MAJOR PRINCIPLES OF MEDIA LAW

2017 EDITION

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Preface

This is the 28th edition of *Major Principles of Media Law*, and the 26th published on an annual revision cycle. This edition includes new developments through the end of the Supreme Court's 2015-2016 term and will be in print in time for fall 2016 classes.

As the Supreme Court's term ended in June 2016, the year was defined by the sudden death of Justice Antonin Scalia in February. The death of the conservative intellectual giant threw the Court into a state of uncertainty, and a number of cases resulted in 4-4 deadlocks. President Barack Obama nominated Merrick Garland, the chief judge of the District of Columbia Court of Appeals, to replace Scalia, but the Senate declined to even hold hearings until after the November 2016 presidential election.

Hundreds of changes take place in media law every year. This year the Supreme Court handed down several cases with First Amendment precedent. In *Williams v. Pennsylvania*, the Court expanded recusal requirements for judges. In *Heffernan v. City of Paterson*, the Court allowed a police officer to challenge under the First Amendment a demotion based on an incorrect belief that he was supporting a mayoral candidate. And in *Friedrichs v. California Teachers Association*, a 4-4 decision by the Court left in place mandatory union dues for public employees.

Beyond First Amendment cases, the 2015 term will also be remembered for several other key decisions, including striking down a Texas abortion law, overturning the president's authority to ease immigration laws, and overturning the corruption conviction of a governor.

Many other developments occurred in 2015 and 2016 with media law implications. Terrorist attacks in the U.S. and around the world increased calls for greater digital surveillance and policing of extremist speech. The website Gawker lost a trial and was ordered to pay $140 million in damages for the posting of a sex tape. President Obama signed into a law a major reform of the Freedom of Information Act on its 50th anniversary. Net neutrality had another day in court. The Federal Trade Commission issued new rules on native advertising. In several states, legislatures considered expanding the rights of student journalists. And the "Happy Birthday" song entered the public domain.

The 28th edition of *Major Principles* notes many other changes in the law. Here are just a few of the highlights of what is new in this edition.

Chapter One (The American Legal System) discusses:
- The death and legacy of Justice Antonin Scalia
- President Barack Obama's nomination of Merrick Garland to the Supreme Court
- *Williams v. Pennsylvania*, in which the Court expanded recusal requirements for judges
- Updates on the number of open judgeships in the federal courts.

Chapter Two (The Legacy of Freedom) discusses
- Legal implications of new attempts to address terrorist communications
- "Panama Papers" leak of financial records.

Chapter Three (Modern Prior Restraints) discusses:

- Updates on the *Susan B. Anthony v. Driehaus* case, in which the Sixth Circuit struck down an Ohio law prohibiting false statements in political campaigns
- *Friedrichs v. California Teachers Association*, a 4-4 decision by the Supreme Court after Justice Scalia's death that left in place mandatory union dues for public employees
- *Heffernan v. City of Paterson*, a case involving a First Amendment challenge to a government employee's demotion.
-

Chapter Four (Libel and Slander) discusses:

- Updated list of states with anti-SLAPP statutes
- Update on Jesse Ventura appellate libel case
- A Florida appellate case that reinforces the notion that even online rants are not protected as opinion unless they really ARE opinion

Chapter Five (The Right to Privacy) discusses

- A "Focus on" sidebar about the $140 million judgment against the website Gawker over a sex tape featuring professional wrestler Hulk Hogan
- *Whole Woman's Health v. Hellerstedt*, in which the Supreme Court struck down a Texas law that shut down half of the state's abortion clinics
- *Electronic Arts v. Davis*, in which the Supreme Court declined to hear an appeal involving a right-of-publicity lawsuit filed by athletes against a video game company.

Chapter Six (Copyrights and Trademarks) discusses:

- "Happy Birthday to You" passes into the public domain after 123 years
- "Blurred Lines" infringement case between Marvin Gaye's family and the team of Pharrell Williams and Robin Thicke
- The TTAB's finding for San Francisco rock group The Slants and how it might help the Washington Redskins trademark case
- Supreme Court considers fee-shifting in copyright cases in *Kirtsaeng v. John Wiley & Sons*, mark II
- A last gasp for the Authors Guild suit against Google's book scanning in the Second Circuit

Chapter Seven (Fair Trial-Free Press) discusses:

- Results of a four-year pilot study on cameras in the federal trial courts.

Chapter Eight (Newsgatherer's Privilege) discusses

- Update to Montana's shield law to protect journalists from subpoenas to third parties for their digital communications.

Chapter Nine (Freedom of Information) discusses

- Happy 50th, FOIA! The FOIA Improvement Act of 2016
- Hillary Rodham Clinton's personal e-mail account while at the State Department
- The ongoing *Detroit Free Press* quest to gain access to certain mug shots

Chapter 10 (Obscenity and Pornography) discusses:
- A Section 230 case that protects Backpage.com, even in an egregious sex trafficking allegation
- The Third Circuit's revisiting of porn actor registration laws in light of an earlier Supreme Court case

Chapter 11 (Regulation of the Electronic Media) discusses:
- A win for the FCC's net neutrality rules at the D.C. Circuit
- The FCC's latest indecency fine: $325k for a one-time, three-second video at the corner of the TV screen

Chapter 12 (Ownership and Antitrust Issues) discusses:
- The Justice Department's lawsuit to stop Tribune Publishing from purchasing Freedom Communications.

Chapter 13 (Advertising Regulation) discusses:
- New FTC rules on deception in native advertising
- U.S. post office rules on marijuana advertising

Chapter 14 (Student Press Law) discusses:
- "New Voices" developments: more states consider student speech laws
- An update on off-campus posting of a rap song: unprotected

* * *

As has been true ever since these annual revisions began, *Major Principles of Media Law* will be the first media law textbook in print with many of the year's new developments. As Wayne Overbeck has written in this *Preface* in previous years, having a textbook this current is possible only because of the emergence of desktop publishing technology—and because there are publishers willing to throw out traditional schedules for textbooks. We share Wayne's belief that an up-to-date textbook makes teaching (and learning) this challenging and always-changing subject much easier. Although much of the material is new, *Major Principles of Media Law* retains the primary goal: to present a clear, concise and comprehensive summary of the law for mass communications students.

Much of the credit should go to the many reviewers who have offered so many helpful suggestions since the first edition was written years ago. Special thanks should go to the most recent reviewers, including Stuart Babington, Spring Hill College; Janine Dunlap, Freed-Hardeman University; Andrea Frantz, Buena Vista University; Kristine Nicolini, Marian University; and Kenneth Pybus, Abilene Christian University. Past reviewers include Andy Alali, California State University, Bakersfield; Ron Allman, Indiana University Southeast; Jodi Bromley, Old Dominion University; Christopher Burnett, California State University, Long Beach; Michael Cavanagh, State University of New York at Brockport; Tom Dickson, Missouri State University; Thomas Gardner, Westfield State College; Thomas Gladney, University of Wyoming; Dale Grossman, Cornell University; Jake Highton, University of Nevada, Reno; James Landers, Colorado State University; Carole McNall, St. Bonaventure University; Fritz Messere, State University of New York at Oswego; Donald Mohr, Purdue University; Henry

Ruminsky, Wright State University; Jeff Stein, Wartburg College; and Omar Swartz, University of Colorado at Denver. Separate thanks to Tom Gardner and Robert Humphrey who have taken the time to point out typos, clarity issues and the like over the past few years.

We also offer gratitude to Wayne Overbeck, who has trusted us with this work that he so ably shepherded through so many editions, and to Rick Pullen of California State University, Fullerton (now also retired), who was co-author of the first two editions of this book. xtine burrough's design helped reshape the book, literally. Thanks also to former CSUF students Christine Amarantus for her Westboro Baptist Church protest photo and Michelle A. Scott for her wonderful photo of the Supreme Court building in all its glory; and to Lourdes Cueva Chacón for the great image of old license plates.

* * *

Genelle's thanks: To Jason Shepard, for agreeing to join me for Year Two of this wild ride; his knowledge, spirit and critical editorial eye have made and will continue to make this a far better work. To Gene and Ginner Belmas—my parents, who amaze and honor me with their ongoing love, encouragement, and support. To Michael C., my favorite online dork with whom I can discuss everything from tattoos to net neutrality. To Reshiroo, who keeps me company on many late nights buried in the law. To my journalism students and colleagues at KU, who challenge me to learn more, teach better, and keep loving what I do (and who invariably point out errors and super-cool stuff I have missed). And, as always, to Douglas Bornemann, Ph.D., J.D., whom I can never thank enough and with whom I take on the challenges and opportunities of each passing year. *L'chaim!*

Jason's thanks: To Genelle Belmas, for cementing us together on this annual adventure in our shared love of media law. To my Mom, Dad, and Grandma, who never let meager means stop me from being the first in my family to graduate college and dream big things. To my former journalism and media-law mentors, for their professional inspiration: in high school, Roxane Biffert, Loni Lown and Gail Gunderson; in college, Don Downs and Robert Drechsel; at *The Capital Times*, Dave Zweifel, Ron McCrea and Anita Weier; and at *Isthmus*, Marc Eisen and Bill Lueders. And lastly to my students at California State University, Fullerton, where I chair the Department of Communications. The student journalists I work with as publisher of the *Daily Titan* student newspaper and those in my Communications Law class remind me each time I step into the newsroom and the classroom how amazing it is that my job is to bring to life the principles found in this textbook.

Genelle I. Belmas, Ph.D.
Jason M. Shepard, Ph.D.
July 1, 2016

For updates during the academic year, access to archives of material not published in this year's print edition, and contact information, please visit our websites:
www.genellebelmas.com
www.jasonmshepard.com

A test bank for each chapter is available with an instructor account at login.cengage.com.

Table of Cases

1 The American Legal System

America has become a nation of laws, lawyers and lawsuits. Both the number of lawsuits being filed and the number of lawyers have doubled since the 1970s. California has about four times as many lawyers today as it had in 1975. Nationwide, there are more than a million attorneys. For good or ill, more people with grievances are suing somebody.

The media have not escaped this flood of litigation. The nation's broadcasters, cable and satellite television providers, newspapers, magazines, wire services, Internet services and advertising agencies are constantly fighting legal battles. Today few media executives can do their jobs without consulting lawyers regularly. Moreover, legal problems are not just headaches for top executives. Working media professionals run afoul of the law regularly, facing lawsuits and even jail sentences.

Million-dollar verdicts against the media are no longer unusual. In 2016, a Florida jury ordered the website Gawker to pay $140 million in damages to professional wrestler Hulk Hogan for posting a 90-second clip of a sex tape. Big national media are by no means the only targets. Individuals who post comments on Facebook, Twitter and Yelp have become targets of lawsuits. Likewise, anyone who works in journalism, public relations, advertising, entertainment or digital media may risk lawsuits, and threats of lawsuits, for anything from libel to copyright infringement to invasion of privacy.

More than ever before, a knowledge of media law is essential for a successful career in mass communications. This textbook was written for communications students and media professionals, not for lawyers or law students. We will begin by explaining how the American legal system works.

THE KEY ROLE OF THE COURTS

Mass media law is largely based on court decisions. Even though Congress and the 50 state legislatures have enacted many laws affecting the media, the courts play the decisive role in interpreting those laws. For that matter, the courts also have the final say in interpreting the meaning of our most important legal document, the U.S. Constitution. The courts have the power to modify or even overturn laws passed by state legislatures and Congress, particularly when a law conflicts with the Constitution. In so doing, the courts have the power to establish legal precedent, handing down rules that other courts must ordinarily follow in deciding similar cases.

But not all court decisions establish legal *precedents*, and not all legal precedents are equally important as guidelines for later decisions. The Supreme Court of the United States is the highest court in the country; its rulings are generally binding on all lower courts. On matters of state law the highest court in each of the 50 states (usually called the state supreme court) has the final say—unless one of its rulings somehow violates the U.S. Constitution. On federal matters the U.S. Courts of Appeals rank just below the U.S. Supreme Court. All of these courts are *appellate* courts; cases are appealed to them from trial courts.

Trial vs. appellate courts. There is an important difference between trial and appellate courts. While appellate courts make precedent-setting decisions that interpret the meaning of law, trial courts are responsible for deciding factual issues such as the guilt or innocence of a person accused of a crime. This fact-finding process does not normally establish legal precedents. The way a judge or jury decides a given murder trial, for instance, sets no precedent

precedent: a case that other courts rely on when deciding future cases with similar facts or issues.

appellate court: a court to which a finding from a lower court may be appealed.

questions of fact: resolutions of factual disputes that are decided by a jury.

remand: to send back to a lower court for evaluation based on new legal rules.

for the next murder trial. The fact that one alleged murderer may be guilty doesn't prove the guilt of the next murder suspect.

In civil (i.e., non-criminal) lawsuits, this is also true. A trial court may have to decide whether a newspaper or broadcaster libeled the local mayor by falsely accusing the mayor of wrongdoing. Even if the media did—and if the mayor wins his or her lawsuit—that doesn't prove the next news story about a mayoral scandal is also libelous. Each person suing for libel—like each person charged with a crime—is entitled to his or her own day in court.

Finding facts. The trial courts usually have the final say about these *questions of fact*. An appellate court might rule that a trial court misapplied the law to a given factual situation, but the appellate court doesn't ordinarily reevaluate the facts on its own. Instead, it sends the case back (*remands*) to the trial court with instructions to reassess the facts under new legal rules written by the appellate court. For instance, an appellate court might decide that a certain piece of evidence was illegally obtained and cannot be used in a murder trial. It will order the trial court to reevaluate the factual issue of guilt or innocence, this time completely disregarding the illegally obtained evidence. The appellate court's ruling may well affect the outcome of the case, but it is still the job of the trial court to decide the factual question of guilt or innocence, just as it is the job of the appellate court to set down rules on such legal issues as the admissibility of evidence.

This is not to say trial courts never make legal (as opposed to fact-finding) decisions: they do so every time they apply the law to a factual situation. But when a trial court issues an opinion on a legal issue, that opinion usually carries little weight as legal precedent.

Sometimes there is high drama in the trial courtroom, and that may result in extensive media coverage. One trial verdict may even inspire (or discourage) more lawsuits of the same kind. Still, the outcome of a trial rarely has long-term legal significance. On the other hand, a little-noticed appellate court decision may fundamentally alter the way we live. That is why law textbooks such as this one concentrate on appellate court decisions, especially U.S. Supreme Court decisions.

STRUCTURE OF THE U.S. COURT SYSTEM

Because the courts play such an important role in shaping the law, the structure of the court system itself deserves some explanation. Fig. 1 shows how the state and federal courts are organized. In the federal system, there is a nationwide network of trial courts at the bottom of the structure. Next higher are 12 intermediate appellate courts serving various regions of the country, with the Supreme Court at the top of the system.

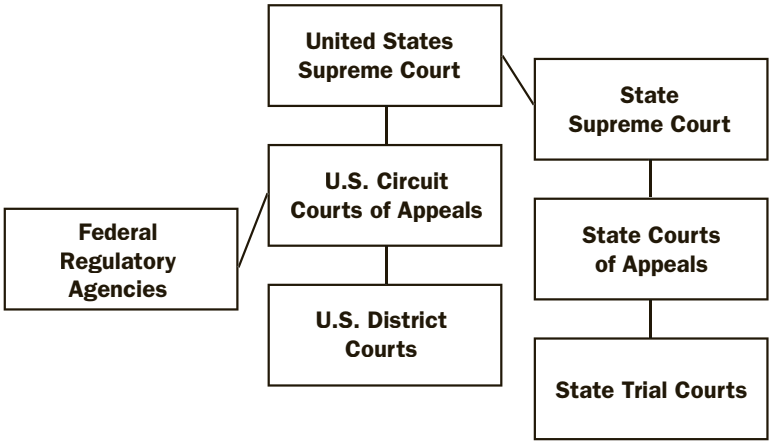

FIG. 1. Organization of the federal courts and a typical state court system.

U.S. District Courts

In the federal system there is at least one trial court called the U.S. District Court in each of the 50 states and the District of Columbia. Some of the more populous states have more than one federal judicial district, and each district has its own trial court or courts. As trial courts, the U.S. District Courts have limited precedent-setting authority. Nevertheless, a U.S. District Court decision occasionally sets an important precedent. The primary duty of these courts, however, is to serve as *trial courts* of general jurisdiction in the federal system; that is, they handle a variety of federal civil and criminal matters, ranging from civil disputes over copyrights to criminal trials of persons accused of acts of terrorism against the United States.

U.S. Courts of Appeals

At the next level up in the federal court system, there are U.S. Courts of Appeals, often called the *circuit courts* because the nation is divided into geographic *circuits*. That term, incidentally, originated in an era when all federal judges (including the justices of the Supreme Court) were required to be "circuit riders." They traveled from town to town, holding court sessions wherever there were federal cases to be heard. Each circuit court today serves a specific region of the country, and most still hear cases in various cities within their regions.

There are 11 regional circuit courts. Fig. 2 shows how the United States is divided into judicial circuits. In addition, a separate circuit court (the U.S. Court of Appeals for the D.C. circuit) exists solely to serve Washington, D.C.; it often hears appeals of decisions by federal agencies, many of them involving high-profile issues. Many "D.C. circuit" judges have been promoted to the Supreme Court. There is also a U.S. Court of Appeals for the Federal Circuit. Unlike the other circuit courts, this one serves no single geographic area. Instead, it has nationwide jurisdiction over certain special kinds of cases, including patent and customs appeals and some claims against the federal government. This court is the product of a merger of the old Court of Claims and the Court of Customs and Patent Appeals. This book will generally refer to these courts by their numbers (e.g., First Circuit, Ninth Circuit).

Some of the circuits have been divided over the years as the population grew. Until 1981, the Fifth Circuit included Alabama, Georgia and Florida, the states that now comprise the Eleventh Circuit. Legislation has been proposed repeatedly to divide the far-flung Ninth Circuit, which serves Alaska, Hawaii and the entire west coast (nine states with a total

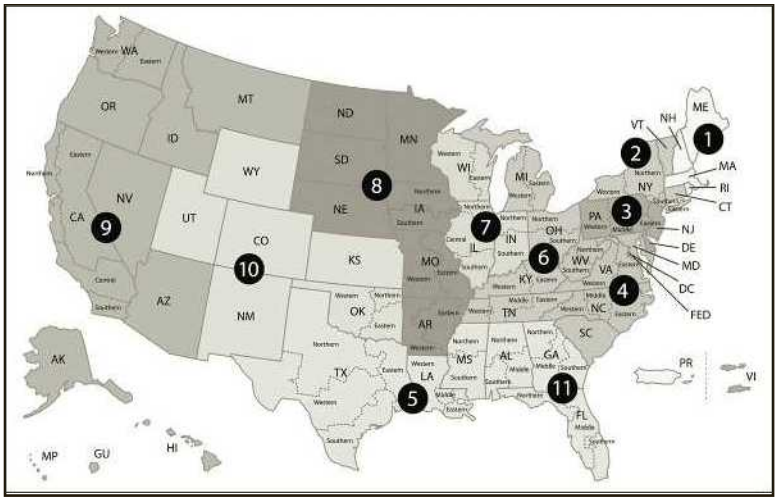

FIG. 2. Geographic Boundaries of United States Courts of Appeals and United States District Courts.

U.S. Library of Congress, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf

population of about 60 million people). Although critics say it is too large and too California-oriented because California's huge population has resulted in many of the Ninth Circuit's judges coming from one state, Congress has never agreed upon a plan to divide it. The Ninth Circuit has 29 active judges, by far the largest number of any circuit. The second largest circuit is the Fifth, which has 17 active judges. Each court also has *senior judges* who are officially retired but volunteer to continue hearing cases.

Appeals process. The losing party in most U.S. District Court trials may appeal the decision to the circuit court serving that region of the country. The decisions of the circuit courts produce many important legal precedents; on federal questions the rulings of these courts are second in importance only to U.S. Supreme Court decisions. Although each circuit court has a large number of judges, most cases are heard by panels of three judges. Two of the three constitute a majority and may issue the *majority opinion*, which sets forth the court's legal reasoning. Sometimes a case is considered so important or controversial that a larger panel of judges decides the case, usually reconsidering an earlier decision by a three-judge panel. When that happens, it is called deciding a case *en banc*. Ordinarily, an *en banc* panel consists of all of the judges serving on a particular circuit court. As the circuit courts grew larger, Congress authorized smaller *en banc* panels in some instances. The Ninth Circuit used panels of 15 judges to hear cases *en banc* for a time and now uses panels of 11.

Since these appellate courts decide only matters of law, there are no juries in these courts. Juries serve only in trial courts, and even there juries only decide factual issues (such as the guilt or innocence of a criminal defendant), not legal issues. Appellate cases are decided by judges alone, unassisted by a jury—both in the federal and state court systems.

Circuit splits. One point should be explained about the significance of the legal precedents established by the U.S. circuit courts. As long as the decision does not conflict with any U.S. Supreme Court ruling, each circuit court is free to arrive at its own conclusions on issues of law, which are then binding on lower courts in that circuit. A circuit court is not required to follow precedents established by other circuit courts around the country, although precedents from other circuits usually carry considerable weight and are often followed.

Occasionally two different circuit courts will rule differently on the same legal issue, called a *circuit split*. When that happens, the trial courts in each region have no choice but to follow the local circuit court's ruling. Trial courts located in other circuits may choose to follow either of the two conflicting precedents, or they may follow neither. Since this kind of uncertainty about the law is obviously bad for everyone, the U.S. Supreme Court often intervenes, establishing a uniform rule of law all over the country.

As well as hearing appeals of federal trial court decisions, the circuit courts also hear appeals from special-purpose courts and federal administrative agencies. For instance, decisions of both the Federal Trade Commission and the Federal Communications Commission may be appealed to the federal circuit courts. Such cases are often heard by the U.S. Court of Appeals for the D.C. circuit, giving that court a major role in communications law.

It bears noting that even though there are many judges serving in federal courts below the Supreme Court, some empty judicial seats go unfilled for months. Sometimes appointments to these seats are politically charged. A snapshot of the current state of vacancies in the federal judiciary, on June 30, 2016, showed a total of 89 judicial vacancies and 58 pending nominees (including seven in the appellate courts). This information is tracked by the Administrative Office of the U.S. Courts (www.uscourts.gov).

ride circuit: the historic practice in which judges rode from place to place to hear appeals in person.

en banc: Latin/French for "in the bench," a session where all judges on a court participate in the hearing and resolution of a case, rather than just a small panel. Pronounced "on bonk."

circuit split: when two or more circuit courts have different rules on the same issue of law; often the Supreme Court will step in to resolve the split.

The U.S. Supreme Court

The U.S. Supreme Court is the highest court in the country. Its nine justices are the highest-ranking judges in the nation, and its decisions represent the most influential legal precedents, binding on all lower courts.

Limited caseload. Because of this court's vast authority, it is common for people involved in a lawsuit to threaten to "fight this all the way to the Supreme Court." However, very few cases have any real chance to make it that far. The U.S. Supreme Court is, after all, only one court, and it can decide only a limited number of cases each year. The Supreme Court accepts at most a few hundred cases annually for review—out of about 10,000 petitions for a hearing. In the end, the court issues formal signed opinions in no more than about 100 cases each year. In recent years the Court has produced even fewer: often only 80 or 90 per term. Obviously, some screening is required to determine which cases will get that far.

In doing the screening, the Supreme Court tries to hear those cases that raise the most significant legal issues, those where the lower courts have flagrantly erred, and those where conflicting lower court decisions must be reconciled. However, the fact that the Supreme Court declines to hear a given case does not mean it necessarily agrees with the decision of a lower court. To the

contrary, the Supreme Court may disagree with it, but it may choose to leave the decision undisturbed because it has a heavy caseload of more important matters.

The fact that the Supreme Court declines to review a lower court decision establishes no precedent: for the Supreme Court to refuse to hear a case is not the same as the Supreme Court taking up the case and then affirming the lower court's ruling. When the Supreme Court declines to take a case, the lower court ruling on that case remains in force—but it is still just the decision of a lower court. There are occasions, however, when the Supreme Court accepts a case and then affirms the opinion of a lower court instead of issuing its own opinion, giving the lower court's opinion the legal weight of a Supreme Court decision.

The nine justices vote to decide which cases they will hear of the many appealed to them. Under the Supreme Court's rules of procedure, it takes four votes to get a case on the high court's calendar (commonly called "*the rule of four.*")

Getting to the Court. Cases reach the U.S. Supreme Court by several routes. The Constitution gives the Supreme Court *original jurisdiction* over a few types of cases (the first court to hear those cases). Disputes between states and cases involving ambassadors of foreign countries are examples of cases in which the Supreme Court has original jurisdiction. Even these cases may sometimes be heard in lower courts instead—with the blessing of the Supreme Court's nine overworked justices. In disputes between states, the Court may appoint Special Masters to hear evidence and prepare factual findings prior to oral argument.

Then there are a few cases in which the losing party in the lower courts has an automatic right to appeal to the Supreme Court. For example, when a lower federal court or the highest court in a state rules an Act of Congress unconstitutional, the U.S. Supreme Court must hear an appeal if asked to do so by the government. The Supreme Court is required to accept these cases for review.

Finally, there are a vast number of cases that the Supreme Court may or may not choose to review; it is not required to hear these cases, but some raise very important questions. In these cases the losing party in a lower court asks the Supreme Court to issue a *writ of certiorari* (often abbreviated *cert*). Technically, a writ of *certiorari* is an order from the Supreme Court to a lower court to send up the records of the case. *Certiorari granted* means the Court has agreed to hear an appeal, while *certiorari denied* means the Court has decided not to hear the

FIG. 3. The Supreme Court of the United States, 2010.

Steve Petteway, Collection of the Supreme Court of the United States.

Front, L-R: Justice Clarence Thomas, Justice Antonin Scalia, Chief Justice John Roberts, Jr., Justice Anthony Kennedy, Justice Ruth Bader Ginsburg.
Back, L-R: Justice Sonia Sotomayor, Justice Stephen Breyer, Justice Samuel Alito, Justice Elena Kagan.

case. (This book will use the terms "*cert* granted" or "*cert* denied.") For the Court to grant *cert*, according to the *rule of four,* four of the nine justices must vote to hear the case.

This *certiorari* procedure is by far the most common way cases reach the Supreme Court, although many more petitions for *cert* are denied than granted. Cases may reach the Supreme Court in such appeals from both lower federal courts and from state courts. The Supreme Court often hears cases that originated in a state court, but only when an important federal question, such as the First Amendment's guarantee of freedom of the press, is involved. Most of the Supreme Court decisions on libel and invasion of privacy that will be discussed later reached the high court in this way.

The Supreme Court will consider an appeal of a state case only when the case has gone as far as possible in the state court system. That normally means the state's highest court must have either ruled on the case or refused to hear it.

The justices. It would be difficult to overstate the importance of the nine justices of the U.S. Supreme Court in shaping American law. That is why bitter battles are so often fought in the U.S. Senate over the confirmation of those nominated to be Supreme Court justices. In 2016, the U.S. Senate refused to even hold confirmation hearings for President Barack Obama's nomination of Merrick Garland, the chief judge on the D.C. Circuit Court of Appeals, leaving the Court with only eight justices following the death of Justice Antonin Scalia. As a result, one of the most anticipated Supreme Court opinions of the 2015 term was a 4-4 tie. When a tie occurs, the lower court's ruling stands. The case involved a challenge to President Obama's executive authority over immigration policy, and as a result of the tie, the Fifth Circuit Court of Appeals decision ruling against Obama was left to stand. Republicans in the Senate aimed to delay Garland's nomination hearings until after the end of Obama's second term, hoping that a Republican president, if elected, would nominate a justice more to their liking.

It was not the first time that Supreme Court nominations garnered public attention. Clarence Thomas's nomination hearings in 1991 were broadcast live on television after he was accused of sexually harassing former employee Anita Hill. President George W. Bush was forced to withdraw one his nominees, Harriet Miers, in 2005 after senators from both parties questioned her qualifications.

While Supreme Court justices are appointed through a political process, justices do not always vote in the traditional liberal-conservative mold of the presidents who nominated them. As Chapter Five explains, in 1992 the Supreme Court upheld the basic principle of *Roe v. Wade,* the landmark abortion decision, by a 5-4 vote. Three justices appointed by presidents who opposed abortions (Anthony

original jurisdiction: the first court with jurisdiction to hear a case; in the case of the Supreme Court, its findings in original jurisdiction cases are final.

writ of certiorari: the order issued by the Supreme Court when it agrees to hear a case.

rule of four: four justices must agree to grant *certiorari* to hear a case before the case is permitted to be argued before the Court.

M. Kennedy and Sandra Day O'Connor, appointed by Ronald Reagan, and David H. Souter, appointed by George H.W. Bush) formed the nucleus of the majority that upheld *Roe v. Wade*. Had any of them voted as the president who nominated them probably expected, *Roe v. Wade* would have been overturned. But no one can predict how a jurist will vote once on the high court. Souter, considered a conservative when he replaced the liberal William Brennan, has written some surprisingly liberal opinions, including a stirring defense of the free press (see Chapter Eight). In contrast, Clarence Thomas, who replaced Thurgood Marshall (the first African-American ever to serve on the Supreme Court and an avowed liberal), has taken a decidedly more conservative course as a jurist than his predecessor.

The "Roberts Court." The Supreme Court is sometimes closely identified with its chief justice, who often sets the tone for the entire court.

For example, the "Warren Court," named for Earl Warren, who served as chief justice from 1953 to 1969, had an enormous influence on the modern interpretation of the First Amendment. Later in this chapter and in Chapter Four there are references to the Warren Court's major role in reshaping American libel law. But the Warren Court did far more than that: it also rewrote American obscenity law and greatly expanded the rights of those who are accused of crimes, to cite just two examples. Since the era of the liberal Warren Court ended, more conservative justices have dominated the Court. Under Chief Justice William

Focus on...
The legacy of Justice Antonin Scalia

Justice Antonin "Nino" Scalia's 30-year legacy on the U.S. Supreme Court will last well into the future. Many scholars described Scalia as one of the most significant justices in the history of the Court.

Scalia was a leading conservative judicial voice who embraced originalist and textualist approaches to judicial interpretation and assailed those who viewed the Constitution as a "living" document whose protections change as society changes.

One of the most significant decisions Scalia authored was *District of Columbia v. Heller* (554 U.S. 570, 2008), in which the Court ruled 5-4 that the Second Amendment protected an individual's right to possess a firearm – the first time the Court had ever explicitly interpreted the Second Amendment in this way.

The Constitution did not protect a woman's right to have an abortion, according to Scalia's views. He also opposed affirmative action and ruled against gay and lesbian rights in several cases.

FIG. 4. Justice Antonin Scalia.

Steve Petteway, Collection of the Supreme Court of the United States.

Scalia's views of judicial restraint led him to criticize one of the most important First Amendment decisions in the Court's history, *New York Times v. Sullivan*, as an example of judicial activism. If the legislatures wanted to make it more difficult to sue for libel, so be it. But the Courts shouldn't have made that decision, Scalia said.

When Scalia died unexpectedly in February 2016, the 79-year-old was the longest serving member of the Court. He had been appointed by President Ronald Reagan in 1986. Surprisingly, his best friend on the Court was liberal Justice Ruth Bader Ginsburg. The two regularly attended operas in Washington, vacationed together with their spouses and spent New Year's Eves together. "We were best buddies," Ginsburg said after his death.

FIG. 5. The four female Justices in the Justices' Conference Room prior to Elena Kagan's investiture, Aug. 7, 2010.

Steve Petteway, Collection of the Supreme Court of the United States.

L-R: Justice Sandra Day O'Connor (Ret.), Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg and Justice Elena Kagan.

Rehnquist, the Court began to overturn some of the precedents established by the Warren Court, particularly in such fields as criminal law.

The current court is known as the "Roberts Court," named for Chief Justice John G. Roberts Jr., appointed by George W. Bush to replace Rehnquist as chief justice when Rehnquist died in 2005. Chief Justice Roberts is one of two appointees of George W. Bush, the other being Samuel A. Alito, who replaced Sandra Day O'Connor in 2006. Roberts' record during his first years as chief justice seemed to mark him more as a consensus builder than a doctrinaire conservative, while Alito's early voting record was more conservative than O'Connor's. O'Connor had wielded great influence as a centrist. Roberts, Alito and Thomas make up the "conservative" bloc on the Court. The current "centrist" on the Court is Justice Anthony Kennedy, appointed by President Reagan in 1987. His vote is often sought by the conservative and liberal blocs on the Court, and he often is the author of 5-4 decisions. President Bill Clinton's appointees include Ruth Bader Ginsburg and Stephen G. Breyer.

President Barack Obama got his first chance to appoint a justice to the Supreme Court in 2009 when Justice David Souter announced his retirement after 19 years on the Court. He appointed Judge Sonia Sotomayor, a federal judge from the Second Circuit, who is the first Hispanic justice and the third woman to serve on the Supreme Court. Obama also made history with his appointment of Elena Kagan, dean of Harvard Law School, as solicitor general, the first woman to hold that office. The solicitor general argues for the government of the United States before the Supreme Court. When Justice John Paul Stevens announced his retirement in 2010, after nearly 35 years on the Court, Obama chose Kagan as his second Supreme Court appointment.

At the time of this writing, it remains to be seen who will replace Scalia on the Court. Whoever it is will likely reshape the Court for many years to come. Stay tuned.

The State Courts

Each of the 50 states has its own court system, as already indicated. Larger states such as California, New York, Ohio, Pennsylvania, Texas, Illinois and Michigan have two levels of state appellate courts plus various trial courts, duplicating the federal structure.