I. THE UNITED STATES SUPREME COURT: INTRODUCTORY, NON-TECHNICAL READING FOR GENERAL AUDIENCES

(A) Books on the mechanics of how the Court is organized, how it accepts cases for review, how it decides cases, and how it issues written opinions:


In the famously cloistered and secretive environment of the United States Supreme Court, this is probably as close as we’ll come to an authoritative account of life on the Court. Chief Justice Rehnquist’s book contains three interesting chapters near the end on the certiorari process the Court uses to select the cases it will hear and on two of the most important procedural steps in the decision-making process: oral argument and the “conference” system. Justice Rehnquist’s prose is a tad dry and pedantic at times, but nobody speaks on these topics with more gravitas than the Chief Justice of the United States.


After graduating from Yale Law School in 1987, Edward Lazarus served as a law clerk to Justice Harry Blackmun during the Supreme Court term that began in the summer of 1988. He waited nine years (perhaps because he knew he was burning bridges by writing an “insider’s” account of life at the Supreme Court), then wrote...
this gossipy tell-all book. Scholars and Court-watchers were offended by Lazarus’s breach of etiquette and his score-settling storytelling (Professor David Garrow, reviewing the book in the *New York Times*, called it “badly overstated” and “harshly negative”). But like all tattle-tale books, it’s morbidly fascinating and revealing in its own vainglorious way, and it has much to say about the process the justices employ when they render decisions.

(B) **Books on the Justices:**


  This book, written fourteen years ago, is partially out of date due to the retirement and replacement of four justices profiled in its pages. But five others, including the Chief, are still with us, and the informed portraits in this book of some of the Court’s most important members are lively, witty and informative.


  Short but useful profiles of all nine of today’s justices with good accounts of the political considerations and confirmation battles that preceded their appointments. You’ll encounter the names of people whom you probably haven’t thought about for a while—Douglas Ginsburg, the first President Bush’s failed nominee for the seat eventually filled by Justice Anthony Kennedy; former Senators Howard Metzenbaum (an Ohio Democrat) and Alan Simpson (a Wyoming Republican), their party’s most caustic critics of the nominees of presidents of the opposing party; and Professor Anita Hill, whose sensational sexual harassment allegations nearly torpedoed the nomination of Clarence Thomas in 1991.

(C) **Books on the Court’s Jurisprudence and Philosophy:**


  This well-written book by one of the leading lights of the Republican right—former Solicitor General, Court of Appeals judge, and Whitewater special prosecutor—presents the conservatives’ case for the jurisprudence of the Rehnquist Court. About 240 of the book’s 280 pages are devoted to essays on specific cases and areas of the law, including interesting chapters on affirmative

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action and the Supreme Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000), the case that effectively decided the last presidential election.


The left’s attack on the Supreme Court’s rightward swing during the Rehnquist era. Although not written as a rebuttal to Judge Starr’s book, it provides virtually a chapter-by-chapter counterpoint, perhaps best captured by the name of the short essay on *Bush v. Gore*—“Equal Protection for One Lucky Guy,” by former *Washington Post* Supreme Court correspondent John P. MacKenzie.

(D) **My all-time favorite book on the Supreme Court:**


This is an amazing book. John Dean served as White House Counsel under President Nixon, and his quiet but deadly testimony during the Senate Watergate Committee hearings played a major role in exposing the cover-up that led to Nixon’s resignation in 1974. It was Dean who, in October, 1971, almost casually suggested that William Rehnquist, then a relatively young Justice Department official, might make a suitable nominee for a Supreme Court vacancy that year. Dean’s book consists in large part of transcribed Oval Office conversations between Nixon and the small circle of advisors—Attorney General John Mitchell, White House aides John Ehrlichman and H. R. Haldeman, and Dean himself—who were responsible for advising Nixon on Supreme Court nominees. For those who have never read Nixon White House tapes, Dean’s book presents a grimy sense of the bigotry, paranoia, and bare-knuckled politics that informed everything Nixon did. I can’t resist one representative passage. Nixon met Rehnquist for the first time in the summer of 1971, when Rehnquist chaired a low-level Justice Department working group. After a brief ceremonial meeting with the working group in the West Wing, Nixon returned to the Oval Office with Dean.

> “John, who the hell was that clown?”
> “I beg your pardon?”
> “The guy dressed like a clown, who’s running the meeting.”
> “Oh, you mean Bill Rehnquist.”
> “What’s his name?”
> “Rehnquist,” I answered.
> “Rehnquist,” the president repeated. “Spell it,” he asked, which I did. Nixon then asked, “Is he Jewish? He looks it.”
> “I don’t think so. I think he’s of Scandinavian background.” …
Later that month, on July 24, during a meeting with Ehrlichman and Krogh, the president came back to the subject.

“You remember the meeting we had when I told that group of clowns we had around here. Renchberg and that group. What’s his name?”

“Rehnquist,” Ehrlichman replied.

All in all, an inauspicious introduction for a future Supreme Court nominee to the commander in chief. [P. 86.]

II. A SUPREME COURT PRIMER

(A) The Court in the Constitutional scheme of things. The United States Supreme Court is established by Article III of the United States Constitution and is the ultimate decision-making body in the federal judicial system. The Court consists of nine justices: the Chief Justice of the United States and eight Associate Justices. Members are appointed by the President and confirmed by the United States Senate. “To ensure an independent Judiciary and to protect judges from partisan pressures, the Constitution provides that judges serve during ‘good Behaviour,’ which has generally meant life terms.”

(B) The jurisdiction of the Supreme Court. The Supreme Court is a court of limited jurisdiction. Unlike a trial court, which is generally required to adjudicate any case filed in its clerk’s office, the Supreme Court hears only the cases it chooses to hear—and selects only a minuscule proportion of filed cases to decide on the merits. Parties who want their cases heard by the Supreme Court file a petition—known as a petition for writ of certiorari—with the Court. If four or more justices vote to “grant certiorari,” then the

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2 Article III starts with this sentence: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The Supreme Court is the only court the existence of which is mandated by the Constitution. All the other federal courts we now accept as immutable features of the judicial landscape—the powerful appellate courts (known as the Circuit Courts of Appeal), the trial courts (United States District Courts), the specialized courts (the Tax Court, the customs and patent appeals courts, the courts of military justice, and many others) exist because Congress has created them by statute. In theory, Congress could un-create them if it wished.

3 Students of American history know that the number of Associate Justices is fixed, not by the Constitution, but by federal statute. The number could conceivably be increased or decreased by legislative fiat. In 1937, President Roosevelt, persistently frustrated by a conservative majority of Supreme Court Justices opposed to New Deal legislation, proposed a judicial reorganization bill that would have enabled the President to appoint an additional justice for every sitting justice aged 70 or older—a measure that would have expanded the Court to as many as thirteen justices. Before Congress could act on the proposed legislation, however, the Supreme Court in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), reversed one of its earlier rulings and upheld the legality of minimum-wage legislation, handing the Roosevelt Administration a major victory. The Court’s decision in West Coast Hotel was instantly branded “the switch in time that saved nine,” and commentators as well as congressmen recognized that the decision “clearly signaled the Court’s acceptance of the main features of the New Deal.” Kermit L. Hall, William M. Wieck & Paul Finkelman, AMERICAN LEGAL HISTORY: CASES AND MATERIALS 487 (1991). Roosevelt’s Court-packing legislation died quietly during the summer of 1937, and nobody has seriously suggested in the intervening two-thirds of a century that the number of Supreme Court members be changed from the current nine.

4 This passage is from the Supreme Court’s official Web site—www.supremecourtus.gov/about/institution.pdf.
case is put on the Court’s calendar for argument and decision. There is no appeal from
the Supreme Court’s grant or denial of a petition for writ of certiorari. One of the Court’s
most significant powers, then, is the power to determine its own agenda through the cases
it chooses to decide—and, just as important, the cases it chooses not to decide.

Over the last quarter-century, there have been startling shifts in the Court’s caseload, both
quantitatively and qualitatively.

• In the 1979 Term—the term that started in October, 1979, and embraced the
moment in January, 1980, when Bob Bickel’s inaugural Stetson conference
convened at the Don CeSar Hotel in St. Petersburg Beach—the Court received
3,812 petitions for review. From those appeals, the Court “granted cert”—in other
words, exercised its discretionary authority to grant review—in 279 cases.
Petitioners, then, were successful in persuading the Court to grant review in 7.3
percent of all cases, or about one out every 14 petitions filed.

• Consider the corresponding figures from the most recent term for which data are
available: the 2002 Term that started in October, 2002, and ended in the summer
of 2003. The Court received 8,342 petitions for review—more than twice as many
as it received two decades earlier. Yet the Court granted review in only 155 cases.
The success rate for petitioners was only 1.8 percent, or about one in 56 petitions.

• In the 1979 Term, 29 percent of the cases the Court decided with full opinions (in
other words, cases that were briefed, argued, and decided with formal written
opinions) were what we might call traditional civil liberties cases—cases
involving civil rights guaranteed by federal statutes or by the Bill of Rights (e.g.,
due process, equal protection, free speech, freedom of religion, privacy). The
corresponding figure for the 2002 Term was 18 percent. More of the
contemporary Court’s caseload is devoted to what we could characterize as
commercial litigation—lawsuits over copyrights, patents, trademarks, securities
laws, antitrust laws, tax laws, pension laws, and the like—with room for those
cases on the Court’s docket coming at the expense of actions brought to vindicate
the constitutional rights of individual citizens.5

How, as a practical matter, does the Court decide when to grant a petition for certiorari?
Rule 10 of the Supreme Court’s Rules6 sets out three broad categories of cases that the
Court will, under appropriate circumstances, accept for review:

5 The figures in these indented paragraphs are derived from detailed statistical data reported in the HARVARD
LAW REVIEW’s annual summary of Supreme Court activity. See The Supreme Court, 1979 Term: The Statistics, 94
-6-

- When a federal appellate court enters a decision that is “in conflict with the decision of another [appellate court] on the same important matter,” the Court may grant certiorari in one or both cases (so-called “split in the circuits” jurisdiction).

- When a state court or federal appellate court “has decided an important question of federal law that has not been, or should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court,” then review may be granted (“important federal question” jurisdiction).

- The Court may accept review when a lower court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.”

All three categories contain ample wiggle room (the matter has to be “important” to warrant review, and so forth). To repeat, the Court has virtually unfettered freedom to decide what cases it will hear or not hear as part of any given year’s docket of cases.

(C) How the Court and the individual Justices’ chambers are organized. By the standards of the federal government, the United States Supreme Court is minuscule. It employs about 400 people. (The executive branch, by comparison, employs about 2.7 million civilian workers, and the legislative branch about 30,000.) Those people all work in the beautiful, Corinthian-columned, Vermont-marble-clad Supreme Court Building across the street from the United States Capitol in Washington, D.C.

Each justice presides over a very small collection of rooms and staff members referred to as “chambers.” Typically a justice employs only six or seven people: a secretary, an assistant (whom Chief Justice Rehnquist refers to in his book as a “factotum”—a jack-of-all-trades who runs errands, delivers papers, and generally keeps chambers humming), and three or four law clerks—more on them in a moment. In addition to the sixty or so people who work directly in chambers, the Court employs a central staff divided into several offices: the office of the administrative assistant to the Chief Justice (which, among other duties, manages the building and serves as the operating link between the Court, the lower federal courts, and the other branches of the federal government); the Clerk of the Court (who administers the Court’s docket, controls the flow of briefs and petitions, and supervises the printing of the Court’s decisions); the Supreme Court Marshal (responsible for building security); and the Librarian (who operates one of the

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8 The building was not occupied until 1935. Before then the Court met at various locations in the Capitol Building.
most beautiful and serene spots anywhere in official Washington—the Supreme Court Library).\(^9\)

A great deal of the intellectual heavy lifting is performed for the Justices by their law clerks. From Phillip J. Cooper, \textit{BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT} 74-75 (1995):

\begin{quote}
[Law clerks are selected from] the brightest graduates of the most prestigious law schools in the nation. In recent years most have already successfully completed a clerkship in a lower court and often come to the Supreme Court with the sponsorship of a federal district court or U.S. Court of Appeals. They are bright, quick, strong, [and] opinionated …. They have been hired through a screening process unique to each justice, often with the advice and support of law school professors, practitioners, and other judges. … The fact of a clerkship and the existence of fulsome recommendations from a member of the Court are valuable professional tickets whether the law clerk is headed for a faculty position at a leading law school, a government position, or private practice. …

[T]he justice very much needs the help and effective performance of the clerks. Their work keeps a justice’s chambers operating. From review of cert petitions, to bench memos, to research, to opinion drafts, to debate over positions the justice is contemplating, the clerks are extremely helpful. Although the clerks are only at the Court for a year, the working environment is intense, and it is very common for the justices to form friendships as well as good working relationships with their junior colleagues.

Three current Supreme Court Justices—Rehnquist, Stevens, and Breyer—are former law clerks, as are many of the litigators who make Supreme Court practice their specialty (lawyers like former Solicitors General Kenneth Starr and Seth Waxman); many of the nation’s most prominent law professors (such as Harvard’s Alan Dershowitz, Yale’s Stephen Carter, Duke’s Walter Dellinger, and Georgetown’s Vicki Jackson); and Edward Lazarus, the author of the tell-all book mentioned on the first page of this outline.
\end{quote}

\footnote{9 See generally chapter 16, \textit{They Also Serve: Other Court Staff}, in Lisa Paddock, \textit{SUPREME COURT FOR DUMMIES} (2002), pp. 269-77.}

I suspect that, with this footnote, I have just become the first Stetson Conference speaker ever to cite a book in the popular “Dummies” or “Idiots” series in his or her outline. This one isn’t bad. It’s strongest when it describes the inner organization and workings of the Court, and weaker when it tries its hand at substantive treatment of constitutional doctrine and Court decisions. It has nice photographs (for example, of the Justices’ conference room—see page 11 of this outline) and useful charts.
(D) How the Court decides cases on its docket.

(1) Submission of briefs. Once the Court grants certiorari in a particular case, the parties are given a schedule for filing briefs with the Clerk of the Court. Very arcane and specific rules govern the color, size, and contents of “briefs on the merits,” as they’re referred to in the Rules. Here, for example, are excerpts from Rule 33:

(a) … every document filed with the Court shall be prepared in a 61/8-by-91/4-inch booklet format using a standard typesetting process (hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. …

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in Roman 11-point or larger type with 2-point or more leading between lines. … Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited. Type size and face shall be consistent throughout. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 9-point or larger with 2-point or more leading between lines. The text of the document must appear on both sides of the page. [This rule and other rules of Supreme Court procedure are displayed on the Court’s Web site at www.supremecourtus.gov/ctrules/-rulesofthecourt.pdf.]

Elsewhere are equally detailed rules about the color of the brief’s cover page (the petitioner, i.e. the party that filed the petition for writ of certiorari, must use a light blue cover, the respondent a light red cover), the maximum length of the brief (no more than fifty pages without leave of Court), and the exact contents of the brief in prescribed order (questions presented for review, list of parties, table of contents, statement of jurisdiction, summary of argument, argument, and conclusion—and I’ve left some required elements out).10

10 Because the Rules confine briefs to a fixed number of pages, and because many precious pages must be devoted to mundane but required items like jurisdictional statements and lists of questions presented, the pressure on lawyers to be concise and marshal their arguments succinctly can be intense. If I may be allowed a personal anecdote: In the early 1980s, the law firm at which I was then employed represented the Commonwealth of Puerto Rico in litigation to prohibit the U.S. Navy from using an uninhabited island off the coast of Puerto Rico—the island of Viequez—for missile testing and weapons training. In 1981, the United States Court of Appeals for the District of Columbia Circuit issued an injunction prohibiting Naval target practice on Viequez. The Defense Department sought Supreme Court review, and (as is frequently the case when the petitioner is the Pentagon) the Court granted certiorari. I prepared the first draft of our brief on the merits. It was 52 pages long—slightly over the page limit. With the deadline rapidly approaching for getting the brief filed, we made the executive decision to cut the “summary of argument” from three pages to one paragraph. On February 23, 1982, our Viequez case was argued in
Although any lawyer who has passed a bar examination, practiced for three years, and tendered a check for $100 can become a member of the Supreme Court Bar, the number of lawyers who regularly argue cases before the Court is extremely small, perhaps no more than a dozen or two dozen in the entire United States—possibly the most elite practice group anywhere in the legal profession.†† Supreme Court briefs—particularly when prepared by experienced practitioners—are elegant, understated, persuasive works of written advocacy. The forum is different from any other in that Supreme Court cases are a unique amalgam of law and policy. No other court is as free from the fetter of precedent. No other court binds every other court in the country when it decides a case. The uniqueness of Supreme Court practice was captured in an essay by a lawyer who had recently prepared his first brief in a Supreme Court case:

The biggest difference from normal litigation briefs is that the facts matter virtually not at all. The Supreme Court couldn’t care less about the facts. It wants to think only about law, the more abstractly the better. If the Court thought the facts were in issue, it probably would not have taken the case. While I can’t say the factual portion of the brief is beside the point, I do think making fact-based arguments is futile, and just takes up precious pages within the page limit. The Supreme Court grants certiorari for the purpose of making a pronouncement on the law. The equities of the particular case are beside the point.


†† If you want to get a sense of just how elite Supreme Court practice is, see Kevin T. McGuire, The Supreme Court Bar: Legal Elites in the Washington Community (1993). A wonderful chart on page 184 of that book shows that, if a petitioner is represented by a Washington lawyer who has argued at least one prior case on the merits in the Supreme Court, the Court is thirteen times more likely to grant the cert petition than if the petitioner’s lawyer has never appeared before the Court. McGuire quotes a former Supreme Court law clerk as saying, ‘You look at the cover and you say, ‘Well, this should be a decent brief. This guy should talk about the real issues and not bullshit me.’ So it might get the brief read in circumstances where it wouldn’t get read.” (P. 185.)
(2) **Argument.** The Supreme Court term extends from the first Monday in October until approximately the end of the following June. During that nine-month period, arguments are scheduled (usually) on Mondays, Tuesdays and Wednesdays two weeks a month (in other words, in two-week blocks separated by two weeks during which no arguments are held). On days when arguments are scheduled, the Court usually goes into session at 10:00 a.m., hears arguments from then until the lunch hour, and adjourns for the day after (typically) two cases are argued.

From Chief Justice Rehnquist’s book *The Supreme Court*:

Each justice prepares for oral argument … in his own way. Several of my colleagues get what are called “bench memos” from their law clerks on the cases—digests of the arguments contained in the briefs and the clerk’s analysis of the various arguments pro and con. … When I start to prepare for a case that will be orally argued, I begin by reading the opinion of the lower court that is to be reviewed. I find this is a good starting point because it is the product of another court, which, like ours, is sworn to uphold the Constitution and the laws, and is presumably not biased against either party to the case. I then read the petitioner’s brief, and then the respondent’s brief. Meanwhile, I have asked one of my clerks to do the same thing, with a view to our then discussing the case.

Each of the nine members of our Court must prepare for argument in at least two cases a day, on three successive days of each week. One can do his level best to digest from the briefs and other reading what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings. [Pp. 239-40, 244-45.]

The typical argument lasts for an hour, with each side given thirty minutes. Chief Justice Rehnquist describes the ideal oral advocate in these terms:

[S]he … realizes that her spoken lines must have substantive legal meaning and does not waste her relatively short time with observations that do not advance the interest of her client. She has a theme and a plan for her argument but is quite willing to pause and listen carefully to questions. … She avoids table-pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one’s client requires controlled enthusiasm and not an impression of barely suppressed boredom. [P. 248.] 12
Conference and decision. Every Friday during weeks when the Court hears oral argument, the nine justices gather to discuss and vote on the cases argued that week. The “conference,” as the conclave is called, starts at 10:00 a.m. and can last most or all of the rest of the day. What transpires during conferences is one of Washington’s most sacred and immutable secrets. From the Chief Justice’s book:

A buzzer sounds … and the nine members of the Court then congregate in the conference room next to the chambers of the Chief Justice. We all shake hands with one another when we come in, and our vote sheets and whatever other material we want are at our places at the long, rectangular conference table. Seating is strictly by seniority: the Chief Justice sits at one end and the senior Associate Justice [currently John Paul Stevens] at the other end. … The three Associate Justices next in seniority sit on one side, and the four associates having the least seniority are on the opposite side.

To anyone familiar with the decision-making process in other governmental institutions, the most striking thing about our Court’s conference is that only the nine justices are present. There are no law clerks, no secretaries, no staff assistants, no outside personnel of any kind. If a messenger from the Marshal’s Office—the agency responsible for guarding the door of the conference—knocks on the door to indicate that there is a message for one of the justices, the junior Justice [currently Steven Breyer] opens the door and delivers it ….

I think that the tradition of having only the justices themselves present at the Court’s conference is salutary …. Its principal effect is to implement the observation of [former] Justice [Louis] Brandeis … that the Supreme Court is respected because “we do our own work.” If a justice is to participate meaningfully in the conference, the justice must himself know the issues to be discussed and the arguments he wishes to make. …

SUPREME COURT AND APPELLATE ADVOCACY (2003). In a short foreward to Frederick’s book, Supreme Court Justice Ruth Bader Ginsburg offers the distilled nineteenth-century advice of Justice Joseph Story:

Be brief, be pointed,
Lucid in style and order.
Spend no words on trifles.
Condense. …
Keep this your main guide:
Short be your speech, your matter strong and clear,
And leave off, leave off when done.

(P. ix.)
[T]he Chief Justice [begins the discussion of particular cases at the conference] by reviewing the facts and the decision of the lower court, outlining his understanding of the applicable case law, and indicating either that he votes to affirm the decision of the lower court or to reverse it. The discussion then proceeds to senior Associate down to the most junior. … With rare exceptions, each justice begins and ends his part of the discussion without interruption from his colleagues, and in the great majority of cases, by the time the most junior justice is finished with his discussion it will be evident that a majority of the Court has agreed upon a basis for either affirming or reversing the decision of the lower court in the case under discussion. …

During a given two-week session of oral argument, we will usually hear twelve cases. By Friday of the second week we will have conferred about all of them. Now the time comes for assigning the task of preparing written opinions to support the result reached by the majority.

In every case in which the chief justice votes with the majority, he assigns the case; where he has been in the minority, the senior associate justice in the majority is the assignor. Although one would not know it from reading the press coverage of the Court’s work [a rare tart remark from the Chief Justice!], the Court is unanimous in a good number of its opinions, and those of course are assigned by the chief justice. Since the odds of his being in a minority of one or two are mathematically small, he assigns the great majority of cases in which there is disagreement within the Court but which are not divided by a close vote. …

When I assign a case to myself, I sit down with the clerk who is responsible for the case and go over my conference notes with him. … After this discussion I ask the clerk to prepare a first draft of a Court opinion and to have it to me in ten days or two weeks. … The practice of assigning the task of preparing first drafts of Court opinions to clerks who are usually just one or two years out of law school may undoubtedly and with some reason cause raised eyebrows in the legal profession and outside of it. Here is the Supreme Court of the United States, picking and choosing with great care less than one hundred of the most significant cases out of the seven thousand presented to it each year, and the opinion in the case is drafted by a law clerk! I think the practice is entirely proper; the justice must retain for himself control not merely of the outcome of the case but of the explanation for the outcome, and I do not believe this practice sacrifices either.
(4)  Reporting. When the Court issues a decision, the full text is made available to lawyers, reporters and the public through two commercial databases, *Lexis* and *Westlaw*. Within a matter of days or weeks, the decisions are published in the official compilation of Supreme Court decisions, a multi-volume reference collection known as *United States Reports* and abbreviated as “U.S.” Complete sets of *United States Reports* are available in university libraries, law libraries, and depository libraries across the country.

Take a look at the first line on page 3 of this outline. There you’ll see the following case citation:


The words in italics are the official name of the case—petitioner versus respondent (using the abbreviation “v.” to represent the Latin word “versus”). The numbers following the case name mean that a person wishing to read the full text of the decision could find it by going to Volume 531 of *United States Reports* and turning to page 98—the first page of the reported decision.

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13 Advice to those wishing to be cool: A lawyer reading this citation aloud or referring to it in conversation would say “Bush vee Gore,” pronouncing the “v.” like the letter V. A busy lawyer would never say “versus.” A really erudite lawyer wishing to impress clients would substitute the English word “against” for the “v.” and would say “Bush against Gore.”
III. THE JUSTICES ON THE COURT TODAY (WITH A GLIMPSE AT TOMORROW)

A) Reproduced in an appendix at the end of this paper are the abbreviated biographies of the nine justices who serve on the Supreme Court today.\textsuperscript{14}

The Chief Justice, William Rehnquist, was originally appointed as an Associate Justice in 1972 and ascended to the Chief Justiceship in 1986, when former Chief Justice Warren Burger retired.

Like Chief Justice Rehnquist, six of the eight Associate Justices (John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas) were appointed to the Court by Republican Presidents. The Court’s most junior members—Ruth Bader Ginsburg and Stephen Breyer—were appointed by President Bill Clinton, a Democrat. (See Table 1 below.)

There is a tradition—which, with only a few isolated exceptions, has prevailed up to the present—of according the President broad latitude in appointing justices. Since President Reagan’s contentious and ultimately unsuccessful nomination of Robert Bork in 1987, five Supreme Court nominees have been confirmed by the Senate. Only the vote on Clarence Thomas’s controversial nomination in 1991 was close. (See Table 2, next page.)

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|l|l|}
\hline
Justice & Current Age & Year Appointed & By President -- & President’s Party \\
\hline
William Rehnquist & 79 & 1972 & Nixon & Republican \\
John Paul Stevens & 83 & 1975 & Ford & Republican \\
Sandra Day O’Connor & 73 & 1981 & Reagan & Republican \\
Antonin Scalia & 67 & 1986 & Reagan & Republican \\
Anthony Kennedy & 67 & 1988 & Reagan & Republican \\
David Souter & 64 & 1990 & Bush & Republican \\
Clarence Thomas & 55 & 1991 & Bush & Republican \\
Ruth Bader Ginsburg & 70 & 1993 & Clinton & Democrat \\
Stephen Breyer & 65 & 1994 & Clinton & Democrat \\
\hline
\end{tabular}
\caption{Incumbent Supreme Court Justices, by Date of Appointment and Party Affiliation}
\end{table}

\textsuperscript{14} This biographical material is taken from the Supreme Court Web site at \url{www.supremecourtus.gov/-about/biographiescurrent.pdf}.\
Table 2: Senate Votes on Supreme Court Nominees, 1988 to Present

<table>
<thead>
<tr>
<th>Nominee</th>
<th>Date</th>
<th>Senate Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kennedy</td>
<td>1988</td>
<td>97-0</td>
</tr>
<tr>
<td>Souter</td>
<td>1990</td>
<td>90-9</td>
</tr>
<tr>
<td>Thomas</td>
<td>1991</td>
<td>52-48</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>1993</td>
<td>96-3</td>
</tr>
<tr>
<td>Breyer</td>
<td>1994</td>
<td>87-9</td>
</tr>
</tbody>
</table>

(B) Some characteristics of the Supreme Court today. In comparison to other epochs in the history of the Court, today’s Court has five unique characteristics that define it in political terms.

1. It is an unusually experienced Court. The nine justices have been on the Court for an average of eighteen years each, an unusually long time. Two justices (Chief Justice Rehnquist and Justice Stevens) have been on the Court for more than a quarter of a century, and eight of the nine justices have served for ten years or more (Justice Breyer will celebrate his tenth year on the Court later this year). Even before they reached the Supreme Court, eight of the nine justices (all but Chief Justice Rehnquist) served apprenticeships as judges on the lower federal courts or state trial and appellate courts. Eight of the nine justices, in fact, have worn judicial robes for twenty years or more; only Justice Thomas (with 14 years of service as a judge) has been judges for less than two decades.

In another respect pertinent to the Stetson conference, the justices are experienced: four of them (Justices Scalia, Kennedy, Ginsburg and Breyer) were full-time university faculty members prior to their appointments to the bench. Justice Scalia taught at the University of Virginia, the University of Chicago, Georgetown University and Stanford University. Justice Kennedy spent 23 years on the faculty at the McGeorge School of Law in California. Justice Ginsburg taught for seventeen years at the law schools at Rutgers and Columbia. Justice Breyer spent more than a dozen years on the faculty at Harvard. In comparison to Courts of the past, this one has first-hand experience in academia and presumably understands what higher education stands for and how it works.

But while the justices have a great deal of experience on the bench and in the classroom, there is one respect in which they collectively lack the kind of experience members of the Court possessed in years gone by: only one justice—Justice O’Connor—has held elective office, and none has held elective federal office. In the past, some of the most distinguished members of the Court were former United States Senators (Justice Hugo Black), former governors (Chief
Justice Earl Warren), and even, once, a former President of the United States (Chief Justice William Howard Taft).

(2) *It is markedly more conservative than the Court of a quarter-century ago.* Table 3 on the next page starts on the top with the nine justices who made up the Supreme Court in 1980, the year in which the Stetson Conference began. The justices are subjectively arrayed from “left” to “right,” with the Court’s most liberal members on the left and its most conservative members on the right. The table then shows turnover on the Court over the past quarter-century. Note that during the Reagan and first Bush administrations the arrows in the chart are all directed rightward—meaning that each time a new justice was appointed to replace a retiring justice the addition was more conservative than the justice he replaced (in some instances spectacularly so, as for example when Justice Thomas replaced Justice Thurgood Marshall in 1991). During the Clinton administration the arrows changed direction and pointed to the left.

(3) *It is an unusually stable Court.* The justices who are on the Court today have served together for almost ten years—or, to make the same point in another way, it has been almost ten years since a vacancy on the Court was filled by a new justice. Not since 1823 has the Court been through a longer period without a change in personnel. By way of comparison, between 1930 and 1990, a period of sixty years, Presidents appointed 33 new justices, an average of one new appointee every 22 months.

(4) *It is an unusually—one could even say startlingly—polarized Court.* It is a Court with strongly cohesive and well-defined voting blocs, and indeed one cannot fully understand today’s Court without an appreciation of the ideological divide represented by those blocs.

- On the left, politically speaking, are the four justices who form the Court’s more or less dependably liberal bloc: Justices Stevens, Souter, Ginsburg and Breyer.

- On the right are the four justices who form the Court’s solidly conservative bloc: Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas.15

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15 There are more than a few eminent commentators who classify Justice Kennedy, not as a member of the Court’s right flank, but as a swing vote. I beg to disagree, based on the statistics compiled by the HARVARD LAW REVIEW as part of its year-end summary of the Supreme Court Term. The law review calculates for each justice a so-called “alignment quotient,” representing the frequency with which each justice votes with each of the other justices in full-opinion decisions. Alignment quotients can be compared to see how often particular combinations of justices voted as a bloc. In the October 2002 Term, Justice Kennedy voted with Chief Justice Rehnquist 83 percent of the time; with Justice Thomas 52 percent of the time; and with Justice Scalia 58 percent of the time. By contrast, he voted with the members of the liberal bloc only 47 percent of the time on average. *The Supreme Court, 2002 Term: The Statistics*, 117 HARV. L. REV. 480, 482 (2003).
Table 3: The Justices of the Supreme Court, “Left” to “Right,” 1980 to Date

<table>
<thead>
<tr>
<th>Year</th>
<th>Marshall</th>
<th>Brennan</th>
<th>Stewart</th>
<th>Stevens</th>
<th>Blackmun</th>
<th>White</th>
<th>Powell</th>
<th>BURGER</th>
<th>Rehnquist</th>
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<td></td>
<td></td>
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Capital letters: Chief Justices
Boldfaced type: Current members of the Court.
• In the middle is Justice O’Connor, who plays a remarkable role as the Supreme Court’s pivot point. The Court is so intractably divided, and Justice O’Connor’s vote is so frequently determinative of the outcome in specific cases, that as a practical matter she almost never dissents. Her vote is assiduously cultivated by advocates who argue before the Court and by the justices themselves, who reason (often with justification) that her vote will provide the crucial fifth vote needed to cement a Court majority. With tongue in cheek, one wag commented, “This has led efficiency experts to suggest that Court staff could be trimmed 88% if the redundant Justices were simply eliminated, leaving Justice O’Connor to decide the cases on her own.”

To the consternation of some legal commentators, the rigid schisms among the Justices has had another effect besides close outcomes: it has caused palpable friction among the Justices and contributed to what many perceive as a deterioration in comity and civility at the Court. One scholar compared the justices to “nine scorpions in a bottle” and chronicled many examples of intertemperate language in dissenting opinions, scornful questioning of counsel during oral arguments, and other manifestations of interpersonal tensions in the relationships among the justices. The well-known Supreme Court reporter Stuart Taylor once described the contemporary era in Supreme Court history as “the season of snarling justices,” and the phrase was quickly repeated by others writing about the Court during the Rehnquist era.

(5) Fifth and finally, this Court suffers from—or enjoys, depending on your viewpoint—an unusually high political profile. In the last decade, to an extent unprecedented in its history, the Court has been the subject of sustained, intense, and often far from flattering attention from the media. The Court has been in the spotlight because of—

• Justice Thomas’s nationally televised and highly controversial face-off against Anita Hill during his confirmation hearing in the summer of 1991;

• Chief Justice Rehnquist’s role as presiding officer during the Senate impeachment trial of President Clinton in 1998 and 1999;

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• The emergence of the Supreme Court and several individual justices as issues during the 2000 Presidential election campaign\(^\text{19}\); and

• The unprecedented attention paid to the Supreme Court’s two decisions in the Florida Presidential election dispute in December, 2000.\(^\text{20}\)

The predictable result is that the Court has become the object of rancorous partisan finger-pointing. The Court’s decision in *Bush v. Gore*, reported *Newsweek Magazine*, “exposed the raw undercurrent of politics that runs beneath [the justices]. Their actions sullied the naive but necessary faith in their Olympian neutrality. In pulling the legal fire alarm, we may have set the fire station ablaze—with high courts just another set of institutions cuffed around in the hardball culture.”\(^\text{21}\)

(C) *A Glimpse at the Supreme Court of Tomorrow: Who Might Go? Whom Might President Bush Appoint?*

(1) By contemporary standards, the nine Supreme Court Justices are collectively old—but not that old. When President Carter assumed office in 1977, the nine justices then on the Court averaged slightly less than 64 years of age. Almost a quarter-century later, when President George W. Bush was sworn in, the nine justices were an average of just over 66 years old – not a pronounced increase over a period during which the average life expectancy for American males increased by almost five years and for American females by almost two years.\(^\text{22}\)

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\(^{19}\) During the summer of 2000, Republican candidate George W. Bush, in answer to a reporter’s question, described Antonin Scalia and Clarence Thomas as the justices he most admired, and promised that his appointees to the Court would fit their conservative mold. Democratic candidate Al Gore pounced on the issue during one of the televised Presidential debates, saying in answer to a question about Supreme Court appointments: “[T]he next president is going to appoint three, maybe four Justices of the Supreme Court. And Governor Bush has declared to the antichoice groups that he will appoint Justices in the mold of Scalia and Clarence Thomas who are known for being the most vigorous opponents of a woman’s right to choose.” “Supreme Interest: For Some Justices, The Bush-Gore Case Has a Personal Angle,” *Wall Street Journal*, December 12, 2000, page A1.

\(^{20}\) For access to the complete texts of court decisions and briefs in the interrelated cases constituting the Florida Presidential election dispute, see the “Florida Election Cases” page on the Supreme Court Web site—[www.supremecourts.gov/florida.html](http://www.supremecourts.gov/florida.html).

\(^{21}\) “Disorder in the Courts: Judicial Rollercoaster: Bush vs. Gore is Headed Back to the U.S. Supreme Court. Will the Fierce Legal Battles Finally Get Us a New President and End the Chaos--or Ignite a Constitutional Crisis?”, *Newsweek Magazine*, December 18, 2000, page 26.

Still, there are differences between the Court now and the Court in 1977. The Carter Court had only one justice who was more than 69 years old; today’s Bush Court has four, including one (Stevens) in his 80s. For another, the justices today may not be as healthy, collectively, as those who served two decades ago. Two of today’s justices (O’Connor and Ginsburg) are cancer survivors, and two (Rehnquist and O’Connor) have disabling back problems. Finally, some Court watchers speculate that partisan rancor among the justices may take its toll in two ways: it may fatigue battle-weary justices to the point where they might consider retiring, and it may prompt conservative justices to retire during the incumbency of a conservative President who could presumably be trusted to appoint ideologically sympathetic replacements. Some compare the situation today to the one that existed in 1993, when the newly elected Democratic President, Bill Clinton, inherited a politically divided Court that had one justice in his eighties (Justice Harry Blackmun, then 84), two in their seventies (Justices Byron White, then 75, and Stevens, then 72), and an average age of 63. In the first two years of President Clinton’s first term, two justices retired (Blackmun and White) and were replaced by Clinton appointees (Ginsburg and Breyer).

At any rate, most observers of the Court, including at least one of the justices, speculate that the president elected this year may have two, three, or even four vacancies to fill in the next few years. The justices most likely to leave the Court are widely assumed to be—

- **Justice O’Connor.** At age 73, she is not in good health and may be ready to return to her home in Arizona.

- **Chief Justice Rehnquist.** A member of the Court for 32 years and Chief Justice for the last 17, he is almost 80 years old and in constant pain from a chronically bad back. If he were to remain on the Court until the end of President Bush’s current term, he would at that point be one of the oldest men ever to serve as Chief Justice and would have served longer than any Chief in almost a century.

- **Justice Stevens.** Although he is the oldest of the currently serving justices, he “boasts of beating opponents half his age at tennis” and may not be

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23 “No less an authority than Justice Thomas mused to a reporter that the next president would ‘certainly’ get to fill some vacancies.” Charles Lane, “Chance for Change Makes High Court a Rallying Point, Washington Post, November 5, 2000, page A6.

24 Tony Mauro, “One New Justice May Tip Court,” USA Today, August 23, 2000, page 15A. And see Charles Lane, “Chance for Change Makes High Court a Rallying Point, Washington Post, November 5, 2000, page A6: “[Justice] Stevens is in vigorous health, has arranged a schedule that permits him to spend ample time at a vacation
ready for ideological reasons to retire, but few justices have served into their mid-80s.

- **Justice Ginsburg.** She is 70 and has spent several years undergoing chemotherapy and radiation treatment for colon cancer.

(2) Whom would the next president select if he were to have one or more vacancies to fill on the Supreme Court? The answer depends, of course, on who the next president is and which justice’s retirement creates the vacancy. For example, if Justice O’Connor or Justice Ginsburg were to leave, there might be pressure on the president from some quarters to appoint a woman to fill that vacancy. Similarly, a vacancy in the Chief Justiceship might get caught up in political cross-currents; at least a few commentators have identified Antonin Scalia as an eager candidate to replace William Rehnquist as the Court’s next Chief Justice, and given then-Governor Bush’s words of praise for Justice Scalia during the last presidential campaign that idea may not be far-fetched if the current president is elected to another term.²⁵

home in Florida and enjoys certain prerogatives on the court by virtue of being the senior associate justice. A former law clerk who met with the justice recently came away convinced that Stevens showed no signs of losing interest in his work. ‘He still gets a charge out of it,’ the former clerk said.”

²⁵ I must pause here to relate one of the more delightful anecdotes from the 2000 campaign. During the last few months of the campaign, Vice President Gore hammered away at his opponent for identifying Justice Scalia as one of the members of the Supreme Court whom he admired most. At an annual conference on the Supreme Court held at the College of William and Mary in the fall of 2000, the tart-tongued dean of Supreme Court correspondents, Lyle Denniston of the *Baltimore Sun*, reported on some investigative digging he had done to determine when and under what circumstances Governor Bush had first proclaimed his admiration for Justice Scalia. It turned out that the Governor had appeared many months before on the NBC news show “Meet the Press.” He and host Tim Russert engaged in the following colloquy, during which the Governor revealed that he did not know Justice Scalia’s first name and appeared not to have a clue about his record on the Court:

*Russert:* Which Supreme Court justice do you really respect?

*Bush:* Well, that’s – Anthony [sic] Scalia is one.

*Russert:* He is someone who wants to overturn Roe v. Wade.

*Bush:* Well, he’s a – there’s a lot of reasons why I like Judge [sic] Scalia. … He’s an unusual man. He’s an intellect. The reason I like him so much is I got to know him here in Austin when he came down. He’s witty, he’s interesting, he’s fun. There’s a lot of reasons why I like [him].

The colloquy is reproduced in Michael McGough, “Supreme Speculation,” *Pittsburgh Post-Gazette*, October 1, 2000, page E1. I will leave to others the task of identifying potential Supreme Court nominees who meet the President’s criteria that they be “interesting” and “fun.”
These caveats aside, what can we predict today about the kinds of candidates who might be nominated for Supreme Court vacancies, the reception those nominees might receive on Capitol Hill, and the impact new members might have on the fragile political and judicial dynamics of a divided Court? In no particular order, here are two concluding observations on the future of the Supreme Court regardless of who is elected president this fall.

- It is possible, maybe even probable, that the nomination of a new Supreme Court justice would unleash a partisan confirmation fight of such ferocity that it would make the World Wrestling Federation SmackDown look tame by comparison. The close split among the justices and the large number of 5-4 decisions rendered by this Court suggest that the appointment of even one new member could make a portentous difference in the balance of political and philosophical power on the Court. The high stakes are amplified by the narrowness of the Republicans’ hold on the Senate, the willingness of emboldened Senate Democrats to use parliamentary and delaying tactics against conservative nominees, and frayed Congressional nerve endings caused by partisan wrangling on almost every domestic issue before Congress.

Supreme Court nominations are acted upon in the first instance by the Senate Judiciary Committee. The Committee is populated by caustic, sharp-elbowed veterans of political trench warfare. Of all the standing committees in the Senate, none is as bitterly divided along partisan and ideological lines as Judiciary. The ten Republican members are among the Senate’s most conservative, and the nine Democratic members are considerably to the left of the Democratic mainstream. Among the most venerable of the various scales used to rate the comparative liberal (or conservative) voting records of Senate members is one compiled each year by the liberal lobbying group Americans for Democratic Action (ADA). Senators are rated on a scale from zero to 100, with zero meaning that a particular Senator did not adopt the liberal position on a single key vote and 100 meaning that the Senator supported the liberal position every time. In 2002 (the last year for which ADA scores are posted on the organization’s Web site), the seven Republicans who were Committee members that year had an average ADA rating of slightly more than 11. The average for the nine Democrats was 87. The score of the lowest-ranking Democrat (John Edwards of North Carolina) was twice as high as the score of the highest-ranking Republican (Arlen Specter of Pennsylvania).26 It’s a committee, in short, that isn’t afraid to cast partisan
votes and doesn’t shy away from bare-knuckled politics in the consideration of Presidential nominees to the federal judiciary.

<table>
<thead>
<tr>
<th>Senator</th>
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<th>Score</th>
<th>Senator</th>
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“N/A” means that the Senator was elected for the first time in November, 2002, and was not a member of the Judiciary Committee in calendar year 2002.

- Finally, and as a good segue to the presentations that will follow my own this afternoon, the alteration of even a single vote on today’s Court could presage seismic shifts in Supreme Court jurisprudence in the immediate future. Some of the most provocative issues on the social agenda—abortion rights, affirmative action, Eleventh Amendment and sovereign immunity, the right to be protected from discrimination on the basis of sexual orientation—were all the subjects of 5-4 decisions in recent Supreme Court terms. The addition of even a single new Justice could create a new majority on either the right or the left of the Court, and two or more new Justices would almost certainly rearrange the existing voting blocs.

On page 25 of this outline is a partial list of major cases from the last three Supreme Court terms that were decided by one-vote margins. As you scan the list, consider the impermeability of the Court’s two principal voting blocs (the conservative bloc of Rehnquist, Kennedy, Scalia, and Thomas, and the liberal bloc of Stevens, Souter, Ginsburg, and Breyer). Look at the interesting (albeit slightly outdated) Web site called “A Vacancy on the Court” maintained by Dr. George Watson, a professor at Arizona State University. The Web site can be found at [http://partners.is.asu.edu/~george/vacancy](http://partners.is.asu.edu/~george/vacancy).
pivotal role Justice O’Connor plays as the tie-breaking vote. And take a look at the landmark decision last year in *Grutter v. Bollinger*, the University of Michigan affirmative action case. Reflect on the fact that, of the five justices who made up the majority, one is in his mid-80s and two others are in poor health. It’s easy to imagine that if a conservative Republican president, buoyed by a Republican majority on the Senate Judiciary Committee and intent on solidifying the party’s conservative Republican base, were reelected in 2004, he might have an opportunity during his second term to appoint new justices less sympathetic to affirmative action than the justices they replace.
<table>
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<td>Consideration of race in a university admissions policy is constitutional.</td>
<td>O'Connor</td>
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<td>U.S. LEXIS 4800</td>
<td></td>
<td>Stevens</td>
<td>Kennedy</td>
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<td>Scalia</td>
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<td>Ginsburg</td>
<td>Thomas</td>
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<td>Breyer</td>
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<td>Georgia v. Ashcroft</td>
<td>123 S. Ct. 2498, 2003</td>
<td>Racial redistricting—boundaries are lawful if they do not dilute overall minority influence in the political process.</td>
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<td>Board of Education v. Earls</td>
<td>536 U.S. 822 (2002)</td>
<td>Requiring high school students to submit to random drug tests as a precondition for participating in extracurricular activities is constitutional.</td>
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<td>Easley v. Cromartie</td>
<td>532 U.S. 234 (2001)</td>
<td>Redistricting—Oddly shaped districts (this one in North Carolina) are lawful if they reflect partisan considerations, not racial gerrymandering.</td>
<td>O'Connor</td>
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