year law school courses is easy enough to grasp, but for too many students, constitutional law seems different and much more difficult to pin down. The Constitution contains a hodge-podge of commands, permissions, and restraints, often only obliquely connected. The most important constitutional phrases are far from plain ("equal protection," "jeopardy of life or limb") or seem wholly open-ended ("necessary and proper," "due process"). The Constitution deals with dozens of unrelated topics (criminal procedure, election rules, government powers, law-making methods, limitations on censorship).

Unlike such first-year staples as torts and contracts, in which the factual settings are relatively stable and, in many ways, repetitive, the cases that arise under the Constitution spring from a vast array of activities having little or no apparent common thread. There appears to be no small common core of principles applicable to every constitutional case, in the sense in which a contracts or a torts case may be said to turn on relatively few issues (intention and consideration, or duty and foreseeability). Leaf through any constitutional law casebook and you'll quickly see how many seemingly disconnected topics are presented:

- The nature and extent of power to regulate commerce (for example, if Congress is silent, may a state dictate the characteristics of mud flaps on long-haul trucks?);
- The appropriate reach of a state law of defamation applied to a public celebrity (for example, what does a movie star have to do to prove a libel case?);
- The procedures required to terminate welfare payments (for example, is the recipient entitled to a hearing before the checks stop coming?);

- The appropriate sort of person to file a constitutional lawsuit (for example, may a divorced father without custody seek, on behalf of his school-age daughter, a court judgment that the phrase “under God” in the Pledge of Allegiance violates his right to raise his child in the religious tradition of his choosing?);
- The diversity in a public school classroom (for example, whether a school board may reserve places for children of certain races or ethnicities);
- Whether a person can be punished for a lie that doesn’t harm anyone (for example, if he falsely claims to have won the Congressional Medal of Honor);
- The validity of a major national health plan (for example, whether Congress may force Americans to buy health insurance simply by providing that those who refuse must pay a penalty when they file their income tax returns);
- The limits of state power (for example, whether a state may prohibit schools from teaching a foreign language)
- The extent of religious freedom (for example, whether a state may bar a religious leader from using a psychotropic drug during a legitimate religious ceremony); and
- Whether the president may take private property to prevent a shortage of critical materials necessary to a war effort (for example, may the president seize a steel mill to avert a potential strike, which would have slowed steel production crucial to a whole range of weapons?).

The range of legal issues encompassed by the Constitution is large indeed. If you think about the Constitution simply as a grab bag of unrelated provisions, the study of constitutional law may well confuse and exasperate you. You may ask, in the midst of that confusion and exasperation, why you are being forced to study the subject. After all, you might mutter to yourself, you do not intend to be a lawyer for health insurers, or deal with Hollywood stars, or try to take down the Pledge of Allegiance, or litigate segregation plans, or prosecute liars about military medals. You plan to be a corporate lawyer, or a personal injury lawyer, or a family practitioner, not a civil rights litigator, or a health-law lawyer, or counsel to the president. Or if you do plan to be a constitutional lawyer, your ambition is to be a civil rights lawyer or a media specialist, not a litigator with concerns over mud flaps on trucks.

The reasons for studying constitutional law are straightforward. Constitutional questions lurk in almost every field of law and legal practice: in corporate law, in product liability law, in the law of remedies, in family law, in media law, in intellectual property, in real estate, in international law, and so on through the roll call of legal topics. Just as important, no student can claim

to be a truly educated lawyer or hope to understand the American legal system without confronting the one thing that every American has in common: the Constitution of the United States. But none of these reasons implies that you should grit your teeth, lower your heads, and charge down the constitutional field, doomed to collide with random issues and cases along the way. In fact, constitutional law does have important unifying principles. If you grasp these, you will be well on your way toward mastering the subject as a whole without feeling overwhelmed by the number of seemingly discrete and unrelated topics.

This chapter sets the stage for constitutional law as it is studied in the vast majority of American law schools. What follows is an outline of the common themes that run through constitutional cases generally.

## **B. STEP 1: A TOUR OF THE CONSTITUTION FROM A BIRD'S-EYE VIEW**

The original Constitution, the part that took effect in 1789, is divided into seven numbered articles, and these, in turn, contain many sections. The original articles were followed by 27 amendments ratified between 1791 and 1992. The first 10 amendments are known as the Bill of Rights. The Twenty-Seventh Amendment, astonishingly, was approved by Congress in 1789 and took 203 years to be ratified by the requisite number of states.

Article I deals with the **legislative power**; Article II, the **executive power**; Article III, the **judicial power**. Article I deals primarily with Congress, and sets out its composition, structure, procedures, duties, and powers. Article II lists presidential powers and duties, as well as procedures for electing and removing the president from office if necessary. Article III describes the Supreme Court and other federal courts, the types of cases that the federal courts may hear, and generalized procedures for criminal cases. These three articles provide the foundation and the rough shape of the federal government—from Congress, to the executive branch, the armed forces, the myriad federal agencies, and the network of federal courts. The three articles are the basis for the vast number of federal laws and regulations that govern everything from the generation of nuclear energy to manufacturing standards for ladders, from polluting smokestacks to the exact length of the mile and the weight of the pound, from standards for drilling for oil to the shape of the income tax code. These articles have been supplemented by many of the later amendments, several of them augmenting the powers of Congress by giving it authority to enact laws concerning the subject of the amendment (for example, in the realm of voting rights).

The Constitution says little about the power of the states. That should not be surprising. The Framers' purpose was to fill the national vacuum and

establish a federal government. The states already existed, and the Framers had no intention of upending the states' legal systems or political culture, except to the extent necessary to make a national government effective. They saw no need to restate or reaffirm the powers that everyone understood the states to have. Only one short section in the first three articles (Section 10 of Article I) concerns the states at all. It imposes some limitations on state activities, mostly in the realm of finance and taxation. Article IV imposes a few additional limitations on state powers and provides the means by which new states may be admitted to the Union. Article VI proclaims the Constitution and federal laws enacted under it to be supreme; state laws may not contravene or countermand federal **enactments**. A few amendments also speak to state power, in most instances limiting it in favor of the people's rights or enhanced federal power. The Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth (ratified in the 1860s)—are the most significant, curbing the previous power of the states to treat their citizens unequally or to act in ways that we would today consider arbitrary or unfair. Only the Tenth Amendment purports to apportion power directly between the federal and state governments, but it says nothing beyond the obvious: that the federal government may exercise all the powers the Constitution has given it, and other powers, if not prohibited to them, may be exercised by the states (or the people).

Those parts of the Constitution that deal with the rights of individuals, or the people as a whole, are relatively few and short. But they are significant and have been the basis for a large portion of federal constitutional cases. Sections 9 and 10 of Article I prohibit certain types of the worst abuses of the old British legal system, like legislative enactments that send people directly to jail and **ex post facto laws**, which punish people for acts not unlawful when committed. These sections bar the federal government from levying certain kinds of taxes, spending money that Congress has not first authorized, and granting titles of nobility. These sections also prohibit the states from imposing various taxes and engaging in certain financial activities or from taking actions of the sort that are ordinarily reserved for national governments, like making treaties or declaring war.

Most of the significant prohibitions against interfering with the people's rights are found in the Bill of Rights. In turn, most of these deal with matters involving crime and criminal prosecutions (and are set out in the Fourth, Fifth, Sixth, and Eighth Amendments), such as limitations on search and seizure, the right against self-incrimination, the right to a speedy and public trial by jury, and the ban on **cruel and unusual punishments**. (Most of these rights and limitations are the subject of criminal procedure courses and are not ordinarily studied in the principal required constitutional law course.) Outside the criminal arena, the most central rights are found in the First Amendment, which prohibits the government from interfering with the right to speak, to

publish, to worship, to assemble, to petition the government, and to associate with others, and the Fifth Amendment, which guarantees **due process**, that is, the right to be free from arbitrary and capricious government action. Some would add to this list the Second Amendment, which only within the past few years has been understood by the courts to guarantee individuals the right to keep weapons for self-protection.

Beyond the Bill of Rights, the Thirteenth and Fourteenth Amendments provide the most significant additional protection for individual rights. The Thirteenth Amendment bans slavery. The Fourteenth Amendment redefines "we the people," so that henceforth all are citizens who are born in the United States (except for certain narrow classes of people, such as the children of foreign diplomats stationed in the United States). The Fourteenth Amendment requires the states to adhere to due process standards and to treat people equally. Most importantly, it became the vehicle for subjecting the states to the same constitutional restraints that apply to the federal government. The remaining amendments deal with an assortment of issues, though it is noteworthy that 11 of the 17 amendments outside the Bill of Rights pertain in whole or in part to elections and the right to vote.

Perhaps surprisingly, the Constitution says very little about itself as a whole or how anyone should go about interpreting it or even changing it. True, in Article VI it proclaims itself the supreme law of the land, and Article V prescribes a method of amending the Constitution, either by Congress or state conventions. To go into effect, an amendment must be ratified by three-quarters of the states. But such amendments have occurred only 27 times in the past 225 years—the first 10 were ratified all at the same time, and one of the much later amendments repeals a previous amendment (Prohibition). The major source of constitutional change, through decisions of the courts, is nowhere discussed in the Constitution itself.

And despite the continuing, noisy, and often heated political debate about whether the Constitution should be understood in broad or narrow terms, or according to some "original intent" of those who wrote it, or instead to contemporary views of the world, the Constitution itself, perhaps astonishingly, says next to nothing. It is mostly silent about how the courts (or anyone else) should interpret its many opaque and abstract phrases or apply its terms to the concrete circumstances that changing technologies, political policies, and cultural norms prompt on a regular basis. Indeed, the only part of the Constitution that expressly discusses a rule of interpretation is the Ninth Amendment, which says that just because some rights are mentioned in the Constitution and not others, this does not mean that the others do not exist. The Supreme Court has almost never mentioned the Ninth Amendment, much less used it as the basis for decisions (although it was referred to in the *Griswold* case, p. 110).



So that is the Constitution. It is short (at 7,500 words, it is the shortest of all among the nations that have a single written constitutional document). Its brevity and abstractions make it less than clear and have prompted frequent disputes about its meaning and applicability. But it is clear about some things. It establishes and structures a national government over which the people have electoral control. It assigns to each of the three branches different powers over different issues. It says that federal powers are limited. It imposes limits in other ways, by recognizing rights that individuals hold against both federal and state governments. It makes changing fundamental constitutional norms politically difficult, but provides a means of airing and resolving disputes peacefully.

These are important matters that can play out in most kinds of law practice. There is a constitutional dimension to every branch of the law, and knowing how to spot constitutional issues, whether substantive or procedural, can be essential to the responsible and effective representation of clients in the many legal matters that will come your way over the course of your career.

### C. STEP 2: COMMON THEMES, OR THE UNDERLYING ISSUES THAT MAKE UP A CONSTITUTIONAL LAW CASE

Despite the wide range of discrete issues that surface in constitutional disputes, it is possible to sort them into a few basic categories. Here is a summary of these categories, which you will explore at greater length in the remaining chapters.

#### 1. THRESHOLD ISSUE 1: WHO MAY DECIDE CONSTITUTIONAL DISPUTES?

Just because someone argues that a course of conduct is unconstitutional does not mean that a client can bring the matter to court or that the court will consider the **merits** of the dispute. The Constitution itself deals with the threshold question of whether any particular case, whether or not it raises a substantive constitutional issue, belongs before judges. You should be aware of a cluster of questions that lurk in this general heading:

- a. Is the problem presented a **case or controversy** of the sort that a court can hear?
- b. Can the court decide the case with **finality**?
- c. Is the question posed in the case one that is open to a court to answer or is it **nonjusticiable**? For example, is it a **political question** that the Constitution has committed to another branch of government to resolve?

## 2. THRESHOLD ISSUE 2: UNDER WHAT CIRCUMSTANCES MAY A COURT DECIDE A CASE?

- a. Does the plaintiff have **standing** to bring the suit; that is, is the plaintiff the proper person to seek a remedy?
- b. Does the particular court in which the suit was filed have **jurisdiction** over the case or does the controversy belong in some other court?
- c. Is the claim ready for judicial decision or has it been filed prematurely (the claim not yet being **ripe**) or too late (the claim being **moot**)?
- d. May the claim be brought against the particular defendant or does that defendant have **immunity** from the particular claim filed?

## 3. THRESHOLD ISSUE 3: MUST THE COURT TAKE AND ANSWER A CONSTITUTIONAL QUESTION IN A PROPER CASE?

A case might be appropriate for a court to hear and decide, but that does not mean it must always do so or that it will answer particular questions posed. The issues raised under this heading include:

- a. Must the court answer every constitutional question posed or may it **avoid a constitutional issue and refuse to answer it**?
- b. If the decision could rest on one of several grounds, including a constitutional one, may the courts ignore the constitutional question?
- c. May a court abstain from hearing a case? When is **abstention** an appropriate response?
- d. What is the nature of the constitutional challenge? Is the plaintiff asserting that the statute is **invalid on its face**, or is the plaintiff making an **as applied challenge**, and how does this distinction affect the court's decision?

## 4. SUBSTANTIVE ISSUE 1: DETERMINING THE SCOPE OF GOVERNMENTAL POWERS

As important as the threshold issues are in appropriate cases, they do not arise in every case. The most extensive issues by far in constitutional litigation fall into two categories: (a) the scope of governmental powers and (b) the constitutional restraints on the exercise of power. The first major question, then, is whether the Constitution grants the federal government, or the particular branch taking a challenged action, the power to act as it has done. How is that power defined? Does the definition contain an inherent limit to the power? Because this book is not a history or analysis of the constitutional text, we will not look closely here at all, or even at very many of, the various powers granted to the branches of government. Instead, we

will examine four specific problems that bear on the problem of locating and limiting the scope of power:

- a. Is the challenged action within the scope of a power conveyed to the government?
- b. What means may be used to carry out the powers delegated to the federal government?
- c. Is the power in question open to any branch of the federal government or may it be exercised only by a particular branch?
- d. Are there inherent limitations on powers granted to the government?

## 5. SUBSTANTIVE ISSUE 2: FEDERALISM—THE RELATION BETWEEN FEDERAL AND STATE POWERS

- a. Does the power belong to the states, the federal government, or is it shared?
- b. How are conflicts between federal and state laws to be resolved?
- c. What control may the states and federal government exert over each other?

## 6. SUBSTANTIVE ISSUE 3: WHAT CONSTITUTIONAL RESTRAINTS LIMIT THE EXERCISE OF GOVERNMENTAL POWER?

Another major class of constitutional cases involves prohibitions and restraints on government power, such as the right to freedom of speech in the First Amendment, which bans the government from blocking or penalizing people who speak their minds. Although the idea of a restraint may seem quite straightforward—the First Amendment says that Congress shall not abridge freedom of speech—in fact, the problem of restraints has several less obvious features.

- a. Do constitutional restrictions apply to all those who interfere with a person's right or only to **government actors**? If only to government actors, how can we tell who they are?
- b. Does a particular constitutional restraint apply to a particular branch or to all?
- c. Which limitations in the Constitution are the states bound by?
- d. How broad are individuals' constitutional rights?
- e. What principles, which are embedded in the major abstract rights to due process and equal protection, guide our understanding of restraints on governmental action?

## D. THE BASIC CONSTITUTIONAL INQUIRY

With this summary of the basic issues in constitutional analysis, it is now possible to state, in very abbreviated fashion, a synopsis of the basic constitutional law inquiry. In general, then, if a constitutional claim challenging a governmental action is properly presented, that is,

- (a) By a plaintiff with standing,
- (b) In a case or controversy
- (c) Ripe for adjudication against
- (d) A proper defendant, and
- (e) The court has jurisdiction to hear the complaint,

then the government will prevail if

- (f) It has acted within the scope of a power conferred in the Constitution,

but will lose if

- (g) It has acted beyond any inherent limitation implicit in the power itself  
or
- (h) Is barred from so acting by a particular constitutional restraint or prohibition.

When you have finished reading the book, you should come back to this general inquiry and test it against cases that you have read in this book and that you will be reading or already are reading in your constitutional law course.

## E. FURTHER REFINEMENTS

After surveying the components of the basic constitutional inquiry, we consider three additional ways of looking at the Constitution. These are different methods that the courts use to interpret the text to reach judgments in each controversy: (1) the use of particular tests for various types of controversies; (2) interpretive tools for understanding the Constitution's words and phrases; and (3) the use of precedent to guide new cases.

### 1. METHODS OF INTERPRETING 1: USING TESTS TO DETERMINE THE LIMITS OF POWER AND THE EXTENT OF RIGHTS

As will become apparent when you have considered the questions set out in the initial chapters in more detail, the Court frequently uses one or another "test" to discern the meaning of constitutional words and phrases.

These tests go by various names—for example, **balancing**, **strict scrutiny**, **intermediate scrutiny**, and **rational basis**—and one of the important questions in many cases is determining which to apply and how to apply it. Although identifying the appropriate test is rarely the sole question in a case, it will be useful in this separate section to consider tests and how they operate.

## 2. METHODS OF INTERPRETING 2: WHAT TOOLS ARE AVAILABLE TO INTERPRET THE CONSTITUTION?

Clashing theories—**original intent**, **strict construction**, and a **living Constitution**—are the stuff of everyday political arguments, and they certainly play out in the actual approaches judges take in resolving cases. But these different approaches are not necessarily constitutional rules. The Constitution itself, as noted, provides few, if any, guides to interpretation. Nevertheless, the justices' views on the appropriate methods of interpretation can determine the outcome of a case. Although the justices rarely make explicit their theory of interpretation, every case has one or more embedded theories, and you should get comfortable identifying the many strands of constitutional interpretation.

## 3. METHODS OF INTERPRETING 3: PRECEDENT AND CHANGE

Although lawyers will rarely be called on to provide courts to which they've brought their cases a historical overview of the doctrines they are debating, your constitutional law casebook may very well do so. It is important to recognize when you are being asked to read a case that helps explain the historical origins of a current doctrine, but is not itself still "good law," and when a case actually announces or reaffirms a current constitutional understanding.

## F. THE PLAYERS AND THE PLAY: NAMES OF PARTIES AND NAMES OF CASES

In ordinary trials, and the opinions that refer to them, the usual players are the plaintiff and the defendant. By now, those words are commonplace. Constitutional disputes, as reflected in the cases, also begin at the trial level, but you will rarely read judicial opinions from trial judges. Almost all the cases you read in a constitutional law course are from appellate courts (usually the Supreme Court), and the players assume different names, depending on how they fared in the lower courts.

The usual term for the party seeking review is **appellant**. That term does not correlate with plaintiff or defendant because the person appealing is

almost invariably whoever lost at the trial stage, and, of course, the losing party could be either the plaintiff or the defendant. The party who prevailed at trial and who is opposing the appeal is known as the **appellee** (or in some jurisdictions, **respondent**). Confusingly, the parties to whom these terms apply can sometimes reverse when a case reaches a second level of review. An appellant who won an appeal in an intermediate state court of appeals can become an appellee in the state supreme court because he is opposing the losing party's further request for an appeal (the appellee below).

In some proceedings in both state and federal courts, a person bringing a legal matter may be known as the **petitioner** (for example, in divorce cases and in other proceedings in which the moving party is petitioning the court for a remedy other than money damages); in those cases, the opposing party is the **respondent**.

There are two paths for parties seeking review by the U.S. Supreme Court. One very narrow path is an appeal as of right. Under its **mandatory jurisdiction**, set out in the federal law that governs its docket, the Court is obliged to hear appeals of very few types of issues, including reapportionment cases, cases arising under certain civil rights statutes and the Voting Rights Act, and some antitrust matters. The parties in those cases are known as appellant and appellee. But as more and more litigants have clamored for Supreme Court review, Congress began nearly a century ago to relieve the justices from the pressures of the mandatory docket. Since the late 1980s, the Court has won virtually complete control over whether or not to hear cases. Technically, an appellant's request that the Court take a case to review under its **discretionary jurisdiction** is known as a **petition** for a **writ of certiorari**. That writ is an order to a lower case to 'send up' the papers in the case for review. The party seeking review in the Supreme Court is usually known as the **petitioner**, and the party opposing review is known as the **respondent**.

Most case names are arranged in the conventional way: *Clinton v. Jones*—the appellant (the losing party below) v. the appellee (the prevailing party below). Often there are multiple appellants or appellees; only one of their names each will be used in the case title. Sometimes a case name will appear with the words "ex parte" and no "v": *Ex parte McCardle*. "Ex parte" means on one side, and when used in Supreme Court cases, it usually means that the party named has petitioned for a writ of **habeas corpus** (an order requiring a warden to let the prisoner go free because the prisoner was being held unlawfully). Even less occasionally, the case name will appear in this form: *Shaughnessy v. United States ex rel. Mezei*. "Ex rel" (an abbreviation of the Latin *ex relatione*) means on the information of the **relator**, a person or public entity with special information and a particular interest in the matter. A case with this title means that the suit has been brought by the government on the application of the relator. The relator's name follows the term "ex rel" in the case title.