
RESEARCHING

Constitutional
Law

Albert P. Melone

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Southern Illinois University, Carbondale



HarperCollins *Publishers*

Dedicated to the best teacher I know, Jody DeGenaro. Friend for thirty years, he is the model for what we should all aspire to as educators and human beings. He really cares.

Library of Congress Cataloging-in-Publication Data

Melone, Albert P.

Researching constitutional law / Albert P. Melone.

p. cm.

Includes bibliographical references.

ISBN 0-673-52086-2

1. United States—Constitutional law—Legal research. I. Title.

KF241.C66M455 1990

342.73'0072—dc20

[347.302072]

90-8018

CIP

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4 5 6—PAT—99 98 97 96

Preface

Educated persons are able to think and act independently. A goal of liberal arts education is to help individuals acquire the skills necessary for living an independent life. It is not enough to know the right answers to pre-programmed questions, nor is it sufficient to know what the right questions might be. The ability to study issues outside a structured classroom setting is the training for life that distinguishes the truly educated from those condemned to the follower ranks. *Researching Constitutional Law* reflects the view that all persons living in a democratic culture should possess the tools to research questions that guide how they must live. The law belongs to the people and each member of the polity should know how to investigate questions of law and society. *Researching Constitutional Law*, then, is meant for general lay public use, for students enrolled in law-related courses, and for professionals who may find parts of this book suitable for their purposes.

Researching Constitutional Law is a considerable revision of an earlier text, *Primer on Constitutional Law*, coauthored with Carl Kalvelage. It follows the same format as the earlier volume, but is up-to-date and contains more material. Each chapter is thoroughly revised and expanded, and there is an additional chapter summarizing landmark Supreme Court decisions.

Students of constitutional law will find this book useful because it acquaints them with legal research skills necessary for getting the most from their classroom experiences. Before writing research papers on constitutional law topics, students may turn to this text for descriptions and explanations of general legal research materials as well as literature especially pertinent to their topics. *Researching Constitutional Law* examines specific legal materials and relevant literature found in law libraries or legal collections at general college or community libraries. It explains the correct reference forms for citing materials in research papers, and the reasons and methods for briefing court opinions. It contains summaries of leading decisions of the U.S. Supreme Court, a glossary of legal terms, and a substantial bibliography on constitutional law and related topics.

A poorly researched law-related term paper is a living nightmare of

students and instructors alike. Too often students read a few books and articles and their finished papers erroneously purport to fully explore the subject. Because laws are constantly changing, even relatively current publications cannot give the reader a contemporary understanding or a complete historical appraisal of legal topics. Students must be able to find the latest words on subjects and relate given legal issues to other matters of social and historical concern. This book can help researchers understand their topics comprehensively.

Because most constitutional law instructors do not have the time to teach their students about legal research, they can save valuable time by assigning selected chapters or parts of chapters in this text for students to read outside the classroom. Chapter One, for example, describes how legal opinions are reported by official and unofficial sources; it also details numerous sources available to conduct legal research. Chapter Two contains annotations of books which consider the relationship of judicial review to constitutional interpretation, the problems encountered in studying the lives of Supreme Court justices, historical accounts of the Supreme Court and subject-specific expository works, and the variety of approaches and methods used when studying public law topics. Chapter Four provides students with a description and sample of the ways to brief court opinions. The glossary will help students answer definitional questions.

Students may use chapters of this volume without reading the book cover to cover. For example, students may use Chapter Three when writing and documenting research papers for any social science or humanities course. Chapter Five contains summaries of leading Supreme Court decisions. Anyone needing to recall the facts and holdings of particular landmark opinions will find this chapter handy. The Contents and Index should be used to guide readers to the answers for their specific questions.

Persons without legal training or individuals without specific course work in constitutional law should find this work to be a handy research guide. The previous version of this work won high praise from former students who entered the worlds of business and education. Students who earned law degrees commented that the *Primer on Constitutional Law* was a fine introduction to legal research and proved invaluable to them particularly during their first year of law school; it gave them a significant head start over their struggling peers. Practicing paralegals noted they used the previous edition on a daily basis. Residents of Illinois correctional centers commented that the *Primer* helped them understand and deal with legal processes more fully than was permitted by their personal experiences alone. This new text will be an even more helpful reference work for personal libraries. However, anyone with a genuine legal problem is best advised to consult an attorney. *Researching Constitutional Law* can help clarify legal issues and language, but it should not take the place of professional advice.

I owe thanks to many individuals who helped me write this text. The

professional staff of the law library at the Southern Illinois University School of Law has been cooperative. In particular, law librarians Kathy R. Garner and Elizabeth W. Matthews have been helpful in answering my questions and those of my students. I am especially grateful to Laurel Anne Wendt for her assistance over many years in helping me track down sources and better understand legal literature. Always professional, engaging, charming, and witty, she has made visits to the law library pleasant and fruitful. My research assistants over several semesters have helped locate materials and shape up this manuscript in a variety of important ways: Scott Myers and Timothy Millmore performed yeoman service. Aline Davis Wilson and Cathy Croquer were responsible for the final word processing of the submitted manuscript, and Darren Nix typed revisions. They all did a good job. Professor John R. Schmidhauser of the University of Southern California and Professor Steven Cann of Washburn University of Topeka provided cogent and in-depth criticisms of the manuscript. In one way or another, I used most if not all of their fine suggestions. Special appreciation goes to Cecilia G. Lause for bringing my manuscript to the attention of Richard Welna at Scott, Foresman and Company. The treatment afforded me by Dick Welna and his staff has been superb. They prove that a modern corporation can be productive, innovative, and humane. Further thanks go to Sean Leman, Bob Cooper, and Barbara Tompkins for their careful help in producing the text.

Consistent with good manners and the truth of the matter, I relieve any of the above-named individuals from responsibility for the inevitable shortcomings of this book. Hopefully, owing to the collective efforts of all involved, the practice of chanting "*mea culpa, mea culpa*" will prove little more than a customary ritual.

A.P.M.

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Conducting Legal Research

Introduction

The purpose of this chapter is to familiarize students with the basic legal research tools. These materials, presented here with no unnecessary legal jargon, can help students to do legal research for undergraduate and graduate assignments. Many examples in this chapter are from the constitutional law field; however, they are applicable to many law-related undergraduate and graduate courses,—business law, criminal justice, consumer affairs, and planning law, for example.

The primary sources for all legal research in the United States are the reported opinions of law courts. Without such opinions it is impossible to cite cases as precedent and the principle of *stare decisis*—stand by past decisions—has little meaning. With this in mind, understanding where and how to locate the sources of court opinions is important.

Most college and university libraries have much of the legal-research material discussed in this chapter. Those institutions with law schools naturally will provide the most research materials. Some readers may discover inadequate library sources; many community libraries, however, have adequate law collections, and many state governments provide law libraries for public use.

Opinions of the United States Supreme Court

Because government and private firms publish judicial opinions, there is often more than a single citation to the same case—for example, *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951). These multiple citations to a single case are called *parallel citations*. For the case of *Dennis v. United States*, there are three citations. The first, 341 U.S. 494, refers to the official government publication, *United States Reports* (U.S.).

The number preceding the letters U.S. (341) refers to the volume, and the number following U.S. (494) indicates the first page in Volume 341 of *United States Reports* at which *Dennis* appears. The citation to the *Supreme Court Reporter* (S. Ct.) is 71 S. Ct. 857. It indicates that the *Dennis* case is located in Volume 71 and begins on page 857. The final citation, 95 L. Ed. 1137, refers to the place in the *United States Supreme Court Reports—Lawyers' Edition* (L. Ed.) where the *Dennis* case may also be located; that is, Volume 95 beginning on page 1137. Because students often have access to only one set of court reports, it is convenient to provide parallel citations.

All three of these court reports have one common feature—they each present the written opinions of the Supreme Court. The *United States Reports* (U.S.) is an official report, whereas the *Supreme Court Reporter* (S. Ct.) and the *Lawyers' Edition* (L. Ed.) are unofficial publications of private firms. Each source has its own special features.

United States Reports (U.S.)

The first ninety volumes of this official report contain the names of the respective court reporter. From 1790 to 1874 the court reporter's name is on each volume and is cited—*Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803). The following is a list of the full names of the seven reporters along with their name abbreviations as they appear in legal citations, the volume number designations of the *U.S. Reports* for which they each contributed, and the corresponding years of service.

A. J. Dallas (Dall.)	1–4 U.S. (1789–1800)
William Cranch (Cranch)	5–13 U.S. (1801–1815)
Henry Wheaton (Wheat.)	14–25 U.S. (1816–1827)
Richard Peters (Peters)	26–41 U.S. (1828–1842)
Benjamin C. Howard (How.)	42–65 U.S. (1843–1860)
J. S. Black (Black)	66–67 U.S. (1861–1862)
John William Wallace (Wall.)	68–90 U.S. (1863–1874)

The designation for the *United States Reports*, changed in 1875, is now by volume number only, beginning with Volume 91 and the letters *U.S.*

Besides the official opinions of the Supreme Court, *United States Reports* contains summaries of facts, syllabi, and indexes. Syllabi (or syllabuses), sometimes called headnotes, are brief summaries of the important aspects of cases and contain references to the pages of the written opinions containing significant legal points. These features provide a quick reference for the contents of each case and can save valuable research time.

Shortly after a Supreme Court opinion is handed down, the Government Printing Office releases a *slip opinion*, the Supreme Court's initial issue; most

libraries that have *U.S. Reports* receive slip opinions. At the end of the Court's term, permanently bound volumes replace the slip opinions.

When citing a U.S. Supreme Court opinion, legal authorities prefer the official report (U.S.) alone without parallel citations. For social science purposes, however, it is desirable to include unofficial and official reports. The following are sample citations: *Testa v. Katt*, 330 U.S. 386 (1947); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). When citing a case in the body of a text, the case name should not be underlined or placed in italics. When a case name with citation appears in a footnote or bibliographic entry, it should not be underlined or placed in italics (printers treat an underline entry as italics). If the name of the case or a case name and date of the opinion are written in the body of the text, then underline the case name.

United States Supreme Court Reports—Lawyers' Edition (L. Ed.)

United States Supreme Court Reports—Lawyers' Edition, an outstanding private organ, is published by the Lawyers Co-operative Publishing Company and the Bancroft-Whitney Company. It contains all Supreme Court decisions in two series beginning with Volume 1 with accompanying tables of parallel references to the official *United States Reports*. In addition to the opinions rendered in the official reports, the *Lawyers' Edition* contain features valuable to the practicing attorney and student researcher, including summaries of each case with headnotes (syllabi), and abbreviated versions of the briefs of counsel with annotations discussing important legal developments reported in the official cases. For example, the case of *Nixon v. Administrator of General Services*, 53 L. Ed. 2d 867 (1976) gave rise to an annotation on Bills of Attainder. The twenty-nine-page essay at the back of the volume provides a thorough and current treatment of the topic. Beginning with Volume 32 of the *Second Series*, each volume contains pocket supplements placed at the back cover. This service provides brief summaries of holdings from later Supreme Court decisions making reference to decisions published in the in-hand *L. Ed.* 2d volume. In this way, it is possible to learn how a case just read is treated many years later.

A useful *Desk Book*, which accompanies the *Lawyers' Edition, Second Series*, contains a *Table of Cases* for those instances when the researcher knows only the case name, without benefit of a volume number, page number, and reporter name. By looking up the case name, the researcher can find the parallel legal citations as well as other references keyed to other Lawyers Co-operative Publishing Company material. This annual supplement also contains a *Table of Justices of the Supreme Court*, a *Table of Federal Laws, Rules and Regulations Cited and Construed*, and an *Index to Cases and Annotations* arranged alphabetically by subject matter.

When the Supreme Court is in session, the *Lawyers' Edition* is kept

current with the twice-monthly publication of Advance Sheets, which contain the most recent decisions of the Supreme Court with various research aids furnished by the editors. Together with other Lawyers Co-operative publications, the *Lawyers' Edition* becomes an outstanding research tool.

Supreme Court Reporter (S. Ct.)

Supreme Court Reporter, issued by the West Publishing Company, is an unofficial law reporter that contains many of the same features as the *Lawyers' Edition*. For example, headnotes and other references correlate with other West publications. It is also supplemented with semimonthly advance sheets when the Supreme Court is in session. The Court's opinions are first placed in temporary volumes before final publication, making it convenient to access decisions.

Unfortunately, in contrast to the *Lawyers' Edition*, *Supreme Court Reporter* offers one disadvantage: it begins with the Supreme Court's 1882 term and therefore does not contain the cases reported in volumes 1–105 of the official *United States Reports*. Nonetheless, the *Supreme Court Reporter* remains a useful reference.

Briefs Filed with the U.S. Supreme Court

Supreme Court rules require legal counsel to present written arguments, or *briefs*, to support their respective cases. Attorneys file such briefs, which vary from several pages to several hundred pages, with the explicit intent to convince justices how they should decide the case. Briefs contain detailed legal justifications with appropriate citations to existing precedents and extralegal materials in support of client interests.

Supreme Court justices are free to reject any or all the arguments found in the written briefs. Careful reading of briefs and opinions written by justices, however, show that justices often rely on briefs for arguments in support of a given position. Interested third parties may also file *amicus curiae* briefs with the Court to provide material, information, and arguments that assist in decision making.

Researchers use briefs to gain a greater understanding of the issues and possible outcomes in cases than they receive from reading only Court opinions. Because legal counsel commonly presents in writing a wide range of ideas, lines of legal reasoning, and social and political justifications, even when they appear contradictory, briefs of counsel are particularly useful when exploring such addendum. If the researcher is conducting an in-depth study of a particular case, then a careful reading of the submitted briefs will add much to understanding. In addition, it is interesting to note whether the Court accepts, rejects, or ignores the arguments contained in the briefs.

The following citation is an example of how to cite one of the several sources where Supreme Court arguments and briefs can be found: Appellant's

Brief at 112, *Roe v. Wade*, 410 U.S. 113 (1973), in vol. 75, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*. A discussion of these sources will follow. See Chapter 3 for additional illustrations.

Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law

Before the middle of the nineteenth century, oral arguments were the principal form of advocacy. In 1849, the Supreme Court ruled that counsel could not be heard at oral argument unless they first filed a formal brief.¹ As a result, briefs are not uniformly available for many early cases of the Supreme Court. However, the editors of *Landmark Briefs and Arguments of the Supreme Court of the United States* have made a significant contribution by locating existing briefs including notes and summaries of oral arguments held by the National Archives and private sources.

Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, edited by University of Chicago law professors Philip B. Kurland and Gerard Casper and published by University Publications of America, Inc., is usually available in law libraries. The first eighty volumes of this impressive work appeared in 1978; by 1986 the set numbered 159 volumes and will continue to grow as additional landmark cases are handed down by the high court. Notable examples of briefs in this set include: *McCulloch v. Maryland* (1819) in Volume 1, *Carter v. Carter Coal Co.* (1936) in Volume 32, *Baker v. Carr* (1962) in Volume 56, and *Garcia v. San Antonio Metropolitan Transit Authority* (1984) in Volume 159.

U.S. Supreme Court Records and Briefs

Unfortunately, the Kurland and Casper work contains briefs and oral arguments of only landmark decisions. To satisfy research needs on lesser decisions, several publishers have made available on microfilm or microfiche *U.S. Supreme Court Records and Briefs*, which begins with cases decided in 1832 and extends to the present day. This work contains the extant briefs and other materials pertinent to each Supreme Court opinion. The following publishers were associated at one time or another with the production of these materials: Congressional Information Service (CIS), Scholarly Resources, Information Handling Services, Microcard Editions Services, and the United States Printing Office. Ask your law librarian to determine whether the briefs of specific research interest are available in microtext format. If a law library

¹Philip K. Kurland and Gerard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, 159+ vols. (Washington, D.C.: University Publications of America, Inc., 1978), preface to Vols. 1-4.