PSCI 212 The United States Supreme Court:
The Constitution at a Crossroads
Professor Joel Seligman
Fall 2021: Monday/Wednesday 2:00 – 3:15 p.m.

This course is about our Constitutional system of government, particularly focusing on leading United States Supreme Court decisions, including those that address the separation of powers, the powers of the President, Congress and Judiciary, racial equality, freedom of expression and the religion clauses of the First Amendment, economic regulation, marital and voting rights.

All readings for the course will be in Noah Feldman & Kathleen Sullivan, *Constitutional Law* (20th ed. Foundation Press 2019) (*CB*), in cases you download, or in Handout Materials.

There is a reading assignment for the first class.

Academic Honesty: All students will be expected to conduct themselves in accordance with the University's Academic Honesty policy. Assignments will be graded on an individual basis with the expectation that each assignment will be completed by each student acting alone. Students may email questions to me at seligman@rochester.edu. Students may study together for class preparation.

Grades: Your grade will be based 25 percent on your performance on the Midterm Examination on October 13; 25 percent on the in class Final Examination on November 29; and 50 percent on your oral and written performance at the Constitutional Convention, December 1 and December 6.

Both the Midterm and Final will be in a one hour format with four to six essay questions.

For the Constitutional Convention, each of you will be expected to propose an Amendment to the Constitution and based on the readings in this course to prepare the most persuasive legal analysis of why the Amendment should be adopted. Final papers may be up to 20 double spaced pages including footnotes with a font no smaller than 12.

August 25	Introduction: Alternative Views of the Constitution. Download Declaration of Independence
August 30	The American Revolution: Download Articles of Confederation, and read in Casebook (*CB*), The Constitution of the United States, CB lix-lxvii. Just read the original Constitution. We will study Amendments later.
September 1	A President, Not a King: Preamble and Article II of the Constitution, CB lix, lxiii-lxv; *Youngstown Sheet & Tube v. Sawyer*, CB 298-306; Download *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (2020) – just read Chief Justice Roberts Opinion.
September 6	LABOR DAY
September 8	Presidential Powers in Times of War: Note, Executive Power in Times of War or Terrorism, CB 341-350; *Ex Parte Milligan*, CB 350-353; *Ex Parte Quirin,* CB 353-355; *Johnson v. Eisentrager*, CB 356-357; Note, The Executive Response to the Events of 9/11, CB 357-358; *Rasul v. Bush*, CB 358-359; *Hamdan v. Rumsfeld*, CB 372-379; *Boumediene v. Bush*, CB 379-387.

September 13	Limits on the Power of the President: *United States v. Nixon*, CB 425-427; *Nixon v. Fitzgerald*, CB 428-429; *Clinton v. Jones*, CB 429-433; Note, Impeachment of the President, CB 437-441; Download *Trump v. Vance*, 591 U.S. ___ - just read Chief Justice Roberts Majority Opinion; *Trump v. Mazars*, 591 U.S. ___ - just read Chief Justice Roberts Majority Opinion, focus on the final Part IIE.
September 15	Congress and the Separation of Powers: Article I of the Constitution, CB lix-lxiii; *McCulloch v. Maryland*, CB 79-89; *United States v. Comstock*, CB 92-94.
September 20	Congressional Powers under the Commerce Clause: *Lochner v. New York*, CB 489-498; Note, The Commerce Clause and the New Deal, CB 122-128; *United States v. Caroline Products*, CB 503-504; *United States v. Darby*, CB 131-133; *Wickard v. Filburn*, CB 134-135.
September 22	Congressional Powers under the Commerce, Taxation and Spending Clauses : *National Fed. of Independent Business v. Sibelius*, CB 160-166, 196-199, 212-217.
September 27	The Power of the Judiciary: Article III of the Constitution, CB lxv; Download Federalist Paper No. 78; *Marbury v. Madison,* CB 2-9; *Cooper v. Aaron*, CB 21-22; *Dred Scott v. Sanford*, CB 446-449.
September 29	The Second American Revolution: 13th-15th Amendments, CB lxix; *Slaughter House Cases*,

	CB 451-455; *Civil Rights Cases*, CB 856-859; *Plessy v. Ferguson*, CB 657-659; *Brown v. Board of Education I* and *II*, CB 661-664, 667-668.
October 4	Implementing *Brown v. Board of Education*: Note, CB 668-670; Download *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) – just read Majority opinion; *Adarand Contractors, Inc. v. Pena*, CB 704-709.
October 6	Affirmative Action: Powell opinion in *Regents of California v. Bakke*, CB 692-695; *Gruter v. Bollinger*, CB 710-719; Majority opinion in *Graetz v. Bollinger*, CB 719-720; *Schuette v. Coalition to Defend Affirmative Action*, CB 733-735; *Fisher v. University of Texas*, CB 729-733; *Parents Involved in Community Schools v. Seattle School District*, CB 736-743.
October 13	Midterm Examination
October 18	Gender Classifications: *Reed, Frontiers*, CB 759-761; *Craig v. Boren*, CB 761-764; *Mississippi University for Women v. Hogan*, CB 765-767; *United States v. Virginia*, CB 768-775; download Justice Gorsuch Opinion in *Bostock v. Clayton County, Georgia*, 590 U.S. ___ (2020).
October 20	The Right to Privacy and Reproductive Rights: *Griswold v. Connecticut*, CB 511-518; *Eisenstadt v. Baird*, CB 519-520; *Roe v. Wade*, CB 521-524; *Planned Parenthood v. Casey*, CB 531-538; *Whole Women's Health v. Hellerstedt*, CB 544-546.

October 25	Marital Rights: *Loving v. Virginia*, CB 672-673; *Lawrence v. Texas*, CB 563-570; *United States v. Windsor*, CB 575-582; *Obergefell v. Hodges*, CB 583-587.
October 27	Voting Rights: *Reynolds v. Sims*, CB 814-818; *Shelby County v. Holder*, CB 909-913; Download *Rucho v. Common Cause*, 588 U.S. ___ (2019); *Citizens United v. Federal Election Commission*, CB 1494-1502; *McCutcheon v. F.E.C.*, CB 1507-1510.
November 1	Freedom of Expression under the First Amendment: *Schenck v. United States*, CB 947-948; *Abrams v. United States*, CB 950-954; *Gitlow v. New York*, CB 961-964; *Whitney v. California*, CB 965-969; *Brandenburg v. Ohio*, CB 978-980.
November 3	Fighting Words and Hate Speech *Chaplinski v. New Hampshire*, CB 968-987; *United States v. O'Brien*, CB 1176-1180; *Texas v. Johnson*, CB 1186-1192; *R.A.V. v. City of St. Paul*, CB 1038-1044; *Snyder v. Phelps,* CB 1030-1033; download Breyer majority decision in *Mahoney Area School Dist. v. B.L.*, 594 U.S. ___ (2021).
November 8	Time, Place and Manner Tests: *Cox v. Louisiana*, CB 1222; *Heffron v. International Society for Krishna Consciousness*, CB 1222-1224; *International Society for Krishna Consciousness v. Lee*, CB 1264-1267; *Members of City Council v. Taxpayers for Vincent*, CB 1227-1231; *Clark v. Community for Creative Non-Violence*, CB 1232-1236.

November 10	Is the First Amendment Obsolete?: *New York Times v. Sullivan*, CB 1006-1009; Download Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547 (2018), Columbia Pub. Law Research Paper No. 14-573 (2018), available for free and open access at https://scholarship.law.columbia.edu/faculty,scholarship/2079.
November 15	The Free Exercise Clause of the First Amendment: Note, A History of the Religion Clauses, CB 1558-1565; *Reynolds v. United States, Sherbert v. Verner*, *Wisconsin v. Yoder*, CB 1581-1588; *Employment Div. Dept. of Human Resources v. Smith*, CB 1593-1600; *Burwell v. Hobby Lobby*, CB 1608-1614; download Chief Justice Roberts majority decision in *Fulton v. City of Philadelphia*, 593 U.S. ___ (2021).
November 17	The Establishment Clause: Note, CB 1615-1616; *Lee v. Weisman,* CB 1648-1655; *Edwards v. Aguillard,* CB 1660-1664; *Lynch v. Donnelly*, CB 1671-1677; *McCreary County v. ACLU of Kentucky*, CB 1682-1687; *Trinity Church v. Comer*, CB 1699-1702.
November 22	Summary of Course
November 29	Final Examination
December 1	Constitutional Convention
December 6	Constitutional Convention

PSC 212: Class Notes: August 25, 2021

Introduction

I: The United States Judicial System

Article III of the Constitution – Judicial Power

Section 1: 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.

A. The Federal Court System: Supreme Court of the United States:

- The Supreme Court of the United States is the court of last resort.
- The Supreme Court, for the most part, choses which cases to review. The Court receives approximately 7000-8000 petitions for a writ of certiorari each year. The Court grants and hears oral argument in about 75-80 cases.
- The Supreme Court is almost exclusively concerned with substantive legal issues of special significance.

The Federal Court System: Court of Appeals:

- District Court decision can be appealed to the Circuit Court of Appeals.
- Appellate courts are more concerned with legal issues than with factual issues but will review factual determinations for clear error.

The State Judicial System:

- Each State has its own court system as well.
- Many cases can be brought either in federal court or in state court.

- Certain cases can be brought only in federal court (e.g., copyright cases), while other cases can be brought only in state court (e.g., cases arising under state laws brought by citizens of the same state).

THE FEDERAL COURT SYSTEM	
Supreme Court	**United States Supreme Court**
Appellate Courts	**U.S. Court of Appeals** 12 Regional Circuit Courts of Appeals 1 U.S. Court of Appeals for the Federal Circuit
Trial Courts	**U.S. District Court** 94 judicial districts U.S. Bankruptcy Courts U.S. Court of International Trade U.S. Court of Federal Claims
Federal Courts and other entities outside the Judicial Branch	**Military Courts (Trial and Appellate)** **Court of Vietnam Appeals** **U.S. Tax Court** **Federal administrative agencies and boards**

B. Powers of the Federal Courts

Section 2: The judicial Power shall extend to all **Cases** . . . arising under this Constitution, the Laws of the United States . . . [and] the **Controversies** to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States. . . .

Case of Controversy:

- The "judicial Power" of federal courts – including the United States Supreme Court – only exists where there is a "Case" or "Controversy".

- No "advisory opinions." There must be a concrete dispute between two (or more) adversarial parties.
- There are two basic types of cases: criminal and civil. Criminal cases can only be brought by the government. Civil cases can be brought by the government or private persons.
- "Class actions" are cases involving a group of similarly-situated individuals. They permit the efficient adjudication of large numbers of related cases.

The Parties Involved:

- The person filing the Complaint is the "Plaintiff."
- The person being sued is the "Defendant."
- Federal judges are appointed for life "during good Behavior," and their compensation may not be reduced. Judges decide issues of law and procedure.
- Generally, a Jury determines the facts (sometimes a Judge is the fact finder).

The Federal Court System:

- Federal cases usually begin in United States District Court.
- Trial occurs here.
- In a criminal case, facts at issue must be proven beyond a reasonable doubt.
- In a civil case, facts must be proven by a preponderance of the evidence.
- Jury (or judge) makes findings of fact and renders a verdict or a judgment.
- In criminal case, verdict of guilty or not guilty. In civil case, judgment for plaintiff (often monetary damages) or defendant.

Finding and Citing Court Opinions:

- Courts issue "opinions" that explain their decisions and their reasoning.
- Opinions are reported in a series of books or "reporters" and today accessible via the Internet.
- Different courts have different reporters.
- Published opinions are the primary source of law (together with statutes and regulations.)

Finding and Citing Court Opinions:

Opinions should be cited as follows:

Name of Petitioner v. Name of Respondent, Vol. Number, Reporter, page number (court and year).

For example:

Brown v. Board of Education, 347 U.S. 483 (1954)

C. Legal Reasoning

1. Deductive – Reasoning from the law

- Constitution
- Statutes
- Administrative Agency Rules
- Executive Orders
- Principle of Legislative Supremacy

Holmes: "General propositions do not decide concrete cases."

2. Analogical

- *Stare decisis* – like cases decided alike
- Use of precedents – hierarchy of authorities
- Binding upon whom?
- When do courts overrule?

3. How do you apply the Constitution to a case?

- Text – plain meaning
- Intent or purpose
- Legislative history is often nonexistent, but accounts of proceedings and Federalist Papers sometimes used.
- Statutes – rich legislative history

II. Why was the Constitution Enacted?

Consider three views:

A. A Revolution Against the King

To create a Nation, the challenge of the drafters was to unite 13 colonies which had long been separate into a common cause. The immediate background of the Constitution was the increasing aggressiveness of King George III through taxation, quartering of troops and ignoring the preferences of state legislatures.

In part, the rebellion against King George III was based on natural law. John Locke famously asserted that the laws of nature discoverable by reason could justify rebellion when a monarch acted contrary to the "life, liberty and property" of his people.

Locke's view is consistent with key themes of the Declaration of Independence:

- All men are created equal.
- Governments derive their just power from the consent of the governed.
- George III should be overthrown because he sought absolute tyranny.
- "Life, liberty and the pursuit of happiness" was substituted for Locke's phrase "life, liberty and property" because slaves were property and the phrase would divide the colonies.

Key Challenge: How Do You Create a Nation?

Historically, strong nations had a monarch, standing armies, and taxation to support armies, each of which was unacceptable to the United States in 1787.

The Republican form of government was suspect. Fed. No. 9: "The opponents of the plan proposed here have . . . circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government." This was a highly plausible argument in a country in which it could take as much as seven weeks for a letter sent from Maine to arrive in South Carolina.

Montesquieu believed that confederate republics, e.g., coalition of Greek city states, could work. There were two primary arguments against this. First, the failure of the Articles of Confederacy in the United States. Second, the stark differences in the States in attitudes towards slavery.

Those who advocated the Constitution such as Alexander Hamilton, John Jay and James Madison in *The Federalist Papers* urged innovations in government would make it more possible to create a successful nation such as separation of powers, Federalism, that is Federal and State powers, and judicial review.

The Constitution in 1787 was most notable for substituting a Republican government often based on the votes of a majority of eligible voters for rule by a monarch. This was revolutionary in 1787.

Nearly as unusual was the creation of a new nation without a national church, a concept that would be expressly codified in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Early historians of the Constitution wrote about the creation of the United States as the equivalent to the Glorious Revolution of 1688 in which British King James II was ousted in a relatively bloodless coup and replaced by his daughter Queen Mary II and husband William III,

de facto ruler of the Dutch Republic. The Revolution strengthened the power of Parliament in place of the divine right of the King or Queen to rule with a Bill of Rights which was a contract between the Monarch and the people.

B. The Economic Interpretation of the Constitution

Charles Beard long was the most influential critic of the celebratory view of the creation of the United States.

In *Economic Interpretation of the Constitution of the United States* (1913), Beard championed James Madison Federalist No. 10 in which Madison wrote: "[T]he most common and durable source of factions has been the various and unequal distribution of property."

Given property requirements to vote, Beard believed that no more than 5 percent of the population, about 160,000 voters, expressed an opinion one way or another of the Constitution. Id. at 136.

Of the 55 representatives at the Constitutional Convention, Beard found that no less than 40 to have owned public securities, though some ownership was as small as a few dollars; 14 owned lands for speculation, typically in the Western Reserve; 25 lent money for interest; 15 owned slaves. Id. at 72-73. Beard concluded:

> It cannot be said, therefore, that the members of the Convention were "disinterested." On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain. As a group of doctrinaires, like the Frankfort assembly of 1848, they would have failed miserably; but as practical men they were able to build the new government upon the only foundations which could be stable: fundamental economic interests.

Id. at 73.

In his 1912 book, *The Supreme Court and the Constitution* (1912), Beard emphasized,

> Indeed, every page of the laconic record of the proceedings of the convention, preserved to posterity by Mr. Madison, shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on the one hand against the possibilities of despotism and on the other against the onslaught of majorities. In the mind of Mr. Gerry, the evils they had experienced flowed "from the excess of democracy," and he confessed that while he was still republican, he "had been taught by experience the danger of the levelling spirit." . . . Mr. Hamilton, in advocating a life term for Senators, urged that "all communities divide themselves into the few and the many. The first are the rich and well born and the other the mass of people who seldom judge or determine right." . . .
>
> They were anxious above everything else to safeguard the rights of private property against any leveling tendencies on the part of the propertyless masses. . . .
>
> . . . [B]y the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Mr. Hamilton pointed out, "was so formed as to render it particularly the guardian of the poorer orders of citizens," while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority.

C. The Geostrategic Approach

A recent fervent advocate of the geostrategic approach is Yale Law Professor Akhid Reed Amar, *Words That Made Us: America's Constitutional Conversation, 1760-1840*, which early asserts: "*Almost everything that Charles Beard and his modern-day debunkers have said about the Constitution's launch is either dead wrong or more wrong than right.*"

In Amar's view, the critical protagonist in the transformation of the disparate Colonies to an American nation was George Washington. Praising Washington is hardly unique, but what Amar urges is that our view of Washington's contribution to the United States Constitution vastly understates his significance. Much of the substance of the United States Constitution had already been fashioned in State Constitutions enacted before the 1787 Constitutional Convention. The United States Constitution was to be written, unlike the British system. Democracy and republicanism, not a King and nobility, were to rule. The United States Constitution, unlike the unsuccessful Articles of Confederation, was to be amendable, and stake out in popularly understandable terms fundamental rights, include three branches and an independent judiciary. In the wisest versions of the State Constitutions, the States held multiple votes for an expanded electorate of eligible citizens to choose whether to draft a new Constitution, hold a special election to select convention members and then hold a final vote to ratify the new State Constitution. These procedures were paralleled in the adoption process of the United States Constitution which famously begins "We the People."

The 13 sovereign States were reluctant to surrender power to a national authority. The Articles of Confederacy, formally approved in 1787, clumsily oversaw the American Revolution but lacked the power to enforce taxation or drafting of soldiers. There was no real Executive and while the Articles were Republican with each State having one Vote, The Articles failed to create an effective financial system – the

Dollars issued under the Articles were ridiculed as "not worth a Continental." Action by the Revolutionary War Congress often was frustrated by the need to take unanimous action. "Paradoxically," Amar would observe, "the very weakness of the Articles was their ultimate strength." Or as he put it elsewhere in his text: "The Constitution of 1787 was a direct, logical and proportionate response to the basic failures of the Articles. Period."

From George Washington's point of view, there was one issue and one issue alone, that towered above all others in the adoption of a new Constitution. The United States had to be strong enough to survive. Great Britain had the strongest navy and military in the world and a population three times the size of the United States, and France had twice the population of Great Britain. Spain amounted to a third European threat. Britain's banking system was the engine that could fund wide-ranging war efforts in Europe or North America. After the Revolutionary War, the United States had no standing army, no navy, no effective banking system. For Washington, the purpose of the Constitution was to create a United States capable of fielding an army, equipping a navy and borrowing money from abroad. The United States began as a financially bankrupt state. American veterans and American creditors had not been paid. The role of Hamilton as Washington's Secretary of Treasury, bitterly resented by Jefferson and Madison, was decisive in consolidating an effective national government. Without assumption of state debt, a national bank and a national currency, it is uncertain whether the fledging Republic would have outlasted Washington.

In Amar's analysis, Washington, on all but one occasion, the silent Chair of the Constitutional Convention, was the Constitution's most influential drafter. Article II of the Constitution provided for a strong Executive with an independent electoral base who also was Commander in Chief of the Armed forces. The President compared to State

executives had a four year term and initially unlimited re-electability, the ability to nominate his administration leaders and after action in 1789, to remove them without seeking Congressional consent, as well as powerful veto and pardon powers. Congress augmented Presidential power with the power to tax, create a military and with a few exceptions would legislate by majority rule. Foreign trade, potentially a mechanism by which foreign powers could divide the United States, solely would be regulated at the national level. State powers would be limited by the Supremacy Clause which made national law supreme when State law was in conflict.

While much recent scholarship has focused on other aspects of the Constitutional Convention, such as how power would be allocated among the States, whether the Senate would be directly elected or elected by legislatures, how the veto power would work, Washington, in Amar's colorful phrase, did not sweat these details. Amar writes: "The Constitution gave him what he wanted and needed for himself and for his country. . . . The Constitution of 1787 was emphatically Washington's Constitution, not Madison's."

Washington championed the Constitution, as he privately wrote during the Virginia Ratification Convention: "There is no alternative between the adoption of the proposed Constitution and anarchy."

To create a United States with all 13 states, Washington decisively endorsed a key criticism of the Anti-Federalists and supported a Bill of Rights in his Inaugural Address, overruling the *Federalist Papers* which had argued that a Federal Government with limited powers did not also need a Bill of Rights. Washington did so, Amar recounts, to woo Rhode Island and North Carolina into the United States, which had begun with 11 states.

Washington's urgent quest for unity was repeatedly challenged, most painfully by slavery, which Amar calls the "second existential threat" to American constitutionalism. "Human bondage, if not placed

on a path of ultimate extinction, threatened to destroy the soul of the American republic." To create a nation, the Constitution included the notorious Three-Fifths compromise by which slaves would court for three-fifths of free persons in the census that determined apportionment of seats in the House of Representatives and votes in the Electoral College. To create a United States including states such as South Carolina and other slave-importing states would have been impossible without this type of compromise. In Amar's analysis, slavery was morally wrong and potentially could have been addressed either by an extinction date of the Constitution itself, phasing out of the Three-Fifths Clause or by Jefferson working with Congress to prohibit slavery in the Louisiana Territory which doubled the land mass of the United States, among other opportunities. None of these steps were pursued and slavery grew in the United States from 1.2 million slaves in 1820 to 2.5 million in 1840, with little change in the percentage of our population that was enslaved.

Slavery, women's rights, the rights of Native Americans were the most consequential enduring challenges to our Constitutional system.

PCS 212: Class Notes: August 30, 2021

The American Revolution

UNITED STATES CONSTITUTION

I. Historical Context

The Constitution addressed its purpose in the Preamble:

Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The Federalist Papers – useful but unofficial contemporaneous evidence:

A. Dangers from Foreign or Civil Wars. Federalist No. 4-9.

- France and Britain were rivals in the fisheries. Fed. 4
- Spain thinks it convenient to shut the Mississippi against us; Britain excludes us from the St. Lawrence. Fed. 4
- Weakness and division at home would invite dangers from abroad. Fed. 5 begins: "Nothing would tend more to secure us from [foreign dangers] than union."
- Fed. No. 7: What inducement could the states have, if disunited, to make war upon each other?
- Territorial Disputes, i.e., Western Territory provides "an ample theatre for hostile pretentions."

- Competitions of commerce, e.g., "Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?"
- The public debt would be a further cause of collision between the separate states or confederacies.
- Fed. No. 8 warns of dangers of Civil War.
- Fed. No. 9: "A firm union will be of the utmost moment to the peace and liberty of the states as a barrier against domestic faction and insurrection."

B. Fear of Concentration of Power

- Constitutional Convention debate regarding "Virginia" and "New Jersey" plans:

The main question before the Convention was how much to strengthen the Federal Government. The debates initially focused on the "Virginia Plan" presented by Edmund Randolph, which was strongly nationalist. It gave Congress the power to veto state laws and to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Anti-nationalists representing smaller states countered with the "New Jersey Plan," which augmented the minimal powers of Congress and added a weak executive. Although the New Jersey Plan was rejected, the delegates remained sharply divided about issues of State prerogatives. Ultimately, the deadlock over States' rights was broken with a compromise about Congressional representation, giving the States equal votes in the Senate but requiring popular representation in the House.

- Federalist Papers focused on limiting powers of Monarch.

- Fed. No. 10 – tendency to control violence of faction (Faction: United majority or minority of citizens).
- Republican principle permits majority to defeat minority by vote.
- U.S. Constitution protects against majority faction: Separation of Legislative, Executive & Judiciary – Fed. No. 47. Quoting Montesquieu: "There can be no liberty where the legislative and executive are united in the same person or body of magistrates." See also Fed. Papers No. 48-51.
- Divided legislature: "In republican government, the Legislative authority necessarily predominates."
  - Divided houses
  - Different terms
  - Different modes of election
- Government itself divided into:
  - Federal
  - States

C. Weakness of Articles of Confederation

- Fed. No. 15: "We may indeed with propriety be said to have reached almost the last state of national humiliation." Why?
- No penalty for disobedience to law of confederation. Nos. 15 & 21.
- Unanimity required for action by Confederation. No. 15.
- Defects in tax system.

D. Constitution Drafted to Correct Defects of Articles of Confederation

- Art. I §7 – Raise revenue without unanimous approval.
- Art. I §8 – Limit powers of Congress when Constitution adopted.

- Art. I §10 – Powers removed from states.
- Art. II §2 – President is Commander in Chief.
- Art. IV §1 – Full faith and credit.
- Art. VI §1 – The Engine: U.S. assumes debt.
- Art. VI §2 – Supremacy Clause.

II. The Constitution

A. Rejected Natural Law & Define Right of Monarch in Favor of Written Constitution

B. Republican: Fed. No. 39: meaning:

- Legitimacy from people, not States
- Democratic, but with limits
  - House – popular election
  - Senate – State legislature
  - President – Electoral college

C. Separation of Powers

- National Government –
  - Legislature – executive – judicial
  - Federalism: Fed. No. 45:
    The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people,

and the internal order, improvement, and prosperity of the State.

- The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the Federal Government. The more adequate, indeed, the Federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular states.

  See generally, Fed. Nos. 32 (Hamilton) and 44 (Madison).

D. National Government: Limited Powers, but Supreme

- Fed. No. 23: Principal purposes of Union:
  - Common Defense
  - Preservation of public peace
  - Regulation of commerce with other nations and between the States
  - Foreign relations
- Two Constitutional Controversies: Fed. Nos. 33, 44
  - Art. I §8 [18] at 1viii: Necessary and proper clause to carry on enumerated powers.
  - Art. VI 2d clause – Supremacy Clause.

III: Problems Not Effectively Addressed

A. Bill of Rights (Amendments No. 1-10)

- Fed. No. 84 – Opposed Bill of Rights.
- Montesquieu View: Human rights best protected by limited government and separation of powers.

- Ratification proved controversial.
- New York and Virginia called for Bills of Rights in their ratification resolutions.
- Bill of Rights quickly ratified in 1791 – by their terms only binding on National Government.

B. Slavery

Although the word never appears in the Constitution, slavery was an important source of dissension at the convention. The slave States feared that both the slave trade and the "peculiar institution" itself might be threatened by a strong National Government. They were also concerned about the issue of fugitive slaves. One major question was how to count slaves for purposes of allocating representatives; the compromise solution was the infamous "three-fifths" rule, which was applied to certain taxes.

- See Article I §2(3)
- Article I §9
- Article IV §2(3)

C. Women

- Constitution simply assumed power to hold office or vote would be limited to men.

D. Role of President

- Article II §2(1):
  - Commander-in-Chief
  - Request opinions from principal officer of each department in writing.
  - Power to grant reprieves and pardons.
- Article II §2(1):

    - Power to nominate, with advice and consent of Senate, ambassadors, ministers, consuls, justices and judges of courts.
- Article II §2(3):
    - Give Congress information on state of Union.
    - Recommend legislation.
    - Convene Congress.
    - Receive ambassadors and ministers.
- Fed. No. 67 – "There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this."
- Fed. No. 69: Not a hereditary monarch – limited term between elections.
- Fed. No. 69 took pains to compare President to a hereditary monarch:

> The President of the United States would be an officer elected by the people for four years; the king of Great Britain is a perpetual and hereditary prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a qualified negative upon the acts of the legislative body; the other has an absolute negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the sole possessor of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatsoever; the other can make denizens of aliens, noblemen of commoners; can erect

corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church!

PSC 212: CLASS NOTES: SEPTEMBER 1, 2021

A PRESIDENT, NOT A KING

Article II of the Constitution:

Section 1: The Executive Power shall be vested in a President

Four year term

Natural born citizen or a citizen at time Constitution adopted

35 years old

Oath to preserve, protect and defend Constitution

Section 2: Commander in Chief of Army and Navy and Militia of several States when called into actual service by United States

Power to grant reprieves and pardons

Power to make treaties with two thirds vote of Senate and to nominate Ambassadors, Judges of the Supreme Court, all other Officers of the United States by majority vote

Section 3: Deliver to Congress State of the Union information

Recommend legislation

Convene Congress or in cases of disagreement, adjourn Congress

Take care law be faithfully executed

Section 4: May be removed from Office on impeachments and conviction of treason, bribery and other high crimes and misdemeanors and afterwards is liable to prosecution and punishment in ordinary course of the law

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

CB 298-306

Q: Material facts – why lawsuit?

Q: What authority did President invoke?

Q: Was the Nation at war?

Q: Beginning in 1941, President Roosevelt seized an aircraft manufacturing plant and coal mines, why was this permitted?

Q: Why did President Truman believe that seizure of steel plants was necessary?

Q: Justice Black rejects Truman's seizure. Why?

Q: Has Congress ever considered power of seizure to settle labor dispute?

Q: Does Constitution provide basis for seizure?

Q: Consider this situation: Early in the Civil War when Congress was not in session, President Lincoln caused the arrest of several Maryland legislators about to vote for secession of Maryland from the Union. He justified this as necessary to save the Union and continue transportation of soldiers and goods to the military front and Washington D.C. Would Justice Black have permitted this?

Q: Justice Jackson concurring opinion suggests there are three types of cases to judge Presidential power:

- Under Act of Congress
- In absence of Congressional authorization or denial

- Contrary to Act of Congress

Under which grouping does Truman's seizure of steel plants fit?

Q: Solicitor General urges Unitary Executive Theory: "In our view, the Executive Power Clause of Constitution grants all executive power of which the Government is capable." Why did Jackson reject this theory?

Q: The Solicitor General also relied on the Clause authorizing the President to be Commander in Chief of Army and Navy. This essentially was basis for Roosevelt seizures. Why was this rejected? Jackson stresses that this is a loose appellation and must be squared with Congressional power to supply armed forces and raise revenues – President not Commander in Chief of war industries.

Q: Does this case simply demonstrate that the Court will find a way to support a popular President in a popular war, but not an unpopular President in an unpopular war?

Q: If Congress has voted for war in Korea, doesn't the President have a duty to see to it that the law is faithfully executed during a National Emergency by ensuring adequate supplies?

Q: Lincoln justified suspension of habeas corpus and other acts that would be illegal during times of peace as necessary to ensure that all the laws save one in the Constitution could be protected. Is that type of balancing appropriate here?

Q: The dissent argues that only the President can act 365 days a year. Are the President's powers broader when Congress is not in session?

Q: Should the President's powers be broader when the Nation is at war?

Q: Does it make a difference if the war is declared?

Department of Homeland Security v. Regents of Univ. of Calif. 591 U.S. ___ (2020)

In the past Supreme Court terms, several Supreme Court decisions were decided 5-4 with Chief Justice Roberts casting the swing vote, sometimes in support of more liberal opinions than his supporters expected.

Roberts was a "lawyer's lawyer" as an appellate advocate, who argued and won several Supreme Court decisions by mastery of the facts and applicable law. He is an institutionalist with respect for judges, the law and legal process with some concern for Constitutional norms such as separation of powers and Federalism. To be sure, Roberts' conservative analyses often are clear, but his preference "turning square corners", that the Executive Branch follow the rule of law is particularly evident in *Homeland Security*.

Q: What is the DACA Program?

Q: Why in September 2017 did the United States Attorney General advise the Department of Homeland Security to rescind DACA?

Q: What was the basis of Acting Secretary Elaine Duke's rescission order in 2017?

Q: After three Federal District Courts rejected Duke's position that DACA policy was contrary to law, how did Homeland Secretary Kirstjen Nielsen restate the basis for rescinding DACA?

Q: All parties in the litigation agreed that the Department of Homeland Security may rescind DACA. Then why this lawsuit?

Q: Why did Roberts not follow Nielsen's Memorandum?

Q: Why did Roberts conclude that the Department of Homeland Security's decision to rescind DACA was arbitrary and capricious?

The *Homeland Security* decision was a serious setback for the Trup Immigration Policy. But note how narrow the decision is: The decision did not hold that rescission of DACA was illegal nor that it violated the Constitutional requirement of equal protection. Nonetheless, the decision was another aspect of the Constitution's requirement that the President is bound by law.

Compare Trump v. New York, 592 U.S. ___ (2020) in which the court declined to implement a Presidential Memorandum excluding 10.5 million aliens without lawful status from the census.

PSC 212: CLASS NOTES: SEPTEMBER 8, 2021

PRESIDENTIAL POWERS IN TIME OF WAR

Reading Assignment: CB 341-353, 356-359, 372-387

I: CONSTITUTIONAL FRAMEWORK

A. Four pages of parchment, whose meaning evolves over time.

B. Constitutional Law almost uniquely involves balancing rights and powers

C. Article I Section 8 (11) vests Congress with the exclusive power "to declare War."

D. Article II Section 2 declares the President "shall be Commander in Chief."

E. Article III has been interpreted to give the Supreme Court the exclusive power to declare laws unconstitutional.

F. The Bill of Rights guarantees individual citizens "due process of law" before being deprived of life, liberty or property (5th Amendment); the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted by witnesses against her or him; to have compulsory process for obtaining witnesses in her or his favor; and to have the assistance of counsel for her or his defense (6th Amendment).

Our Constitution, unlike a tax code or other detailed legal document, proceeds at a very high level of generalization and has been subject to evolving interpretations over time. In trying to explain what the Constitution means, there is no official legislative history of the Constitutional Convention to guide us, only James Madison's Unofficial Notes from the Convention.

The most thoughtful commentary on the drafters view of President War Powers was written by Alexander Hamilton in *The Federalist Papers*. In *Federalist Paper No. 8*, Hamilton offered a truism: "It is the nature of war to increase the executive at the expense of the legislative authority."

What made Hamilton's analysis in *The Federalist Papers* of enduring significance is that it went beyond such truisms to capture a fundamental tension in the nature of Presidential power generally. Limited as the powers of the President might be in contrast to a hereditary monarch, as Hamilton wrote in *Federalist Paper No. 69*, they were far greater than the Executive Power exercise under the Articles of Confederation. As Hamilton stressed in *Federalist Paper No. 70*: "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."

Harmonizing the generally limited powers of the President compared to a hereditary Monarch with the war time powers of the President, Hamilton wrote in *Federalist Paper No. 74*:

> The President of the United States is to be "commander in chief of the army and navy of the United States, and of the militia of the several States when called into the Actual Service of the United States." . . . Of all the cares or concerns of government, the direction of was most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an unusual and essential part of the definition of the executive authority.

From these and other sources, three general principles can be articulated which describe the contours of Presidential War Powers:

First, Presidential War Powers effectively are created by Congress. Only Congress can create and fund an Army, a Navy or a War, whether declared or not. As a matter of political reality, it is often difficult for Congress to resist a call to arms or the sustenance of a war effort when an enemy attacks or threatens to attack, but as a matter of Constitutional law, there is no real question that if Congress chooses, it can start or end wars, with or without conditions, through the power of the purse.

Second, once Congress has created a military force and provided funds and other support for a war effort, the power of the President is virtually unlimited during wartime in a theatre of war. Presidential War Powers are virtually unlimited to provide for rapid and decisive leadership. It is worth stressing that while Presidential War Powers can be likened to emergency powers, they have been exercised frequently. A 1996 Report to Congress found that Presidents have used U.S. armed forces abroad on more than 250 occasions since 1789. Raven-Hansen, *supra* at 10, citing n.39, Richard F. Grimmett, *Instances of Use of the United States Armed Forces Abroad, 1798-1995* (CRS Report to Congress N. 96-119F 1996).

Third, judicial limitations on the exercise of Presidential War Powers rarely occur.

II. EARLY INTERPRETATIONS OF PRESIDENTIAL WAR POWERS REGARDING DETAINEES

A. In Ex Parte Milligan, 71 U.S. (4 Wall. 2) (1866), CB 350-353, the United States Supreme Court ordered the release of an individual who was characterized "as not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana," who had been arrested by the commander of the Indiana military district, tried by a court martial, convicted, and sentenced to be hung. The Supreme Court held that

Congress could not authorize such a Military Commission to operate after the "late rebellion" while the Federal Courts were open and operating.

B. In contrast, in Ex Parte Quirin, 317 U.S. 1 (1942), CB 353-355, the United States Supreme Court unanimously affirmed the conviction of six alleged Nazi saboteurs, including Hans Haupt, a United States citizen. Shortly after the alleged saboteurs were captured in this country, President Roosevelt created a military tribunal to try them for violating the laws of war. They were tried in secret with appointed counsel. *Quirin* held that the rules protecting United States citizens from court martial while civil courts can function do not insulate combatants from military jurisdiction. This holding extended to a combatant who was a United States citizen whom the Government captured within the United States. The Court further distinguished "lawful" combatants, who, when captured are treated as prisoners of war, from unlawful combatants who are subject to trial by military tribunals. A spy or an enemy combatant who without uniform "comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war."

C. In Johnson v. Eisentrager, 339 U.S. 763 (1950), CB 356-357, a United States military commission in China tried certain German soldiers and found that they had engaged in military activity against the United States in China before the surrender of Japan (but after the surrender of Germany). The German soldiers were subsequently confined in U.S. Army custody in occupied Germany and sought release under a writ of habeas corpus (which will permit a court to release a

prisoner held in violation of the United States Constitution or statutes). The Supreme Court denied the writ, with Justice Jackson, writing that German nationals confined in U.S. Army custody in occupied Germany after conviction by a military commission, had no right to a writ of habeas corpus: "The ultimate question is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." The Court majority found no jurisdiction. Justices Black, Douglas and Burton dissented.

III: THE 2004 AND 2006 DETAINEE CASES

A. In Rasul v. Bush, 542 U.S. 466 (2004), CB 358-359, the United States Supreme Court distinguished *Eisentrager*. After September 11, 2001, Congress passed a Joint Resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization of Use of Military Force, Pub. L. 107-40, 115 Stat. 224.

Petitioners in *Rasul* were two Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. After 2002, the United States military held them at the Naval Base at Guantanamo Bay, Cuba.

The Supreme Court Majority held that the Habeas Corpus statute confers a right of judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction although not "ultimate sovereignty."

Justice O'Connor, writing for the Majority, found that their situation differed from that in *Eisentrager* in several important respects: (1) They are not nationals of countries at war with the United States; (2) they deny they have engaged in or plotted acts of aggression against the United States; (3) they have never been afforded access to any tribunal; (4) they have not been charged with and convicted of wrongdoing; and (5) for more than two years, they have been imprisoned in territory over which the United States exercises jurisdiction and control.

The Court emphasized that Congress had enacted a new Habeas Corpus statute after *Eisentrager*, 28 U.S.C.A. §2241, which extends to a right to challenge imprisonment as long as "the custodian can be reached by service of process."

The Court ruled: "Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that Section 2241 confers on the District Court jurisdiction to hear petitioners' Habeas Corpus challenges as to the legality of their detention at the Guantanamo Bay Naval Base." The right to be heard does not mean that the petitioners would be released, but did have the right to a legal challenge.

Justice Kennedy concurred, emphasizing two points: (1) Guantanamo Bay is in every practical respect a United States territory, and (2) the detainees are being held indefinitely and without benefit of any legal proceeding.

Justice Scalia, Chief Justice Rehnquist and Justice Thomas dissented and held that this case should be controlled by the result in *Eisentrager*.

B. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), not assigned, also written by Justice O'Connor, the Supreme Court held that the Authorization for Use of Military Force adopted after September 11th, authorized the Executive Branch to detail even a United States citizen on United States soil as an "enemy combatant" for the duration of the particular conflict in which they were captured. Nonetheless, the Court also held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. "These essential Constitutional premises may not be eroded."

The Court emphasized the role of the courts in this process. "Unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, service as an important judicial check on the Executive's discretion in the realm of detainees. Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by the government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process."

Hamdi was a plurality decision with three other justices signing O'Connor's decision. Justice Souter and Ginsburg agreed with the judgment but disagreed that the

Authorization for Use of Military Force authorized the detention. Justices Scalia and Stevens dissented and held that unless Congress suspended the Writ of habeas corpus under Article I §9 of the Constitution, a United States citizen should be tried in Federal court in a trial like this for treason or some other crime.

C. In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), CB 372-379, the Supreme Court by a 5-3 vote, held that the military tribunals created after September 11th lacked the power to proceed against Hamdan, who admitted to being Bin Laden's chauffeur and was detained in November 2001. The Court held that the military tribunal could not proceed because its structure and procedures violated the United Code of Military Justice and the Geneva Conventions and was not authorized by the Authorization for Use of Military Force or a separate Detainee Treatment Act, which was enacted after Hamdan's detention. The Detainee Treatment Act provides that "no court, justice, or judge shall have jurisdiction to hear" the habeas application of Guantanamo Bay detainees.

The Court specifically held that the Authorization for Military Force did not authorize the President to create military tribunals and thus the President was limited to proceeding under the Uniform Code for Military Justice. The Court specifically held that the military tribunals created by the President were impermissible because they provided that the accused and his or her civilian counsel may be excluded from any part of the proceeding the presiding officer decides to close in order to protect classified information.

Article 3 of the Geneva Conventions prohibits nations engaged in combat from "violence to life and person, in particular murder of all kinds, cruel treatment and torture and

outrages upon personal dignity, in particular, humiliating and degrading treatment."

IV: CONGRESS ENTERS THE FRAY

Following the *Hamdan* decision, Congress passed the Military Commissions Act of 2006, which was signed into law by President Bush on October 17, 2006. The Act authorized the President to establish military commissions to "try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission." (*Id*. at §3, codified at 10 U.S.C. 948(a)).

A. JURISDICTION OVER "UNLAWFUL" COMPATANTS

The Military Commissions Act differentiates "lawful" from "unlawful" enemy combatants, a distinction rooted in the definition of a "prisoner of war" in the Geneva Conventions. Only a person determined to be an "unlawful" combatant may be tried by military commission. Lawful enemy combatants are beyond the jurisdiction of the military commission (they are subject to courts-martial).

The status of a combatant as "unlawful" is determined by a Combatant Status Review Tribunal. The status findings of the Combatant Status Review Tribunal are dispositive.

Lawful combatants include soldiers of a State at war with the United States, and others who are part of an organized resistance movement belonging to a State and who "are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war."

Unlawful combatants are anyone else "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States."

B. THE COMPOSITION AND CONDUCT OF A MILITARY COMMISSION

A Military Commission is convened by the Secretary of Defense (or his designee). The Military Commission must be comprised of no fewer than five members –12 members if the death penalty will be sought (though, in exigent circumstances, 9 will do).

The accused is given certain basic rights, including: the right to be informed of the charges against him, the right against self-incrimination, the right to exclude statements obtained by torture, and the right to present evidence in defense and cross-examine adverse witnesses. The accused is assigned military defense counsel, and may also retain a civilian lawyer that meets certain qualifications (such as holding a security clearance).

Guilt must be established beyond a reasonable doubt to the satisfaction of at least two thirds of the members present (unanimous vote required to impose a penalty of death).

C. REVIEW OF MILITARY COMMISSION DECISIONS

The findings and sentence of a Military Commission must be reported to the authority that convened the Commission. The convening authority can review the proceedings of the Military Commission, order a rehearing, modify the findings and sentence of the Military Commission in favor of the accused. A finding of guilt is automatically referred to the Court of Military Commission

Review, an entity created by the Act within the Department of Defense.

The Court of Appeals for the D.C. Circuit has exclusive jurisdiction to review the final judgment of a Military Commission following review by the Court of Military Commission Review.

Further appeal to the Supreme Court is by writ of certiorari.

D. HABEAS CORPUS SUSPENDED

The Act suspends the writ of Habeas Corpus as to the proceedings involving a Military Commission (10 U.S.C. §950j(b)), and as to "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." (Act, §7(a), codified at 28 U.S.C. 2241(e)(1)).

V. BOUMEDIENE v. BUSH, 553 U.S. 723 (2008), CB 379-388

In *Boumediene*, the Supreme Court on a 5-4 vote, held that detainees in the United States Naval Station at Guantanamo Bay, Cuba, had a Constitutional privilege of Habeas Corpus and that §7 of the Military Commissions Act of 2006, which suspends this privilege, is unconstitutional.

Q: In so holding, how did the Court harmonize this holding with *Eisentrager*, which was not overruled?

Q: Why was the procedure enacted by Congress to substitute for Habeas Corpus held to be inadequate?

Q: Did the Court give weight to the length of time the detainees were held?

Q: Did the Court otherwise hold unconstitutional the Detainee Treatment Act of 2005 or the Military Commission Act?

Q: How do you reconcile *Boumediene* with the President's role as Commander in Chief and national security?

Where does this leave us? Unless the United States Supreme Court reverses *Boumediene*, the core lesson from this review of Presidential War Powers is that they are essentially created by Congress. The President cannot suspend the Writ of Habeas Corpus without an enabling statute. Only Congress can.

Our Constitution is protective of individual due process rights during criminal litigation. But the Supreme Court in each of its major decisions on point has been willing to curtail due process when Congress has enacted enabling legislation and a President exercises War Powers during the war time or the period of military occupation within a theatre of war. The earliest Supreme Court case on point, *Ex Parte Milligan*, forcefully reminded us that this power is not unlimited. Neither Congress nor the President in that case was permitted to create a Military Commission after a war when the Federal courts were open and operating.

The concept of an elastic Constitution whose powers and rights vary depending whether we are at war or at peace is a familiar one to Constitutional scholars. As Justice Oliver Wendell Holmes, Jr. wrote in a 1919 decision upholding the conviction of an individual who sought to cause insubordination in the military during World War I: "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any Constitutional right." Schenck v. United States, 249 U.S. 47 (1919). These words take on unusual force when one appreciates that they were

written by a Justice whose protection of unpopular advocacy earned him the moniker of "the great dissenter."

For all its elasticity, as its core there is a nonelastic Constitutional concept that characterizes Presidential War Powers. They cannot operate unless Congress chooses to make it possible for them to do so. The Constitution was written with due regard for the fact that the President might have to respond rapidly to aggression in the absence of a Declaration of War. The implicit initial model of armed forces provided by militias has long been supplanted by a standing military. But a fundamental Constitutional check and balance endures as originally drafted: Only Congress can approve the budgets that fund the military whether in peacetime or in war.

Q: This frames a political question: Why does Congress so rarely act to contravene a President in times of war?

Q: Why did Congress in 1973 enact the War Powers Resolution, see CB 342-343?

Q: Why has the War Powers Resolution not been effective?

PSC 212: CLASS NOTES: SEPTEMBER 13, 2021

LIMITS ON THE POWER OF THE PRESIDENT

Reading Assignment: CB 425-433, 437-441; *Trump v. Vance; Trump v. Mazers*

The most important limit on abuse of Presidential Power is Impeachment. Article 1 §3 states:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article 2 §4 further provides:

> The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The closest any President has come to being impeached was the Impeachment Trial of Andrew Johnson, March 4, 1868. He was impeached by a vote of 126 to 47 but not convicted by votes of 35-19, one vote short of the required two-thirds majority.

On February 24, 1868, the House of Representatives approved 11 Articles of Impeachment, most significantly including:

1. Dismissing [Secretary of War] Edwin Stanton from the office after the Senate had voted not to concur with the dismissal.

2. Appointing [Lorenzo] Thomas Secretary of War ad interim despite the lack of vacancy in the office since the dismissal of Stanton had been invalid.

3. Conspiring to unlawfully curtail execution of the Tenure of Office Act.

4. Making three speeches with intent to attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States.

Q: Johnson urged that the President's power to remove a Cabinet Officer cannot be subject to a Congressional Veto such as was enacted in the Tenure in Office Act. What weight should this argument have? Johnson's position is consistent with subsequent Supreme Court decisions.

Q: In the three speeches for which the House voted Impeachment, Johnson called radical Republican Leaders Charles Summer and Thadeus Stevens traitors. Should a President be subject to Impeachment for expressing his opinions? Does it make any difference if the opinions are libelous?

Q: Could Johnson be impeached for double crossing President Lincoln to obtain the Vice Presidency in 1864? As Military Governor of Tennessee during the Civil War, Johnson had stated "Treason must be made odious and traitors punished." As

President, Johnson issued proclamations of amnesty for most former Government and Military Officers and allowed former Confederate Officials to dominate the re-entry to the Union of Confederate States that had rebelled.

Q: Could Johnson be impeached for fundamental political differences with the Senate Majority on the Freemen's Bureau and a forgiving versus harsh terms for re-entry of the Confederate States?

The failed *Johnson* conviction frames the two most critical issues in impeachment: (1) Can a President be tried in a criminal court before or after leaving office? (2) What documents must a President produce to Congress or to a Federal or State court while in office?

UNITED STATES v. NIXON, CB 425-427

Q: What documents did the Federal District Court subpoena?

Q: Why did the Supreme Court reject the President's claim of Absolute Executive Privilege of Confidentiality for all Presidential Communications?

The last paragraph of the decision, CB 427, preserves the right of the President to invoke claims of privilege against the return of the subpoena. This would include such typical objections as the subpoena is overbroad in what it seeks.

NIXON v. FITZGERALD, CB 428-429

Q: What did this case by a 5-4 vote hold?

Q: Why did Justice White dissent?

CLINTON v. JONES, CB 429-433

Q: How was the *Clinton* case factually different than *Nixon v. Fitzgerald*?

Q: Clinton urged that a civil trial could only occur after a President left office. Why did the Supreme Court reject this argument?

TRUMP v. VANCE, 591 U.S. ____ (2020)

Trump v. Vance, like United States v. Nixon, is a criminal proceeding. The novel issue in the *Trump* case is that it involved a State issued subpoena.

Q: What are the material facts?

Q: Why was the 1807 trial of former Vice President Aaron Burr relevant to determining whether a subpoena could be enforced?

During the next two centuries, successive Presidents have accepted Marshall's ruling that the President is subject to subpoena documents and have agreed to testify. These cases all involved Federal criminal procedures.

Q: Why does the President urge that State proceedings are decisively different?

Q: The Supreme Court unanimous concludes that a President does not possess absolute immunity from a State criminal proceeding. Why are these arguments rejected?

Q: Why does Roberts not believe producing documents to a Grand Jury creates an unacceptable risk that State criminal proceedings

will engage in arbitrary fishing expeditions or run roughshod over the functioning of the Executive Branch?

Q: Why does the Supreme Court reject a heightened standard for a State Grand Jury subpoena of a President's private papers?

Q: Does this mean the President has no "real protection" from an unreasonable subpoena?

Q: Who has the power to determine whether a subpoena should be enforced?

SEQUELAE

The President subsequently challenged the subpoena in this case as overbroad and issued in bad faith. The Federal District Court on August 20, 2020, rejected the arguments in Trump v. Vance, 19 Civ. 8694 (VM), 2020 U.S. Dist. LEXIS 150,786 (S.D.N.Y. 2020, stating in part:

> While the President conclusorily describes the issuance of the Mazars Subpoena as retaliation for the President's refusal to produce tax returns under the Trump Organization Subpoena, the alleged fact pattern described above does not render such an inference reasonable. The SAC lacks detailed factual allegations; it neither includes quotations from nor attaches correspondence in which the District Attorney's communications indicated anything but good faith. Without additional factual allegations supporting the claim that the District Attorney prepared and issued the Mazars Subpoena "in a fit of pique" prompted by the refusal to produce tax returns (*see* Opposition at 2), this sequence of events could obviously be explained in ways that do not impugn the presumptive validity of the Mazars Subpoena. First, the District Attorney's decision not to argue that the Trump Organization

> Subpoena calls for tax returns obviously need not reflect bad faith; normally, acquiescence in the face of another party's opposition is a sign of good faith negotiations.

The District Court also denied the President's request for Discovery.

On August 21, 2020, the Federal District also denied Trump's request for an injunction to prevent enforcement of the District Court's order to deliver the relevant documents to the New York Grand Jury. Trump v. Vance, 19 Civ. 8694 (VM), 2020 U.S. Dist. LEXIS 151,851 (S.D.N.Y. 2020). The District Court stated in part:

> As for the President's claim that injunctive relief is required to preserve appellate review, the Court finds this argument entirely unpersuasive. The President claims that without a stay, he "will be deprived of *any* appellate review" (Motion at 2), ignoring the fact that he has, in fact, already sought relief from every level of our federal judicial system, and that relief was denied at every turn. While the Supreme Court did quote United States v. Nixon, 418 U.S. 683, 702, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), for the proposition that "appellate review . . . should be particularly meticulous," the Court was speaking generally about the lack of any heightened need standard in presidential challenges to subpoenas; the Court was not referring to a predicted appeal of this particular case. Trump v. Vance, 140 S. Ct. at 2430. There is no sign that the Supreme Court contemplated any further appellate proceedings, and in fact appeared to agree with the Second Circuit that the case should be remanded back to the District Court. Furthermore, for all the reasons explained in its August 20 Decision, the Court is not persuaded that appellate review would be successful in any event. This argument cannot suffice to show irreparable harm. . . .

> Thus, nothing in the Motion alters the conclusion the Court reached in its October 7 Order. The President has not demonstrated that he will suffer irreparable harm. Because the President has not made this necessary showing, the Court need not address the remaining factors governing entitlement to injunctive relief. Nevertheless, the Court notes that its views remain unchanged with respect to the President's likelihood of success on the merits (or whether he has demonstrated sufficiently serious questions going to the merits and a balance of hardships tipping in his favor), particularly given the concerns address in the August 20 Decision regarding the effect of further delay on the grand jury's investigation. *See*, Trump v. Vance, 2020 U.S. Dist. LEXIS 150,786, 2020 WL 4,861,980, at *31-32.

A separate Supreme Court Decision, Trump v. Mazars USA LLP, 591 U.S. ____ (2020), decided the same day as *Trump v. Vance*, also written by Chief Justice Roberts dealt differently with four subpoenas issued by three House of Representative Committees. The Supreme Court had never addressed a Congressional subpoena for the President's information.

The Court stated in part:

> Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have hald that each House has power "to secure needed information" in order to legislate. . . .
>
> Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187. The subpoena must serve a "valid legislative purpose," *Quinn v. United States*, 349 U.S. 155, 161

(1955); it must "concern[] a subject on which legislation 'could be had,'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) (quoting *McGrain*, 273 U.S., at 177).

Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S., at 161. . . .

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.*, at 188, 198. And recipients have long teen understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.

The Court stressed the significant separation of powers issues raised by Congressional subpoenas for the President's information. "Without limits on its subpoena powers, Congress could 'exert an imperious control' over the Executive Branch and aggrandize itself at the President's' expense."

The Court remanded to develop a "balanced approach" to a subpoena directed at the President's personal information as "related to, and in furtherance of a legitimate task of Congress." The lower court should take into account several special considerations:

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. . . .

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U.S., at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in

quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U.S., at 384; see *Senate Select Committee*, 498 F.2d, at 732. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. . . .

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose.

CLASS DISCUSSION

Q: Given the lengthy temporal delays that a sitting President can cause in a criminal or Congressional subpoena, is the ability to subject a President to impeachment or Congressional review dysfunctional?

Q: If you were czar or czarina of the Universe, what alternative approach would you create?

PSC 212: CLASS NOTES: SEPTEMBER 15, 2021

CONGRESS AND THE SEPARATION OF POWERS

Reading Assignment: Art. I of Constitution, CB lix-lxiii, CB 79-89, 92-94

Article I most fully developed in Constitution.

Article I Section 8 specifies powers of Congress, including:

- Lay and collect taxes
- Pay debts
- Provide for common defense
- Borrow money
- Regulate interstate commerce
- Coin money
- Make all laws necessary and proper for carrying into execution the foregoing powers

Article I Section 10 denies States several powers including coining money, impairing the rights of Contract and under most circumstances laying any duties upon imports or exports.

The 10th Amendment provides *in toto*: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively or to the people."

BACKGROUND TO *MCCULLOCH v. MARYLAND*

In 1789, first Treasury Secretary Alexander Hamilton proposed the First National Bank of the United States.

Strongly opposed by James Madison, Attorney General Edmund Randolph and Thomas Jefferson, on several grounds:

- Implied power would give Congress the power to do whatever it sought and be the sole judge of the good or evil of any action.
- Necessary and proper clause should be construed narrowly and limited to powers absolutely necessary to carry out an enumerated power of Congress.

Hamilton persuaded Washington to sign the National Banking Act after Congress enacted the law. Hamilton emphasized: "Every power vested in a government is in its nature sovereign, and includes, by force of its term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution."

Hamilton won the debate and Washington signed the law. Hamilton subsequently lost the war.

Presidents Jefferson and Madison did not support the Bank and after its 20 year term, the First Bank went out of business.

Economic necessity after the War of 1812 and rampant inflation because of State Bank growth and improvident grant of money led to the enactment of a Second Bank in 1816.

McCulloch v. Maryland focused on the Constitutionality of the Second Bank.

For most of the period from 1832 when President Jackson vetoed the extension of the Charter of the Second Bank until the coming of the New Deal in 1933, the arguments of Madison, Randolph and Jefferson largely prevailed. President Jackson disagreed with the opinion in *McCulloch* and wrote in his Veto Message: "The powers and privileges

possessed by the existing bank . . . are subversive to the rights of the states and dangerous to the liberties of the people."

MCCULLOCH v. MARYLAND

Q: Why did McCulloch sue Maryland?

Q: Has Congress express power to incorporate a bank?

Q: Are powers of Congress delegated by the States to Congress?

Q: Why if the Constitution affords Congress limited powers can Congress create a Bank?

Q: On what power does Marshall rely?

Q: Can Congress enact any law?

Q: Does the Tenth Amendment limit Congress?

Q: What was law adopted in United States v. Comstock, CB 92-94

Q: Why does Justice Breyer also recognize implementation of implied powers?

Q: Back to *McCulloch* – we have a system of concurrent Federal and State governments. Why can't a State tax the Bank of the United States?

PSC 212: CLASS NOTES: SEPTEMBER 20, 2021

CONGRESSIONAL POWERS UNDER THE COMMERCE CLAUSE

Reading Assignment: CB 489-498, 122-128, 503-504, 131-135

LOCHNER v. NEW YORK

198 U.S. 45 (1905), CB 489-494

Q: What were the material facts?

Q: What is the holding?

Q: What is the liberty of contract?

Q: What is the Constitutional basis of this right?

Q: Does the liberty of contract mean that no State can adopt any economic regulation?

Q: Why did the Court uphold State regulation in *Holden v. Hardy*?

Q: How does the Court decide whether a State has engaged in a valid exercise of police power?

Q: Why does the Court dismiss "in a few words" the validity of the NY law as a labor law?

Q: Can the NY law be justified as a health measure?

Q: Does the Court seem to go far towards invalidating *most* health legislation?

Q: Why does Holmes dissent?

Q How does Holmes characterize the purpose of the Constitution?

Q: When would Holmes uphold health or labor legislation?

Q: How did the Supreme Court harmonize upholding an Oregon law limiting female laundresses to a 10 hour day in *Muller v. Oregon*, 208 U.S. 412 (1908), CB 497-498.

Q: Why did the Supreme Court strike down the D.C. statute setting minimum wages for women and children in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), CB 497-498.

Q: Can *Adkins be harmonized with Muller*?

HOLMES AND *LOCHNER*

Aside from *Dred Scott*, itself, *Lochner v. New York* is the most discredited decision in Supreme Court history. When commentators discuss the case, they use it as a vehicle to illustrate the drastic change in jurisprudence during the 20th Century, which has seen the Holmes dissent in *Lochner* elevated to established doctrine.

But as Holmes stated at the very outset of *The Common Law*: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

The Peckham and Holmes *Lochner* opinions represent two opposed conceptions of jurisprudence – the one that of the late 19th Century, the other that of the coming legal era. In this respect there were two essential differences between the two antithetic approaches:

(1) The proper scope of judicial review; and (2) Reliance upon economic theory by the reviewing court.

1. JUDICIAL REVIEW

The *Lochner* Court, in striking down a law whose reasonableness was, at a minimum, open to debate, in effect determined upon its own judgment whether such legislation was desirable. Such an approach was inconsistent with the basic Holmes doctrine, which was one of judicial restraint. Justice Holmes himself once wrote: "On the economic side, I am mighty skeptical of hours of labor . . . regulation." His personal opinion about the desirability of the law was, however, irrelevant under his theory of review. The "criterion," Holms stated in a 1923 case, "is not whether we believe the law to be for the public good," but whether "a reasonable man reasonably might have that belief."

Under the Peckham approach, the desirability of a statute was determined as an objective fact by the Court on its own independent judgment. For Justice Holmes, a more subjective test was appropriate: Could rational legislators have regarded the statute as a reasonable method of reaching the desired result?

2. ECONOMIC THEORY

The substantive Peckham-Holmes difference was on the reliance on economic theory by the Court in its review of the *Lochner* law. The Holmes assertion that the case was "decided upon an [outdated] economic theory" was the opening salvo in the 20th Century approach to review of regulatory action. According to Sir Frederick Pollock, what Holmes was saying here was "that it is no business of the Supreme Court of the United States to dogmatize on social or economic theories." The

Lochner Court struck down the statute as unreasonable because a majority of the Justices disagreed with the economic theory on which the State legislature had acted. This was precisely the approach to economic theory that Justice Holmes rejected. There may, in the given case, be economic arguments against a challenged regulatory law. To Holmes, however, such arguments were properly addressed to the legislature, not to the judges.

According to Justice Peckham, however, that is exactly what should be the concern of a reviewing court. If a law is based upon what the judge considers an unsound economic theory, the judge should hold the law invalid. And there is no doubt that Peckham considered the *Lochner*-type law to be unsound.

LOUIS BRANDEIS AND *MULLER* BRIEF

In 1890, Brandeis cowrote with his law partner *The Right to Privacy*, one of a handful of 19th Century law review articles that continues to resonate to this day. The bravado of the title far overstates the narrow purpose of the article, to provide a new form of legal protection to private citizens from the unauthorized circulation by the press of portraits.

What has given the article its enduring significance was its description of the law's capacity to infer new more general forms of rights. This proved to be a mode of analysis that appeared to provide the underpinning of the Supreme Court's later penumbral Constitutional right to privacy in 1965 in the *Griswold v. Connecticut* case, and the subsequent extension of this Constitutional right to such matters as abortion.

Brandeis' most enduring effort as a People's Attorney occurred in 1908 when he argued the case of *Muller v. Oregon* before the United States Supreme Court.

Brandeis persuasively responded to the formalism of *Lochner* three years later in *Muller* with the most famous written brief in Supreme Court history, still popularly known as the Brandeis Brief. In persuading the Supreme Court to uphold an Oregon law prohibiting women from working more than 10 hours a day, Brandeis wrote a 113 page brief, most of which focused on empirical studies that demonstrated there was a reasonable basis for Oregon's conclusion that to permit women to work "more than ten hours in one day is dangerous to the public health, safety, morals, or welfare."

The emphasis on the findings of social science, rather than logic, was then a novelty.

WHAT HAPPENED?

1. Economic conditions undermined belief in liberty of contract and *laissez faire*.

Professor Tribe wrote in his Constitutional Law treatise:

> In large measure, however, it was the economic realities of the Depression that graphically undermined *Lochner*'s premises. No longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and to produce a social optimum. The legal "freedom" of contract and property came increasingly to be seen as an illusion, subject as it was to impersonal economic forces. Positive government intervention came to be more widely accepted as essential to individual, family, and community

survival, and legal doctrines would henceforth have to operate from that premise. . . .

In fact, the economic crisis provided substantial impetus to evolving legal doctrines which directly contradicted the *Lochner* thesis. . . . A growing number of legal scholars, including most prominently the advocates of legal realism, came to reject the notion that the common law represented a "natural" state of affairs, and instead saw common law doctrines and decisions as expressions of positive governmental intervention to achieve identifiable, though not always laudable, human purposes. Thus, the basic justification for judicial intervention under *Lochner* – that the courts were restoring the natural order which had been upset by the legislature – was increasingly perceived as fundamentally flawed. There *was* no "natural" economic order to upset or restore, and legislative or judicial decision in any direction could neither be restrained nor justified on any such basis. . . .

Political pressures mounted as well. Franklin Roosevelt had ascended to the Presidency with a promise of a New Deal and he proceeded to enact programs involving extensive federal involvement in economic affairs. Such legislation, while attracting great popular support, was certain to come into conflict with the Constitutional model that had animated the Court since the late 1890s. As the conflict materialized, the pressure on the Court mounted, culminating in the widely condemned Presidential court-packing plan.

TOUGHEST CASES FOR "HORSE AND BUGGY" COURT WERE 1935-1936 REVIEW OF NEW DEAL AND STATE ECONOMIC REGULATION

The effort to move the nation forward came up against the restricted view of governmental power still held by the Supreme Court. The result was a series of decisions that invalidated most of the early important New Deal legislation. In 1935 and 1936 cases, the Supreme Court struck down the two key New Deal antidepression measures, the National Industrial Recovery Act and the Agricultural Adjustment Act. Both measures were held beyond the reach of the Federal commerce power.

The Court's action in this respect came to its culmination just before the 1936 election, when it ruled that there was no power in either States or Nation to enact a minimum-wage law. In the words of a contemporary critic: "The Court not merely challenged the policies of the New Deal but erected judicial barriers to the reasonable exercise of legislative powers, both State and National, to meet the urgent needs of the 20th Century community."

The narrow interpretation of governmental power in these decisions was catastrophic. "We have . . . reached the point as a Nation," President Roosevelt declared, "where we must take action to save the Constitution from the Court." Elimination of manufacturing, mining, and agriculture from the reach of Federal power had rendered Congress powerless to deal with problems in those fields, however pressing they might become.

IN 1937, A SWITCH IN TIME SAVED THE NINE

President Roosevelt's answer to the judicial decisions was his "Court-packing" plan of February 5, 1937. Under it, the President could

appoint another judge for every Federal judge who was over seventy and had not retired. This would have given the President the power to appoint six new Supreme Court Justices.

After lengthy hearings and public discussion, the Senate Judiciary Committee rejected the plan. Yet, if the President lost the Court-packing battle, he was ultimately to win the Constitutional war, for the Supreme Court itself was soon to abandon its restrictive approach to the proper scope of governmental power. Hence, in Justice Jackson's summary of the Court-packing fight, "Each side of the controversy has comforted itself with a claim of victory. The President's enemies defeated the Court reform bill – the President achieved court reform."

A remarkable reversal in the Supreme Court's attitude toward the New Deal program took place early in 1937. From 1934 through 1936, the Court rendered 12 decisions declaring New Deal measures invalid; starting in April 1937, that tribunal upheld every New Deal law presented to it, including some that were basically similar to earlier nullified statutes.

Judicial approval included such crucial New Deal legislation as the Fair Labor Standards Act (see *United States v. Darby*, 313 U.S. 100 (1941)); the National Labor Relations Act (see *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937)); and the new Agricultural Adjustment Act (see *Wickard v. Filburn,* 317 U.S. 111 (1942)), and the Social Security Act of 1935.

UNITED STATES v. DARBY

312 U.S. 100 (1941), CB 131-133

Q: What questions did the Court address?

Q: Is manufacturing addressed by the Interstate Commerce Clause?

Q: Does the Commerce Clause reach legislation whose basic motive and purpose is to raise wages?

Q: In *Hammer v. Dagenhart*, the Court held that Congress was without power to exclude products and child labor from commerce. Can *Hammer* be harmonized with the Court result in *Darby*?

Q: Manufacturing is purely intrastate. How can it be reached under the Interstate Commerce Clause?

In *Wickard v. Filburn*, 317 U.S. 111 (1942), CB 134-135, the Court went further and held that Congress could even regulate farm products consumed on the premises.

Q: Why?

An often quoted test to judge the validity of economic regulation is found in *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), CB 503-504, excerpted (with the Court's famous footnote 4): "[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."

PSC 212: CLASS NOTES: SEPTEMBER 22, 2021

CONGRESSIONAL POWERS UNDER THE COMMERCE TAXATION AND SPENDING CLAUSES

Reading Assignment: CB 160-166, 196-199, 212-217

NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SIBELIUS

Huge case concerning the Affordable Care Act.

TAXATION CLAUSE, CB 196-199

Three issues in case.

At Pages 196-199, the Court by a 5-4 vote upheld the power of Congress to tax individuals to fund the individual mandate.

Q: What is the individual mandate?

Q: The Court permits support for the requirement that all individuals who choose not to participate in the new Federal Health Insurance Program may be required to pay a shared responsibility payment or tax. This is characterized as a lesser burden than giving Congress the power to regulate under the Commerce Clause.

Q: How do you distinguish *Drexel Furniture* at Page 197?

Aftermath

In 2017, Congress nullified the tax penalty under the Patient Protection and Affordable Care Act by setting its amount at $0.

In 2021, the United States Supreme Court rejected the effort of Texas and 17 other States as well as two individuals to hold that the

Patient Protection Act was unconstitutional without the penalty. The Supreme Court rejected this challenge on standing grounds without reaching the merits of their claim. Justice Breyer wrote for a unanimous Court: "Neither the individual nor the state plaintiffs have shown that the injury they will suffer or have suffered is 'fairly traceable' to the 'alleged unlawful conduct' of which they complain."

Q: Does this mean that the Patient Protection Act is now unlikely to be successfully challenged in court?

COMMERCE CLAUSE, CB 160-166

Q: Why does Chief Justice Roberts writing for a 5-4 Majority hold that the individual mandate is not authorized under the Commerce Clause?

Q: Why doesn't *Wickard v. Filburn* provide a basis for application of Commerce Clause – see Pages 161-162.

Q: Suppose Commerce Power could compel action. Could the Federal Government compel people to eat vegetables?

Q: How is this different than the power of Congress to prohibit people from using certain drugs?

Q: Why does Justice Ginsburg writing for four Justices in dissent urge that Court should uphold individual mandate?

Q: Can't hospitals just turn away people without insurance? No.

Q: In Ginsburg's view, there would be no case if health care, like Social Security, a Government program, a so called single payer system. Why did the Obama Administration and Congress not seek this?

SPENDING POWER, CB 212-217

This part of the case concerns Medicaid expansion. Congress required all States participating in Medicaid to provide coverage to individuals with up to 133 percent of the Federal poverty level. Those States that did not so expand Medicaid potentially could lose all Medicaid funding.

Chief Justice Roberts wrote for a 7-2 Majority this exceeded Congressional power under the Spending Clause.

Q: Can Congress place a condition on a grant to the States?

Q: In *South Dakota v. Dole*, Pages 216-217, the Federal Government indicated that it would withhold 5 percent of Federal highway funds from those States that did not raise the drinking age to 21. Is this a permissible condition under the Spending Power?

Q: Then why was the Medicaid Expansion Plan not permissible?

Q: States originally agreed to Medicaid with agreement that terms could be changed. Why doesn't that authorize this Plan?

Q: Did this make all of ACA wholly unconstitutional?

PSC 212: CLASS NOTES: SEPTEMBER 27, 2021

THE POWERS OF THE JUDICIARY

Reading Assignment: Art. III of Constitution, CB lxv, download *Federalist Paper No. 78, CB 2-9, 21-22, 446-449*

THE SUPREME COURT

A. Historical Context

- Art. III bare bones
- Original jurisdiction
  - §2(2)

    In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

- Appellate Jurisdiction §2(2) – All other cases:

  Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - . . . to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - . . . *between Citizens of different States*; - between Citizens of the same State claiming Lands under the Grants of different States, and between . . . the Citizens thereof, and foreign States, Citizens or Subjects.

- Under Art. III §1 appellate jurisdiction only comes into existence if Congress establishes inferior courts.

  Key Supreme Court Jurisdiction is:

- Cases arising under the Constitution and Laws of the United States; and
- Diversity Jurisdiction – between citizens of different states.

In either event, courts are limited to cases and controversies – not an advisory role.

- Judiciary Act of 1789
  - Supreme Court with 6 justices
  - District Courts in each state
  - Three Circuit Courts – East, Middle, South – two Supreme Court Justices and one District Judge in each
  - Supreme Court given appellate jurisdiction under §25 over state courts on cases involving federal questions
- Supreme Court between 1795-1801 was virtually stillborn

B. Political Context

- Two party system evolved under President Washington
  - Federalists – more nationalist
    - Alien and Sedition Acts
  - Jeffersonians – more emphasis on state rights
- John Marshall, first effective Chief Justice
  - Secretary of State before becoming Chief Justice
  - Began opinions of court – rather than seriatim reading

- Congress can act:
  - It canceled rest of 1802 term and repealed Judiciary Act of 1801.
  - It could end inferior courts or restrict their jurisdiction.

- In 1805, Justice Samuel Chase was impeached, but acquitted by a Jeffersonian Senate. A validation of independent judiciary.

Q: In *Federalist Paper No. 78*, Hamilton emphasizes the need for lifetime tenure for judges and justices during good behavior. Why does Hamilton recommend a tenure inconsistent with the limited terms of the President and Congress in our Constitution?

Q: Does Hamilton view other branches of Government as also possessing power to declare laws unconstitutional?

Q: Does Hamilton mean that the Court is superior to the legislature?

Q: To what degree does Article III enact Hamilton's vision?

MARBURY v. MADISON, CB 2-9

President Adams and a Federalist Majority in Congress on February 13, 1801, about three weeks before the end of the Adams Administration on March 4, 1801, enacted the Circuit Court Act of 1801, creating 16 new Federal Judgeships. On February 27, 1801, Congress enacted an Organic Act of the District of Columbia creating Justices of the Peace in D.C.

President Adams appointed new judges and Justices of the Peace before his term expired. These were criticized as being Midnight Judges.

William Marbury was nominated by Adams and confirmed by Congress in the last week of the Adams Administration. His appointment was then signed by Adams, signed and sealed by Secretary of State John Marshall, but not delivered before the end of the Adams Presidency.

Jefferson refused to honor the undelivered judicial appointments and worked with the now pro-Jefferson Congress to repeal the 1801 Judiciary Act, before the case was decided, and abolish terms of the Supreme Court until February 1803.

Q: What did Marbury do?

Q: On Page 2, the Court focuses on three questions: (1) Has Marbury a right to the commission he demands? (2) Do the laws afford him a remedy? (3) If he has a remedy, can the Supreme Court issue a *writ of mandamus*?

Q: Why does the Court conclude that Marbury has a vested legal right?

Q: Why does he have a remedy?

Q: Does this mean that the Supreme Court can direct every action of the President?

Q: Why is this not a political act?

Q: Drum roll . . . we now arrive at the great question decided by the Court, albeit in a very indirect way. Can the Supreme Court issue this *writ of mandamus*?

Q: Section 13 of the Judiciary Act grants the Supreme Court with an exclusive jurisdiction where a State is a party. Does this not empower the Court to issue a *writ*?

Q: Can Congress or the President issue an opinion upholding the Constitutionality of §13 of the Judiciary Act?

Q: Are State courts equally bound by the Federal judiciary's sole power to declare laws unconstitutional?

Q: But to empower the Supreme Court with this power can lead to highly question begging outcomes – see for example *Dred Scott*.

DRED SCOTT v. SANFORD

60 U.S. (19 How.) 393 (1857), CB 446-449

Q: Who was Dred Scott?

Q: Why did he believe that he was a free man?

Q: Why was this case brought in Federal court?

Q: How did the lower Federal court rule?

Q: What questions were before the United States Supreme Court?

TANEY MAJORITY OPINION

Q: Why is it relevant whether Scott is a citizen of the United States?

Q: Is there a distinction in Taney's analysis between a citizen of the United States and a citizen of a State?

Q: Is it determinative in construing the Constitution that the Declaration of Independence includes the premise that "all men are created equal?"

Q: Does the original Constitution offer any guidance as to whether African-Americans were entitled to equality? See Art. I, §9(1); Art. IV, §2(3); Art. I, §2(3).

Q: In Taney's view, would the Southern slave states have joined the United States had slavery been abolished or threatened with abolition?

CURTIS DISSENT

Q: Why did Justice Curtis dissent from Taney's conclusion that the former slaves could never become citizens of the United States?

Q: How would Taney respond?

JUDICIAL INDEPENDENCE AND DISCRETION

Q: Why does virtually every modern commentator consider *Dred Scott* the worst blunder of the United States Supreme Court?

Q: Would it be wiser not to vest the United States Supreme Court with the power to hold acts of the United States Congress unconstitutional?

Q: Would we be wiser if we limited judicial independence by requiring United States Supreme Court Justices, like many State judges and justices, periodically to be elected?

Q: Are there steps that should be taken to limit judicial discretion? If so, what would you propose?

PSC 212: CLASS NOTES: September 29, 2021

THE SECOND AMERICAN REVOLUTION

BACKGROUND TO *SLAUGHTER-HOUSE CASES*

Reading Assignment: 13th – 15th Amendments at CB lxix, CB 451-455, 856-859, 657-659, 661-664, 667-668

Dred Scott (1857) – Descendants of Africans could not be U.S. citizens even if they were State citizens. Prevented Scott from bringing a lawsuit in Federal District Court.

Civil War (1861-1865)

13th Amendment (1865) – Abolished slavery

Lincoln assassinated (1865)

14th Amendment (1868) – Section 1 begins by overruling *Dred Scott*: All persons born or naturalized in the United States . . . are citizens of the United States and the State wherein they reside.

14th Amendment also prohibited a State to:

- Make any law or enforce any law that abridges the privileges and immunities of Citizens of the United States
- Deprive any person of life, liberty or property without due process of law
- Deny equal protection of the laws

1868 – Impeachment of President Andrew Johnson

1868 – Election of Ulysses S. Grant

15th Amendment (1872) – Voting rights cannot be denied on account of race, color or previous condition of servitude.

Slaughter-House Cases (1873)

Civil Rights Act of 1875

Civil Rights Cases (1883)

Plessey v. Ferguson (1896)

Brown v. Board of Education I (1954)

Brown v. Board of Education II (1955)

SLAUGHTER-HOUSE CASES

83 U.S. (16 Wall.) 36 (1873) – CB 451-455

Two issues:

1. 13th – 15th Amendments solely adopted to protect former slaves; and

2. Only privileges and immunities of a citizen of the United States (not privileges and immunities of a citizen of State) protected by 14th Amendment §1.

Tribe Treatise:

> The Slaughter-House Cases involved a Louisiana statute that granted to a single slaughtering company a monopoly on the butchering of animals within the City of New Orleans. Butchers excluded by the monopoly brought suit claiming that the State-sanctioned monopoly infringed their right to work and, consequently, violated the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment. Writing for a bare 5-4 Majority, Justice Samuel Miller denied the

butchers' claims. He began his opinion by limiting the scope of the Reconstruction Amendments, holding that they were concerned, above all else, with the condition of the recently freed slaves: "[T]he most cursory examination of the language of [the Thirteenth, Fourteenth, and Fifteenth Amendments], no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, and the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." Although Justice Miller conceded that persons other than newly freed slaves could claim the guarantees of the Amendments, his emphasis upon their immediate history made clear his intention to interpret them narrowly.

With regard to the butchers' privileges or immunities argument – with which the *Slaughter-House* Court was primarily concerned – Justice Miller turned first to the provision of §1 defining United States citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Though he acknowledged that one of the principal purposes of the Citizenship Clause had been to overrule the infamous *Dred Scott* decision and confer national citizenship on the newly freed slaves, Justice Miller chose to focus simply upon the fact that a differentiation between State and Federal citizenship had been made: "[T]he distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." The distinction itself was of paramount importance, Justice Miller reasoned, because the provision of the Fourteenth Amendment relied upon by the butchers "speaks only of privileges

and immunities of citizens of the United States, and does not speak of those of citizens of the several States."

To the *Slaughter-House* Majority, the Fourteenth Amendment left responsibility over the fundamental rights of State citizenship where it had always rested, in the State Governments. Since the privilege claimed by the *Slaughter-House* plaintiffs numbered among the rights of State citizenship, they were told to look to Louisiana for redress; the Privileges or Immunities Clause provided Federal protection only for the rights of National citizenship.

THE CIVIL RIGHTS CASES

109 U.S. 3 (1883), CB 856-859

Q: What did §1 of the Civil Rights Act of 1875 seek to accomplish?

Q: Who were the plaintiffs in this case?

Q: Were the defendants private businesses or government facilities?

Q: Under §1 of the 14th Amendment, no State is authorized to adopt laws that deprive any person of the equal protection of the law. Why did the Supreme Court not view this as sufficient authority to adopt the Civil Rights Act of 1875?

Q: Are there any circumstances where the Court would hold that wrongful action of individuals could violate the 14th Amendment?

Q: What was the purpose of the 13th Amendment?

Q: Why did the Court reject the argument that this case involved badges of slavery?

Q: Why did the Court conclude that the Civil Rights Act of 1875 was unconstitutional?

Q: Why does Justice Harlan in dissent not believe the Civil Rights Act was Constitutional?

Q: Should States be barred under the 14th Amendment from incorporation of private businesses that deny equal access?

PLESSY v. FERGUSON

CB 657-659

In Louisiana, the law required "equal but separate" railroad cars for "white" and "colored" railroad passengers.

Q: What did the Supreme Court hold when this law was challenged?

BROWN v. BOARD OF EDUCATION I

CB 661-663

Q: What were the material facts in *Brown*?

Q: Why did *Brown* reverse *Plessy*?

Q: What did *Brown* hold?

Q: Why?

BROWN v. BOARD OF EDUCATION II

349 U.S. 294 (1955), CB 667-668

In *Brown v. Board of Education I*, 347 U.S. 483 (1954), the Supreme Court held that "separate but equal" educational facilities are inherently unequal in violation of the equal protection clause of the 14th Amendment.

Q: Why was there a second *Brown* decision?

Q: Does the Supreme Court specify how each school district will comply with its May 17, 1954 decision?

Q: What does it mean that lower courts will be guided by *equitable* principles?

Q: What is the interest of the Plaintiffs?

Q: Why doesn't the court order each admission by a specific date?

Q: Is any guidance given concerning completion of compliance to achieve admission on a nondiscriminatory basis?

PSC 212: CLASS NOTES: OCTOBER 4, 2021

IMPLEMENTING *BROWN v. BOARD OF EDUCATION*

Reading Assignment: CB 668-670, download *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), CB 704-709.

Slaughter-House Cases – 14th Amendment reversed *Dred Scott* by making State citizenship derivative of U.S. citizenship. But Supreme Court reduced the significance of the 14th Amendment by limiting its scope to the privileges and immunities of the United States and not applying to the States.

Civil Rights Cases – Further dramatic limits. The Civil Rights Act of 1875 held unconstitutional because it applied to State action, not wrongful actions of private business owners including those in public accommodations such as hotels, theatres, and train service. Nor was unequal treatment of African-Americans held to be a badge of slavery under the 13th Amendment.

Brown v. Board of Education I – Separate but equal educational facilities inherently unconstitutional under 14th Amendment.

Brown II – But transition to nonsegregated schools should proceed "with all deliberate speed."

SWANN v. CHARLOTTE-MECHLENBURG BD. OF EDUC.

402 U.S. 1 (1971)

Q: Where does this case occur?

Q: In 1968-1969, how many students are in the school system?

Q: What is the racial composition?

Q: Was there in place a school desegregation plan?

Q: Why had the plan failed?

Q: Was segregated education solely the result of school board decisions?

Q: After *Brown II*, did voluntary compliance achieve integration of schools?

Q: How in *Green v. County School Board*, did the Court change its "all deliberate speed" approach?

Q: What is the objective of any judicial remedy?

Q: Must there be a violation of the Constitution for a court to act?

The Court explores four types of remedy:

1. Quotas

Q: Can a court order a quota in a school system if there has been no discrimination by school authorities, but discrimination as a result of other State action:

Q: Did the District Court order a 71-29 ratio in each school in the system?

2. One Race Schools

Q: Is a one race school inevitably evidence of segregation by law?

Q: Who has the burden of showing one race schools are genuinely nondiscriminatory?

3. Altering of Attendance Zones

Q: What was the principal tool employed by school planners and the courts to break up dual school systems?

Q: How are children normally assigned to public schools?

Q: Can segregation only be remedied by a racially neutral plan?

4. Busing

Q: In this case, the Court approved busing, which was the most controversial remedy. Will the Court always approve busing as a remedy?

Q: If resegregation occurs because of housing redlining by banks, can the Courts order School Districts to implement a new desegregation plan?

Q: If full integration can only occur across two or more counties, one of which previously had Government directed segregation and one of which did not, can the Courts order a multicounty desegregation plan?

ADARAND CONSTR., INC. v. PENA

115 S. Ct. 2097 (1995), CB 699-704

Q: What are the material facts in this case?

Q: What law does Adarand assert that the prime contract violated?

Q: Justice O'Conner articulates three propositions with respect to government racial classifications. What does she mean by skepticism?

Q: What does she mean by consistency?

Q: Congruence?

Q: Why did the Court reverse *Metro Broadcasting v. FCC* and hold that racial classifications in broadcasting are not subject to "intermediate scrutiny?"

Q: What does strict scrutiny require?

Q: Does this mean that all racial classifications will be held unconstitutional?

Q: What was the compelling Government interest in *Swann*?

Q: How did the plaintiff demonstrate that the remedy was narrowly tailored?

Q: Why did Scalia write a separate concurrence?

Q: Why does Stevens dissent?

PSC 212: CLASS NOTES: OCTOBER 6, 2021

AFFIRMATIVE ACTION

Reading Assignment: CB 692-695, 710-720, 729-743

REGENTS OF UNIV. OF CALIF. v. BAKKE

438 U.S. 265 (1978), CB 692-695

Justice Powell rendered the deciding vote in two 5-4 Majorities:

1. David Medical School special admissions program unlawful; Bakke must be admitted.
2. Race can be taken into account in a Constitutional plan.

The U.C. Davis Medical School Special Admissions Plan operated with a separate committee, a majority of whom were members of minority groups. On the 1973 application form, candidates were asked to indicate whether they wishes to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Black," "Chicanos," "Asians," and "American Indians." If these questions were affirmatively, the application was forwarded to the Special Admissions Committee.

This plan established a specific numerical goal or quota.

Alan Bakke was a white male denied admission.

Strict scrutiny is the Court's most exacting level of review. It is applied to "suspect" categories such as race. The Court held that strict scrutiny be applied the same in a reverse discrimination case with a

white plaintiff as it would be in a conventional discrimination case with an African-American plaintiff.

Justice Brennan focused on the history of the 14th Amendment to urge that the purpose of the 14th Amendment was to remove "stigma" of earlier treatment of racial minorities. The Powell Majority was not persuaded by this:

> The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined Constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race and are likely to be viewed with deep resentment by the individuals burdened.

The Powell Majority harmonized special treatment for specific races in earlier school desegregation cases:

> The school desegregation cases are inapposite. Each involved remedies for clearly determined Constitutional violations. E.g., *Swan v. Charlotte-Mecklenburg Board of Education.*

Discrimination by race is a "suspect classification" and its purpose must both be (1) Constitutionally permissible and (2) necessary to the accomplishment of the interest. The Special Admissions Program was not justifiable because it had not "reduced the historic deficit of traditionally disadvantaged minorities in medical schools":

> . . . We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of Constitutional or statutory violations.

But attainment of a diverse student body is Constitutionally permissible:

> This clearly is a Constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated Constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing Constitutional interest, that of the First Amendment.
>
> . . . Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, Constitutional limitations protecting individual rights may not be disregarded. . . . As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.

A target or quota, however, is impermissible:

> Petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Race, ethnic background, geography and other facts may be taken into account as "plus factors."

> Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.

GRUTTER v. BOLLINGER, CB 710-719

Q: What were the facts in *Grutter v. Bollinger*?

Q: Isn't a critical mass a quota?

Q: Why did *Grutter* affirm Powell's plus factor analysis in *Bakke*?

Q: Why were amicus briefs important in *Grutter*?

Q: How do you distinguish the outcome in *Bakke* from the result in *Grutter*?

Q: How did *Grutter* satisfy narrowly tailored requirement?

Q: Why not just run a lottery among all applicants?

Q: Why was the undergraduate program in *Gratz v. Bollinger*, CB 719-722, not affirmed?

Q: How did *Schuette*, CB 733-735, nullify *Grutter v. Ballinger*?

Q: Does *Grutter* still matter?

FISHER v. TEXAS

579 U.S. ____, (2016), CB 729-733

Q: What are the material facts? Who is Abigail Fisher?

Q: What is holistic review?

Q: Was the University of Texas's race-conscious admissions program unlawful under the Equal Protection Clause?

Q: Did the Court's opinion preserve the existing legal framework based on *Bakke, Grutter, Gratz* and the first *Fisher* case?

Q: After *Fisher*, is there still support for the proposition that educational benefits of diversity remaining a compelling interest under Federal law?

Q: Can race still be considered in higher education admissions and enrollment decisions? Under what circumstances?

PARENTS INVOLVED IN COMMUNITY SCHOOL v. SEATTLE SCHOOL DIST.

551 U.S. 701 (2007), CB 736-743

Q: Two voluntarily adopted student assignment plans are at issue in this case? What were the material facts in the Louisville plan?

Q: What were the material facts in the Seattle plan?

Q: Is there a Majority opinion decision in this case?

Q: Chief Justice Roberts first addressed the standard of review. What standard does he apply?

Q: Can the Louisville or Seattle plan be justified on the basis of past intentional discrimination in Roberts' view?

Q: What is the second compelling interest?

Q: How did the *Grutter* case explain this interest?

Q: Why does the Roberts decision cast doubt on whether *Grutter* applies to the Louisville and Seattle plans?

Q: What is racial balancing?

Q: Why does the Roberts decision distinguish racial balancing from diversity?

Q: Would the Roberts decision also hold as unconstitutional a local school board choice of where to build a new school if its intent was to increase racial balancing in its district?

Q: What does Justice Thomas mean by a color blind interpretation of the Constitution?

Q: How would he apply this interpretation to a school district experiencing housing resegregation?

Q: What parts of Chief Justice Roberts' decision does Justice Kennedy not join?

Q: Why does Justice Kennedy believe that diversity is an appropriate consideration for a school district to take into account in considering the racial markers of schools?

Q: Why then does Kennedy concur in the judgment of the Roberts opinion and strike down the Louisville and Seattle plans?

Q: What would Kennedy permit a local school district to do?

POLICY DEBATE

Q: What was the purpose of the 14th Amendment?

Q: Is discrimination permissible to achieve integration or is the 14th Amendment intended to be color blind?

PSC 212: CLASS NOTES: OCTOBER 18, 2021

GENDER CLASSIFICATIONS

Reading: CB 759-775 and download Judge Gorsuch Opinion in *Bostock v. Clayton County*, 590 U.S. ___ (2020).

In *Reed v. Reed*, CB 759, the Court struck down under the rational basis test a discrimination against women in the appointment of administrators of estates.

In *Frontiero v. Richardson* (1973), the first case Ruth Bader Ginsburg argued to the United States Supreme Court, the Court followed *Reed* and struck down discrimination against women in the military dependence allowance (automatic for men, women service members had to prove a man's dependence on her). A four Justice plurality of the Court, however, would have applied a strict scrutiny standard.

CRAIG v. BOREN

429 U.S. 1 (1976), CB 761-764

MF: Oklahoma prohibits sale of 3.2 percent beer to men under 21 and women under 18.

Q: Is this an Equal Protection case?

Q: What is the standard of review?

Q: What is the objective of the Oklahoma law?

Q: How did government attempt to prove that the statute supported this objective?

Q: Is reducing two percent male drunken driving a sufficient objective?

Q: Why does Powell concur?

Q: Why does Rehnquist dissent?

MISSISSIPPI UNIV. FOR WOMEN v. HOGAN

458 U.S. 718 (1982), CB 765-766

MF: Hogan, a male, wanted to attend an all female State nursing University.

Q: What is the standard of review?

Q: Why must this be an exceedingly persuasive justification?

Q: What was the purpose of a single gender school here?

Q: When can the State successfully state a compensatory purpose to justify a discriminatory purpose?

Q: Did the State show such disadvantage here?

UNITED STATES v. VIRGINIA

518 U.S. 515 (1996), CB 768-775

Q: What was VMI?

Q: What remedy did the 4th Circuit approve?

Q: Why did the Supreme Court reverse the decision?

Q: What was the standard of review?

Q: Why did Scalia dissent?

Q: Are all single sex institutions unconstitutional?

BOSTOCK v. CLAYTON COUNTY, GA

590 U.S. ____ (2020)

Q: What is Title VII of the Civil Rights Act of 1964?

Q: Why does Gorsuch believe it prohibits an employer from firing an employee even if he, she or they are homosexual or transgender, even if the drafters of Title VII did not imagine such a result?

Q: What were the material facts concerning Gerald Bostock?

Q: What were the material facts concerning Aimee Stephens?

Q: Why, according to Gorsuch, does the Supreme Court normally interpret a statute in accord with the ordinary meaning of its terms at the time of its enactment?

Q: Why isn't legislative history appropriate here?

Q: Why does Gorsuch reject policy grounds for denying coverage to homosexual and transgender persons?

Q: Why is the phrase "because of" before the terms set in Title VII decisive to analysis of this case?

Q: Discrimination because of sex "prohibited with respect to individuals, not groups of individuals." Why?

Q: What about religious objections to employing homosexual or transgender people?

Q: Does this mean that no female, male or transgender employee can be fired under Title VII?

Q: Why does Gorsuch reject the argument that the failure of Congress to add sexual orientation to Title VII's list of protected characteristics provide employers a defense for employers firing a homosexual or transgender employee?

Equal Rights Amendment

The Equal Rights Amendment:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

The Equal Rights Amendment (*ERA*) was a proposed amendment to the United States Constitution designed to guarantee equal rights for women.

Congress had set a ratification deadline of March 22, 1979. Through 1977, the amendment received 35 of the necessary 38 state ratifications. Five states rescinded their ratifications before the 1979 deadline. In 1978, a joint resolution of Congress extended the ratification deadline to June 30, 1982, but no further states ratified the amendment and so it did not become part of the Constitution.

LEVELS AND STANDARDS OF JUDICIAL REVIEW
EQUAL PROTECTION ANALYSIS

Review Level	Classification	Relation	Purpose	Burden
Strict Scrutiny	Suspect classes: race, national origin	Necessary	Compelling	Govt. demonstrates purpose and relation, once plaintiff shows classification or burden on fundamental right.
Intermediate Scrutiny	Gender	Substantially related	Important	Govt. demonstrates purpose and relation once plaintiff shows classification.
Rational Basis	Most economic regulation	Conceivably rationally related	Legitimate	Plaintiff demonstrates lack of purpose, relation.

Q: After *United States v. Virginia* and *Bostock*, what difference would the Equal Rights Amendment make?

PSC 212: CLASS NOTES: OCTOBER 20, 2021

THE RIGHT TO PRIVACY AND REPRODUCTIVE RIGHTS

CB 511-524, 531-538, 544-546

GRISWOLD v. CONNECTICUT

381 U.S. 479 (1965), CB 510-518

DOUGLAS MAJORITY

Q: What were the material facts?

Q: What did this violate?

Q: Is there an express Constitutional right to privacy?

Q: Why did Justice Douglas characterize the rights in *Pierce v. Society of Sisters* and *Meyer v. Nebraska* as penumbral rights?

Q: How does Douglas nonetheless argue that a "zone of privacy" is a penumbral right?

Q: What is the holding?

GOLDBERG CONCURRANCE

Q: Which of the Bill of Rights does Goldberg emphasize?

Q: Why, according to Goldberg, does this reach the right to privacy?

Q: Is the Ninth Amendment an absolute right?

BLACK DISSENT

Q: Does Justice Black accept the Douglas penumbral rights theory?

Q: Why does Justice Black reject Justice Goldberg's Ninth Amendment argument?

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), CB 519-520, the Court stated in part:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right to privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
>
> On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.
>
> . . . We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated,

Massachusetts General Laws Ann., c. 272, §§21 and 21A, violate the Equal Protection Clause.

1. *Eisenstadt* adds to the analysis of privacy with its ban of the *distribution*, not just the use of contraceptives, and extends the right to privacy to not just married couples.

2. The Court provides two alternative readings of *Griswold* near the end of the Majority opinion, including "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted Governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This sentence changes the meaning of "privacy" as used in *Griswold.* "Privacy" no longer refers to seclusion, inaccessibility and nondisclosure, but rather a species of *decisional autonomy*.

ROE v. WADE

410 U.S. 113 (1973), CB 521-524

Q What did the Texas criminal statute at issue here provide?

Q: Who was Jane Roe?

Q: What is the Constitutional argument made on behalf of Roe?

Q: Why were criminal abortion statutes enacted?

Q: What is the Constitutional basis for a woman's right whether or not to terminate a pregnancy?

Q: Is the right to an abortion absolute?

Q: When Justice Blackmun refers to protecting potential life, does he mean that a fetus is a "person" as that term is used in the Constitution?

Q: Does Blackmun accept the argument of Texas that life begins at conception?

Q: How does Blackmun resolve when the State interest is compelling?

a. Abortion funding. In 1977, the Court decided three cases permitting States to refuse Medicaid coverage for nontherapeutic abortions. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977). Although the Government subsidized continued pregnancy and childbirth but not abortion for the indigent, the majority in *Maher* found no "unduly burdensome interference" with the abortion decision, distinguishing the "obstacle" invalidated in *Roe*. The Court treated the refusal to fund abortion as State inaction calling for the rational basis test rather than the strict scrutiny applied in *Roe*. State encouragement of childbirth over abortion, a "value judgment," satisfied this less demanding standard of review.

b. *Government funding of abortions necessary to protect woman's health*. The Court used a similar analysis to reject challenges to Governmental refusals to fund abortions necessary to preserve the woman's health. In Harris v. McRae, 448 U.S. 297 (1980), the Court held that *Roe*'s protection of the right to abortion does not confer an entitlement of funds to realize that right. See also Webster v. Reproductive Health Servs., 492 U.S. 490, 507-513 (1989).

c. *Informed consent*. Soon after *Roe*, the Court upheld State regulations mandating that the physician obtain the patient's prior written consent, regardless of the stage of pregnancy. Planned

Parenthood v. Danforth, 428 U.S. 52 (1976). When States mandated a detailed list of abortion warnings, however, the Court invalidated these measures because of both their interference with the doctor-patient relationship and their underlying anti-abortion motivation. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 442-449 (1983); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759-765 (1986).

PLANNED PARENTHOOD OF SOUTHEASTERN PA. v. CASEY

505 U.S. 833 (1992), CB 531-538

NOTE: 5-4 VOTE

Q: What were the material facts?

O'CONNOR, KENNEDY, SOUTER MAJORITY

Q: The Court reaffirms *Roe v. Wade* and characterizes it as having three parts. What are they?

Q: What is the Constitutional basis of *Roe*?

Q: Does the Court reject the *Griswold* penumbra approach or Ninth Amendment?

Q: What does the Court mean that time has overtaken some of *Roe*'s factual assumption?

Q: Here the Court rejects the trimester approach adopted in *Roe*. What does it adopt instead?

Q: What interest does the State have before viability?

Q: What does the Court mean by an "undue burden standard"?

Q: Under the undue burden standard, can a State prohibit from having an abortion before viability?

Q: Except in medical emergency, can a State require a physician at least 24 hours in advance of an abortion to inform a woman of the nature of the procedure, its health risks, and the probable gestational age of the fetus?

Q: Doesn't a physician have a First Amendment right not to explain these things?

Q: Could informed consent procedures be challenged as undue burdens?

Q: Earlier in *Akron I*, the Court held that a 24 hour waiting period was unconstitutional. Why was *Akron* overruled here?

Q: Why does the Court hold that women need not provide a signed statement that she has notified her spouse of her intent to have an abortion?

Q: Why are parental notification provisions permitted?

BLACKMUN CONCURRENCE, CB 536

Q: Why did Blackmun believe that specific regulations were not held unconstitutional?

REHNQUIST DISSENT, CB 536-537

Q: Why does Rehnquist liken abortion to murder?

Q: Why does Rehnquist believe this case largely overruled *Roe v. Wade*?

Q: Why does Rehnquist criticize the undue burden standard?

WHOLE WOMEN'S HEALTH v. HELLERSTEDT

136 S. Ct. 2292 (2016), CB 544-546

Q: What new restrictions were added by the Texas anti-abortion law, H.B. 2?

Q: Under *Casey*, what standard did the Court apply to review the Constitutionality of H.B. 2?

Q: Why was the new admitting privileges requirement held to be a substantial burden?

Q: Why was the surgical center requirement also held to be unconstitutional?

PSC 212: CLASS NOTES: OCTOBER 25, 2021

MARITAL RIGHTS

Readings: CB 672-673, 563-570, 575-587

LOVING v. VIRGINIA

388 U.S. 1 (1967), CB 672-673

Q: What were the material facts?

Q: What was the reasoning of Virginia in upholding the conviction?

Q: Under what Constitutional principles was the decision in this case decided?

Q: What did the Court hold?

Q: What standard of review?

LAWRENCE v. TEXAS

539 U.S. 558 (2003), CB 563-570

Q: What were the material facts?

Q: What did the Court hold?

Q: What was the substantive right, the fundamental liberty interest, that was at stake, according to the Court?

Q: Why did the Court overrule *Bowers*?

Q: What did O'Connor, at CB 568-569, have to say about the Texas law?

Q: What did Scalia, at CB 569-570, say in dissent?

Q: What was Thomas' position? See CB 570.

UNITED STATES v WINDSOR

570 U.S. 744 (2013), CB 575-582

Q: What is the Defense of Marriage Act (*DOMA*)?

Q: Does this law prohibit states from permitting same sex marriages?

Q: Why did Edith Windsor bring this lawsuit?

Q: Why did New York enact laws permitting same sex marriage to be performed in New York and recognized in New York if performed elsewhere?

Q: Why did the Supreme Court hold DOMA unconstitutional?

Q: Does this mean that the law of marriage is no longer within the authority of the States?

Q: Why did the Court view DOMA as creating second class marriages?

Q: Why did Justice Scalia in dissent view the penultimate sentence of the Majority decision as making inevitable a Supreme Court opinion upholding a Constitutional right to same sex marriage?

Q: Does *Windsor* create a Constitutional right to same sex marriage?

OBERGEFELL v. HODGES

576 U.S. ____ (2015), CB 583-587

MF: Fourteen couples with same sex marriages brought suit challenging statutes in Michigan, Kentucky, Ohio and Tennessee defining marriage as a union between one man and one woman. What are the issues?

Two questions reviewed by the Court: (1) Does the 14th Amendment require a State to license a marriage between two persons of the same sex? (2) Does the 14th Amendment require one State to recognize a same sex marriage licensed in another State that does recognize the right?

Q: The Court grounds its decision in a discussion of "liberty" promised by the Constitution. Under what section of the Constitution does the Court consider the right of marriage to be fundamental?

Q: The Court described four principles and traditions underlying the reason that marriage is fundamental under the Constitution. What are they?

Q: What are some of the Government rights, benefits and responsibilities related to marriage that the Court found persuasive in terms of how society supports a married couple?

Q: How did the Equal Protection Clause influence the Court's decision?

Q: How did the *Lawrence v. Texas* decision factor in the Court's holding?

Two fundamental objections to this decision:

Q: What are the implications for organized religions that seek to define marriage as between a man and a woman?

Q: The Court declines to wait for further legislation or litigation before proceeding. Why?

PSC 212: CLASS NOTES: OCTOBER 27, 2021

CB 814-819; *Rucho v. Common Cause*; CB 1494-1502, 1507-1510

VOTING RIGHTS

The Constitution as initially ratified gave States complete discretion to determine voter qualifications for its residents. After the Civil War, three Reconstruction Amendments were ratified that limited States' discretion – the 13th Amendment (1865), the 14th Amendment (1868), and the 15th Amendment (1870).

During and after Reconstruction, Southern States began campaigns of voter disenfranchisement. States in the 1890s called Constitutional Conventions with the express purpose of enacting means to prevent blacks from voting. Disenfranchisement schemes included poll taxes, literacy tests, grandfather and old soldier clauses, among others. For example, Mississippi's Constitutional Convention adopted a poll tax of $2 for every citizen between the ages of 21 and 60, with the requirement that the tax receipt be presented to vote, a detail that could easily be forgotten or enforced on a selective basis. Also adopted was a provision that excluded those convicted of various crimes, as well as a literacy test that might require satisfactorily reading, understanding, or interpreting any section of the State Constitution.

Other States followed suit. South Carolina held a Constitutional Convention in 1895 that adopted a two year residency requirement; a $1 poll tax; a literacy test that required reading, writing, or understanding any section of the State Constitution, or ownership of property worth $300; and the disqualification of convicts.

Louisiana added the "grandfather clause" to the list of tactics in 1898, directing that the registration list include names of all males whose fathers and grandfathers were registered on January 1, 1867, before blacks had been enfranchised. The State also imposed

educational and property requirements for voting, from which those who qualified under the grandfather clause were exempt. Similarly, the old soldier clause exempted veterans of the civil War and other specified ward from having to submit to a literacy test. Rates of illiteracy for adult black males were significant in some states: 55% in South Carolina and 53% in North Carolina in 1900 were disenfranchised by literacy requirements.

The effect of these disenfranchising measures and the related violence was immediate: in Alabama, for example, of the 181,471 black males of voting age in 1900, 3000 were registered. In Louisiana in 1896, there were 130,344 blacks registered to vote; by 1900, the number had dropped to 5320.

In the 1950s, the Civil Rights Movement increased pressure on the Federal Government to protect the voting rights of racial minorities. Congress responded to rampant discrimination against racial minorities in public accommodations and Government services by passing the Civil Rights Act of 1964. But the Act did not prohibit most forms of voting discrimination. In January 1965, Martin Luther King, Jr. and other Civil Rights Leaders organized demonstrations in Selma, Alabama that drew attention to the issue of voting rights. In the wake of Selma, President Lyndon Johnson called on Legislators to enact expansive voting rights legislation.

The 1965 Voting Rights Act substituted a presumption of racial discrimination in the use of literacy tests if various objective criteria existed – for example, if the States used tests and devices for voter registration and the voting rate was 12 percentage points lower than the National average in the 1964 Presidential Election.

Two issues today: Equal representation and campaign finance

I: Equal Representation

The Constitution in Article 1 §2 and elsewhere vests the right to determine the qualifications of voters in the States.

State power is limited by the:

14th Amendment – which prohibits denying the vote on account of race

19th Amendment – which prohibits denying the vote on account of sex

24th Amendment – which prohibits denying the vote on account of failure to pay a poll tax

26th Amendment – which prohibits denying the vote on account of age to those 18 years old and older

REYNOLDS v. SIMS

377 U.S. 533 (1964), CB 814-818

Q: Why did the Plaintiffs challenge the State reapportionment in this case?

Q: Why are unequal rights given to voters in different voting districts in the same State unconstitutional?

Q: Does this mean that every voting district must be exactly the same calculated with mathematical precision?

Q: Will a voter referendum approved by the citizens of a State justify an unequal representation?

Q: Why did Justice Harlan dissent?

Q: What was the holding in *Evenwel v. Abbott*, CB 818-819?

Q: What is partisan gerrymandering in *Rucho v. Common Cause*, ___ U.S. ___ (2018)?

Q: What did the Court Majority hold?

SHELBY COUNTY v HOLDER

570 U.S. 529 (2013), CB 909-913

Q: What was the purpose of the Voting Rights Act of 1965:

Q: Did the Act apply to all states?

Q: What did Section 4 of Act do?

Q: What did §5 do?

Q: Why did Chief Justice Roberts believe 50 years later "Things have changed dramatically." See Page 910 Full ¶4.

Q: Why did Robert strike down the coverage formula in §4 of the Voting Rights Act?

Q: Is Congress prevented from acting?

Q: Why did Ginsburg, Breyer, Sotomayer and Kagan dissent?

Q: What would the consequence of those provisions of the Voting Rights Act being in place today?

In Brnovich v. Democratic National Committee, 594 U.S. ___ (2021), a 6-3 majority of the Supreme Court held that §2 of the Voting Rights Act does not apply to a facially neutral time, place or manner voting restrictions.

Justice Alito solely focused his analysis on §2 which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10,303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 52 U.S.C. §10,301.

The Majority opined:

> Section 2 of the Voting Rights Act provides vital protection against discriminatory voting rules, and no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated. But §2 does not deprive the States of their authority to establish non-discriminatory voting rules.

Specifically, the Court Majority upheld two Arizona voting restrictions:

> First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver.

The Court Majority was unimpressed by the argument that minority voters were twice as likely to be disqualified because of the out of precinct requirement:

> The District Court found that among the counties that reported out-of-precinct ballots in the 2016 general election, roughly 99% of Hispanic voters, 99% of African-American voters, and 99% of Native American voters who voted on election day cast their ballots in the right precinct, while roughly 99.5% of non-minority voters did so.

Without concrete evidence that Arizona's restriction on third party ballot collection similarly was not held to have a disparate impact on minority voters:

> Even if the plaintiffs had shown a disparate burden caused by HB 2023, the State's justifications would suffice to avoid §2 liability. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence.

Justice Kagan, in dissent, explained that Arizona's out of precinct rule was an exception in discarding out of precinct votes and did so at a rate 11 times the rate of the second state. Some 10,979 of the 35,000 ballots discarded on this basis were in Arizona.

Kagan also criticized Arizona's law banning third party ballot collection as "a significant race-based disparity in voting opportunities":

> The problem with that law again lies in facts nearly unique to Arizona – here, the presence of rural Native American communities that lack ready access to mail service. Given that circumstance, the Arizona statute discriminates in just the way Section 2 proscribes. The majority once more comes to a different conclusion only by ignoring the local conditions with which Arizona's law interacts.
>
> The critical facts for evaluating the ballot-collection rule have to do with mail service. Most Arizonans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom. Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. . . . And for many or most, there is no nearby post office. Native Americans in rural Arizona "often must travel 45 minutes to 2 hours just to get to a mailbox."

What may prove to be most significant about *Brnovich* will be the Court's unwillingness to address facially neutral time, place or manner restrictions in many other states that recently have adopted new voting restrictions.

II: CAMPAIGN FINANCE

There is a complicated statutory and judicial background to *Citizens United*.

- 1907 – The Tillman Act prohibited corporations from making contributions to candidates or political parties in connection with a Federal election.

- 1947 – The Taft-Hartley Act banned expenditures by corporations and labor unions as well as contributions made in connection with any general or primary election for Federal office.
- Watergate involved systematic efforts to secretly have corporations make campaign contributions to Richard Nixon.
- The Federal Election Campaign Act amended in 1974 limited public contributions to $1000 per candidate per election, established disclosure requirements and created the Federal Election Commission. The 1974 Act also limited issues advertising.

Supreme Court decisions in the period after the enactment of the Federal Election Campaign Act stressed two quite different themes.

When the Federal Election Campaign Act itself was challenged on First Amendment grounds and came before the Supreme Court in 1976 in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court found a "Constitutionally sufficient justification for the $1000 contribution limit." *Id.* at 26. Noting the increased importance and expense of mass communications, the Court agreed that "the integrity of our system of representative government is undermined" if large contributions might secure a "political *quid pro quo* from current and potential office holders," and even where there is the mere perception of such improper influence. *Id.* at 26-27.

On the other hand, the Court found that the restriction against independent expenditures "does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. It rejected the Government's argument that expenditures could be controlled or coordinated with the candidate, and have "virtually the same value to the candidate as a contribution," because such "controlled or coordinated expenditures are

treated as contributions" under the Federal Election Campaign Act, not expenditures.

In essence, *Buckley* made a sharp distinction between corporate contributions to a candidate, which remained barred, and support for other expenditures such as an issues advertisement uncoordinated with a candidate, which was permissible.

In 1977, the Court considered State limits on a corporation's political speech First Amendment rights in the context of a referendum election in *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765 (1977). Massachusetts had enacted a criminal statute generally forbidding certain expenditures by corporations for the purpose of influencing the vote on referendum proposals.

The referendum at issue was a proposed Constitutional amendment that would have permitted the legislature to impose a graduated income tax on individuals. The Bank planned to spend money to publicize its view on the referendum, but was told it would be criminally prosecuted if it did so.

Because the speech that the corporations proposed to communicate – core political speech – "is at the heart of the First Amendment's protection," the Supreme Court concluded the law contravened the First Amendment:

> [T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs. If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

The Court in *Buckley* concluded: Protected speech does not lose First Amendment protection "simply because its source is a corporation." *Id.* at 784.

Thirteen years later, the Court sounded a quite different theme when in 1990, it decided the Constitutionality of a Michigan law that was modeled on the Federal Election Campaign Act in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Michigan law prohibited corporations, but not unions, from using their general treasury funds for independent expenditures.

The Court acknowledged that the only legitimate and compelling government interests identified by the Court for restricting campaign finances were "preventing corruption or the appearance of corruption." *Id.* at 658. The Court found that this interest "supports the restriction of the influence of political war chests funneled through the corporate form." *Id.* at 659. Singling out corporations, moreover, was appropriate in the Court's view because of the special advantages such as limited liability or perpetual life that attend the corporate form. "These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Id.*

According to the Court, the danger that the Michigan statute sought to address was not the danger of "financial *quid pro quo* corruption" but was, instead, "a different type of corruption in the political arena": "[T]he corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. The Court concluded that the State's restriction as to corporate spending was

"precisely targeted to eliminate the distortion caused by corporate spending." *Id.*

Now our story gets more complicated. As a result of the *Buckley* Court's construction of the Federal Election Campaign Act's expenditure limitations to prohibit only funds that were used to "expressly advocate the election or defeat of a clearly identified candidate," corporations and unions were free to spend as much money as they pleased on "issue advertising." These ads did not "expressly advocate" for a particular vote for or against a particular candidate, but nonetheless unmistakably conveyed the same message in substance. *See id.* at 650-51. Because such expenditures were unregulated, corporations and unions poured hundreds of millions of dollars into such "issue ads" in each election cycle. *Id.*

Congress subsequently amended the Federal Election Campaign Act by enacting the Bipartisan Campaign Reform Act, popularly known as the McCain-Feingold law. 116 Stat. 81. In this law, Congress sought to regulate "issue advertising," by introducing the concept of the "electioneering communication" which is defined to mean a broadcast message that "refers" to a clearly identified candidate for Federal office that is distributed by mass media within 30 days of a primary or 60 days of general election and "targeted to the relevant electorate." Corporations and unions were prohibited from using their general treasury funds to engage in "electioneering communication," except through the use of their segregated political funds, so called PAC funds.

The Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) upheld this approach to electioneering communications. According to the Court, the ability of corporations and unions to form PACs affords them "a Constitutionally sufficient opportunity to engage in express advocacy." *Id.* Because corporations and unions can fund "electioneering communications" with PAC money, "it is 'simply wrong'

to view the provision barring corporations and unions from using treasury funds for electioneering communications as a complete ban on expression rather than regulation.

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

558 U.S. ___ (2010), CB 1494-1502

Q: What were the material facts?

Q: Why does the Court describe the BCRA as both underinclusive and overinclusive?

Q: What is an "electioneering communication"?

Q: Did the Court follow precedent?

Q: Why was the Majority unpersuaded by the reasoning in *Austin* that there was a "compelling Governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas?'"

Q: Why did the Court say this statute was an "unprecedented Governmental intervention in the realm of speech"? Who was being prohibited from speaking?

Q: Do you think the Government should have some ability to restrict some forms of election expenditures? What about from corporations (foreign or domestic) that do business with Government? Where should the line be drawn?

Q: Does this case mean that corporations are entitled to other Constitutional rights, other than free expression? Does this case make corporations members of "We the People"?

McCUTCHEON v. FEDERAL ELECTION COMMISSION

572 U.S. ___ (2014), CB 1507-1512

Q: Who was Shaun McCutcheon?

Q: Why did he bring suit?

Q: What are "base limits" and "aggregate limits"?

Q: Do you agree that the "aggregate limits" serve no Constitutionally permissible purpose?

Q: Justices Breyer, Ginsburg, Sotomayor and Kagan dissented. What was their main concern?

POLICY QUESTION

Q: If you were czar or czarnian of the Universe, how would you prescribe rules for campaign finance?

PSC 212: CLASS NOTES: NOVEMBER 1, 2021

FREEDOM OF EXPRESSION UNDER FIRST AMENDMENT

CB 947-948, 950-954, 961-969, 978-980

In 1769, Blackstone summarized the law as follows:

> The liberty of the press [consists] of laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. [To] subject the press to the restrictive power of a licenser [is] to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.

The First Amendment. Scholars have long puzzled over the actual intentions of the framers of the First Amendment. The primary dispute is over whether the framers intended to adopt the Blackstonian view – that freedom of speech consists entirely in the freedom from prior restraints – or whether they intended a broader meaning.

The Sedition Act of 1798. The first serious challenge to freedom of expression in the United States came with the Sedition Act of 1798. Act of July 14, 1798, 1 Stat. 596. The United States was on the verge of war with France, and many of the ideas generated by the French Revolution aroused fear and hostility in segments of the U.S. population. A bitter political and philosophical debate raged between the Federalists, then in power, and the Republicans.

Against this backdrop, the Federalists enacted the Sedition Act of 1798. The Act prohibited the publication of:

> false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame [them]; or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any [lawful] act of the President of the United States.

The Act provided further that truth would be a good defense, that malicious intent was an element of the crime, and that the jury "shall have a right to determine the law and the fact, under direction of the court, as in other cases."

The Sedition Act was vigorously enforced, but only against members or supporters of the Republican Party. Prosecutions were brought against the four leading Republican newspapers. The cases, often tried before openly hostile Federalist judges, resulted in ten convictions and no acquittals. Moreover, in the hands of these judges, the procedural reforms of the Act proved largely illusory.

The Supreme Court did not directly consider the First Amendment's guarantee of free expression until Congress enacted the Espionage Act of 1917 at the outset of World War I.

SCHENCK v. UNITED STATES

249 U.S. 47 (1919), CB 947-948

Q: What were the material facts?

Q: Does Holmes regard the First Amendment as providing absolute protection of all ideas?

Q: When will words not be protected by the First Amendment?

Q: Is the same standard applicable in peace and in war?

ABRAMS v. UNITED STATES

250 U.S. 616 (1919), CB 950-954

Q: What did the defendants do?

Q: Why did Holmes not believe that there was a clear and present danger?

Q: Can you distinguish Holmes majority decision in *Schenck* from his dissent in *Abrams*?

Q: Why does Holmes believe First Amendment should protect every political belief or expression of opinion?

GITLOW v. NEW YORK

268 U.S. 652 (1925), CB 961-964

Q: Under what statute did this case proceed?

Q: What did defendants do?

Q: Does the First Amendment according to the majority apply to the States?

Q: Why?

Q: Why did Sanford, for majority, uphold this conviction?

Q: Would Sanford convict if no immediate effect of an utterance could be foreseen?

Q: Does Sanford reject the Clear and Present Danger Test?

Q: Why did Holmes not believe that there was a clear and present danger?

Q: What according to Holmes must the State allege in addition to the publication of a document to satisfy the Clear and Present Danger Test?

WHITNEY v. CALIFORNIA

274 U.S. 357 (1927), CB 965-969

MF: The Court, in an opinion by Justice Sanford, affirmed Whitney's conviction for violating the California Criminal Syndicalism Act. Despite her claim that she did not intend the Communist Labor Party to be an instrument of terrorism or violence, the Court concluded that her knowing decision to remain a member of an organization advocating criminal syndicalism was sufficient to subject her to criminal liability.

Q: Is the First Amendment protection of speech absolute?

Q: Does Brandeis agree with Justice Sanford that the legislature may determine whether "a society organized to advocate criminal

syndicalism constitutes a clear and present danger of substantive evil?"

Q: What did Brandeis characterize as "the final end of the state?"

Q: Why did Brandeis argue that "fear of serious injury alone cannot justify suppression of free speech?"

Q: What are the only circumstances when Brandeis will approve suppression of free speech?

BRANDENBURG v. OHIO

359 U.S. 444 (1949), CB 978-980

Q: Who was the defendant?

Q: Under what statute was he arrested?

Q: What did he do?

Q: How did the Supreme Court reformulate the Clear and Present Danger Test?

PSC 212: CLASS NOTES: NOVEMBER 3, 2021

FIGHTING WORDS AND HATE SPEECH

CB 986-987, 1176-1180, 1030-1033, 1038-1044, 1176-1180, 1186-1192; download Breyer majority decision in *Mahoney Area School Dist. v. B.L.*, 594 U.S. ___ (2021)

Review of last session:

First Amendment has an uncertain history. The Amendment's plain language provides: "Congress shall make no law abridging the freedom of speech or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

Blackstone earlier described freedom of speech as barring prior restraints, but not criminal prosecution after a statement was made.

Sedition Act of 1798 could reach statements exciting the hatred of the people against the President. Truth was a defense. But the Sedition Act was used in a partisan way only to convict publishers associated with the party not in power.

Supreme Court first construed First Amendment freedom of expression clauses in 1919 after the enactment of the Espionage Act of 1917.

1. *Schenck v. United States* (1919) – Holmes wrote Majority and articulated clear and present danger test. No man can falsely shout fire in a theatre and cause a panic.

Law is different in war than in peace.

2. *Abrams v. United States* (1919) – Holmes dissent would not criminalize mere speech unless imminent threat of interference with

lawful and pressing purposes and "[an] immediate check is required to save the country."

3. *Gitlow* (1925) – New York State law against criminal anarchy.

a. First Amendment applies to States as incorporated by the 14th Amendment.

b. Sanford Majority assumed State law condemning specific utterances advocating unlawful overthrow of the country involved a danger of proscribed evil.

c. Brandeis and Holmes dissented. No actual danger of an attempt to overthrow demonstrated.

d. Different question if document had been an attempt to induce an uprising immediately.

4. *Whitney v. California*, subsequently overruled. Brandeis dissent nonetheless instructive.

a. First Amendment is a fundamental, not an absolute right; speech can be restricted.

b. Supreme Court had not yet fixed a standard to determine when a danger is clear, how much danger must be shown, and what degree of evil shall be deemed sufficient to justify abridging free speech.

c. Brandeis view: Only an emergency can justify repression and the speech must pose (1) an imminent danger, and (2) a probability of serious injury to the State.

Brandenberg – three part test:

- Advocacy of use of force or of law violation.

- Directed to inciting or producing imminent lawless action.
- Likely to incite or produce such result.

UNITED STATES v. O'BRIEN

391 U.S. 367 (1968), CB 1176-1180

In *O'Brien*, the defendant burnt his draft card before a sizeable crowd, stating he was burning the card because of his opposition to the Vietnam War and the draft.

He was convicted under a Federal Statute which prohibited knowingly destroying or mutilating a draft card.

The Supreme Court upheld the conviction, as not abridging free speech any more than a law prohibiting the destruction of a driver's license or a tax law prohibiting destruction of books and records.

Nor did the Court accept that this was symbolic speech, but the Court went on to state: "Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is Constitutionally protected activity."

The Court then announced a four part test to determine when Government regulation is sufficiently justified:

- Is the Government regulation within the Constitutional power of Government?
- Does it further an important or substantial Government interest?
- Is the Government interest unrelated to the suppression of expression?
- Is the incidental restriction on alleged First Amendment freedoms no greater than essential to furtherance of that interest?

CHAPLINSKY v. NEW HAMPSHIRE

315 U.S. 568 (1942), CB 986-987

Q: Who was Chaplinsky?

Q: What did he say in front of restless crowd?

Q: Did these words incite use of force or law violation?

Q: Why was he convicted?

Q: Under what statute was he convicted?

Q: Why did New Hampshire Supreme Court affirm conviction?

Q: Why did the United States Supreme Court affirm?

Q: Can *Chaplinsky* be harmonized with the three part test in *Brandenberg*?

TEXAS v. JOHNSON

491 U.S. 397 (1989), CB 1186-1192

BRENNAN MAJORITY

Q: Who was the defendant?

Q: Where did the action in question occur?

Q: What is expressive conduct?

Q: Did the Court view this as expressive conduct?

Q: Under the First Amendment, is expressive conduct entitled to the same protection as speech?

Q: What interests does Texas assert?

Q: Why is preventing a breach of peace unpersuasive here?

Q: Could burning a flag be viewed as fighting words?

Q: Cannot a State prohibit flag desecration because the flag is a symbol of our country?

REHNQUIST, WHITE & O'CONNOR DISSENT

1. The flag occupies a unique position as a symbol of our Nation.

2. Here, it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wishes; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders.

3. The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of the many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or his many other expressions, for which he was punished.

R.A.V. v. CITY OF ST. PAUL

505 U.S. 377 (1992), CB 1038-1044

Q: What were the material facts?

Q: Was this expression the equivalent to fight words?

Q: Why did Justice Scalia for the Majority nonetheless conclude that the relevant statute was facially unconstitutional?

Q: Why did Justice White write a concurring opinion?

Q: Why did Justice Stevens not fully join White's Opinion?

SNYDER v. PHELPS

131 S. Ct. 1207 (2011), CB 1030-1033

This is a case brought under Maryland State law for defamation, intentional infliction of emotional distress, and invasion of privacy.

- The defendants "picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral."
- The picketers' signs said "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."
- The church had been notified by the authorities in advance of the intent to picket at the time of the funeral, and the picketers complied with police instructions staging their demonstration.

- The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. None of the picketers entered church property or went to the cemetery.
- They did not yell or use profanity, and there was no violence associated with the picketing.
- The funeral procession passed within 200 or 300 feet of the picket site.

Q: Why and to what extent does each of those facts affect the Court's analysis?

Q: The Court explained: "To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." Did the plaintiffs establish a cause of action under Maryland law?

Q: Did the speech deal with a matter of public concern? Did the Court find that it did? Why does that matter if it does?

Q: The Court, quoting previous decisions says "'[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,' noting that '[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate.'" (Emphasis added.) Why does that matter?

Q: What does the Court decide? "The Court says, "Our holding today is narrow." Is it?

Q: Why did Alito dissent?

MANONEY AREA SCHOOL DIST. v. B.L.

594 U.S. ___ (2021)

Justice Breyer held that the First Amendment protected a disappointed student from using vulgar words and gestures in a private Snapchat message to her friends.

Q: Would she also be protected in uttering the same words in a private conversation with the principal or a coach?

Q: Suppose she had said the same words in a class?

PSC 212: CLASS NOTES: NOVEMBER 8, 2021

TIME, PLACE AND MANNER RESTRICTIONS

CB 1222-1224, 1227-1231,1232-1236 1264-1267

COX v. LOUISIANA

379 U.S. 536 (1965), CB 1222

Q: What did defendant Cox do?

Q: Under what law was he convicted?

Q: This law attempted to regulate the time, place and manner of free speech. Why did Justice Goldberg hold that it was unconstitutionally applied?

HEFFRON v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS

452 U.S. 640 (1981), CB 1222-1224

Q: What was the Booth Rule in this case?

Q: Why did Justice White uphold this Rule after the limitation on time, place and manner in *Cox* was held to be unconstitutionally applied?

Q: Could a State grant an exemption from the Rule for the International Society alone?

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. v. LEE

505 U.S. 672 (1992), CB 1264-1267

Q: What did the Krishna Society do?

Q: What did the statute that the Port Authority enforced prohibit that was relevant here?

Q: Is solicitation of money and distribution of literature totally prohibited at airport terminals?

REHNQUIST MAJORITY

Q: What is a public forum?

Q: What is an airport terminal if not a public forum?

Q: If airports are not public forums, does this mean that any limit on free speech is permissible?

Q: Why under a reasonableness standard is the prohibition of solicitation and receipt of funds permissible?

KENNEDY CONCURRENCE

Joined by Blackmun, Stevens and Souter

Q: Why did Kennedy view airports as public forums?

Q: Why does Kennedy nonetheless uphold a ban on solicitation and receipt of funds within a public forum?

Q: Would Kennedy prohibit all solicitations?

Q: Why are these risks not equally applicable to distribution of literature?

MEMBERS OF CITY COUNCIL v. TAXPAYERS FOR VINCENT

CB 1227-1231

Los Angeles adopted an ordinance prohibiting posting of signs on public property.

Vincent was a candidate for City Council who wanted to post signs reading "Roland Vincent – City Council" on street lamps.

Q: Why in the *Metromedia* case did the Supreme Court uphold San Diego's prohibition of certain forms of outdoor billboards?

Q: In *Schneider v. State*, the Court struck down a prohibition on distribution of leaflets on public streets. How do you distinguish *Metromedia* from *Schneider*?

Q: Why is the rational of *Schneider* inapplicable to Vincent signs?

Q: If the justification for the ban on signs in public places is based on aesthetics, how can you justify not applying the ban to signs on private property?

Q: Are signs on lampposts public forums?

Q: Justices Brennan, Marshall and Blackmun dissented. Why were they particularly concerned about a justification for a ban on signage based on aesthetic grounds?

CLARK v. COMMUNITY FOR CREATIVE NON-VIOLENCE

468 U.S. 288 (1984), CB 1232-1236

Lafayette Park is immediately adjacent to the White House.

In this case, the National Park Service adopted a regulation prohibiting peaceful protesters from sleeping in Lafayette Park and the Washington Mall to call attention to the plight of the homeless.

Q: Was the Community for Creative Non-Violence granted a permit? If so, what did it permit?

Q: Would overnight sleeping be expressive conduct protected to some degree by the First Amendment?

Q: Then why was it limited here?

Q: Anatole France wrote that neither the rich nor the poor may sleep under the bridges of Paris. Would that be a content neutral prohibition?

Q: Marshall in dissent would not support the prohibition because no evidence of substantial wear and tear caused by sleeping in the parks. Why was the majority not persuaded by this argument?

PSC 212: CLASS NOTES: NOVEMBER 10, 2021

IS THE FIRST AMENDMENT OBSOLETE?

Reading Assignment: *New York Times v. Sullivan*, CB 1006-1009; Download Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547 (2018), Columbia Pub. Law Research Paper No. 14-573 (2018), available for free and open access at https://scholarship.law.columbia.edu/faculty,scholarship/2079.

NEW YORK TIMES v. SULLIVAN

376 U.S. 254 (1964), CB 1006-1009

Q: Who was L.B. Sullivan? Was he named in the advertisement that the *New York Times* carried? How was *he* defamed? Does it matter?

Q: What did the advertisement say? Who paid for the ad? Who said the statement in question – the *Times* or the people who ran the ad?

Q: What were the mistakes in the ad? Defamation is about injury to reputation. Did the mistakes in the ad cause injury to Sullivan's reputation in his hometown of Montgomery?

Q: Early on in Justice Brennan's opinion, he notes? "A jury in the Circuit Court of Montgomery County awarded [Sullivan] damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed." Why is that significant?

Q: Under Alabama law, what must you prove to show defamation? Does a defamation plaintiff have to prove that the statement in question was false?

In the most famous statement in the Opinion, the Court says:

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that they may well include vehement, caustic, and sometimes unpleasantly sharp attacks on **government and public officials**. . . . The present advertisement as an expression of grievance and protest on **one of the major public issues of our time**, would seem clearly to qualify for the Constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent (emphasis added).

Q: What does the rule established by this case protect? Statements about public officials or public issues? Which is the case about?

Q: The Court spends some time discussing the Sedition Act of 1798. Why?

Q: Why isn't it enough protection to allow the *Times* to prove truth?

Q: After the *Sullivan* case, a public official must plead and prove "actual malice" to prevail in a defamation suit. What does "actual malice" mean?

Q: Suppose the plaintiff was a private person who ran the cafeteria at the Alabama State College and brought suit because the advertisement said that the cafeteria was padlocked as part of the oppression of African-American students. Suppose he brought a defamation suit and won a $500,000 verdict. Would he have been covered by the rule established in *Sullivan*? Would he have been allowed to keep the $500,000?

IS THE FIRST AMENDMENT OBSOLETE?

Q: Why does Tim Wu believe the First Amendment today is irrelevant?

Q: Should we draft a new law protecting freedom of expression?

Q: If so, what would it provide?

PSC 212: CLASS NOTES: NOVEMBER 15, 2021

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

Reading: CB 1558-1565, 1581-1588, 1593-1600, 1607-1614; Chief Justice Roberts majority decision in *Fulton v. City of Philadelphia*, 593 U.S. ___ (2021)

The First Amendment bars Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." Context: See CB 1558-1559.

Strict separation. The clauses could be read to erect an absolute barrier to former interdependence of religion and the State. Religious institutions could receive no aid whatever, direct or indirect, from the State. Nor could the State adjust its secular programs to alleviate burdens the programs placed on believers.

Thomas Jefferson, for example, wrote in 1802 to the Danbury Baptists:

> Believing with you that religion is a matter which lies solely between Man [and] his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, [and] not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church [and] State.

Earlier, Jefferson had been Governor of Virginia and a proponent of the Virginia Statute of Religious Freedom, which provides in part:

> Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on

> account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Strict neutrality. Kurland*, Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 5 (1961): "[Religion] may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations." Thus, States must use purely secular criteria as the basis for their actions. Strict neutrality does not permit, much less require, accommodation of secular programs to religious belief. It does permit aid to religious institutions that satisfy the purely secular criteria for participation in the program, at least if the courts are unwilling to conclude that the criteria were not concealed methods of using religion as a basis for the program.

Nonpreferentialism. According to nonpreferentialist views, Government may not favor one religion over another, nor may it disfavor any particular religious view (including antireligious views), but it may support religion in general. In *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___ (2020), for example, the Supreme Court struck down a Montana Department of Revenue Rule that prohibited families from using a State scholarship program at religious schools. This was consistent with other recent decisions, such as *Trinity Lutheran*, 582 U.S. ___, that have concluded:

> [T]he "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny."

Madison expressed views that could be read as consistent with nonpreferentialism such as his argument in the House of Representatives on August 15, 1789: "He believed that the people feared one sect might

obtain pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."

What Congress intended in the religion clauses of the First Amendment is complicated by the fact that contemporaneous with approving the First Amendment, the First Congress also:

- Established a Public Day of Thanksgiving to acknowledge "the many signal favors of Almighty God" (passed the same day). And virtually every President has followed with such proclamations.
    - Jefferson hinted that he thought it might be unconstitutional, and Madison, after he was President, explicitly said so.
    - Despite these statements, both Jefferson and Madison, like Washington and Adams, issued such proclamations.
- Appointed two chaplains, of different denominations, to serve the two houses of Congress (April 15, 1789 – act confirming appointment and salary September 22, 1789).
- Passed the Northwest Ordinance (August 7, 1789) with its provision: "Religion, morality and knowledge, being necessary to good government and happiness of mankind, schools and other means of education shall forever be encouraged."
- In later sessions in the 1790s and 1800s, the Congress also continued the Continental Congress's practice of including religion clauses in its treaties, condoning the American edition of the Bible, funding chaplains in the military, and celebrating religious services officiated by congressional chaplains, each with very little dissent or debate.

REYNOLDS v. UNITED STATES

98 U.S. 145 (1878), CB 1581

Q: What were the material facts in *Reynolds*?

Q: Why wasn't polygamy protected by the Free Exercise Clause?

SHERBERT v. VERNER

374 U.S. 308 (1963), CB 1583-1585

Q: What were the material facts?

Q: Why did the Supreme Court reinstate Sherbert's unemployment benefits?

WISCONSIN v. YODER

406 U.S. 205 (1972), CB 1586-1588

Q: What were the material facts?

Q: Why does this case raise a First Amendment issue?

Q: To invoke the Free Exercise Clause, what does it mean that the claimant must base his claim on a "religious" rather than "social" belief?

Q: Why did Chief Justice Burger characterize the impact of the compulsory attendance law as "severe" and "inescapable"?

Q: The State advanced two primary arguments in support of its contention that no system of compulsory education is so compelling that the Amish religious practices must give way. Why did the Court reject the argument that some degree of education is necessary to prepare citizens to participate in our political system?

Q: Why does the Court not accept the second argument that the Amish position fosters "ignorance" from which the child must be protected by the State?

EMPLOYMENT DIV., DEPT. OF HUMAN RESOURCES v. SMITH

494 U.S. 872 (1990), CB 1593-1600

Q: What were the material facts?

Q: What Free Exercise argument did respondents make?

Q: Does the Free Exercise Clause permit an individual to be excused from compliance with an otherwise valid law?

Q: How did the Court distinguish *Wisconsin v. Yoder*?

Q: What is the balancing test set forth in *Sherbert v. Verner*, CB 1583-1585?

Q: Why did the Court decline to adopt this balancing test?

O'CONNOR CONCURRENCE

Q: How do you distinguish O'Connor's argument from the Majority Opinion?

BLACKMUN DISSENT

Q: Why did Blackmun dissent?

BURWELL v. HOBBY LOBBY

573 U.S. 682 (2014), CB 1608-1614

Q: Who are the parties?

Q: Why did the Court in a 5-4 decision hold that Hobby Lobby was entitled to an exception from this regulatory mandate?

Q: Why did Justice Ginsburg dissent?

FULTON v. CITY OF PHILADELPHIA

593 U.S. ___ (2021)

Q: What were the material facts?

Q: Why did Roberts hold that the City of Philadelphia offended the Free Exercise Clause?

Q: Why was *Employment Division v. Smith* pivotal to this result?

In dissent, Alito, Thomas and Gorsuch wrote:

> This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.
>
> In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

Q: What is the future of the Free Exercise Clause?

PSC 212: CLASS NOTES: NOVEMBER 17, 2021

THE ESTABLISHMENT CLAUSE

Reading: 1615-1616, 1648-1655, 1660-1664, 1671-1677, 1682-1687, 1699-1702

In *School District of Abington v. Schempp*, 374 U.S. 203 (1963), the Court held unconstitutional State law requirements to read without comment, at least ten verses from the Holy Bible or a chapter in the Holy Bible and/or the Lord's Prayer.

The Court held that both the First Amendment Establishment and Free Exercise Clauses apply to the States.

Applying the Establishment Clause, the Court held: "There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." The Court held that the recitation of verses from the Bible or the Lord's Prayer were religious exercises in violation of the First Amendment which command that the Government maintain strict neutrality, neither aiding nor opposing religion.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court addressed the Constitutionality of an anti-evolution statute earlier adopted in Tennessee in 1925 and upheld by the Tennessee Supreme Court in 1927 in the celebrated Scopes Trial. The Arkansas statute prohibited teaching that man evolved from other species of life. The Court concluded: "The overriding fact is that Arkansas selects from the body of knowledge a particular segment which proscribes for the sole reason that it conflicts with a particular religious doctrine; that is, a particular interpretation of the Book of Genesis by a particular religious group."

By 1971, Establishment Clause decisions were subject to an influential test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): A statute can withstand a holding of unconstitutionality if it satisfied three criteria: "First, the statute must have a secular legislative purpose,

Second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

Court decisions have neither been consistent nor found it easy to apply the *Lemon* criteria.

LEE v. WEISMAN

CB 1648-1655

Q: What were the material facts?

Q: Justice Kennedy viewed the religious invocation at the beginning of a graduation as coercion to support or participate in religion or its exercise even though participation was voluntary. Why?

Q: Suppose a rabbi or imam or priest had begun the ceremony in religious garb wishing students well and congratulating them on their graduation. Would that be equally unconstitutional?

Q: Does it make a difference that students were asked to stand and at the least maintain a respectful silence during the Invocation and Benediction? Support no such request was made, would that have made a difference?

Q: Justice Blackmun in concurrence did not regard coercion as necessary to prove a violation of the Establishment Clause. Why would he hold the invocation as unconstitutional?

Q: Is such endorsement always unconstitutional? How do you harmonize Thanksgiving proclamations by Presidents praising God, the motto on our currency "In God We Trust," the beginning of Congressional sessions with a religious benediction?

Q: Why does Justice Scalia in dissent not view a religions invocation as violating the Establishment Clause?

Q: Justice Scalia suggests a better alternative would be the distribution of an announcement that while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will it be assumed, by rising, to have done so. Would such an announcement satisfy Justice Kennedy and the Majority of the Court?

EDWARDS v. AGILLARD

482 U.S. 578 (1987), CB 1660-1664

Q: What were the material facts?

Q: What is creation science?

Q: Why did the Court strike down the Louisiana statute?

Q: The Act's stated purpose was to protect academic freedom. Why did the Court reject this as the purpose?

Q: Does this mean that a legislature can never require creation sciences be taught?

Q: Justice Scalia dissented in part because he accepted Louisiana's articulated view of protecting academic freedom as sincere. Why did Scalia not agree that Senator Keith's religious motivation for introducing the Act established a primary religious purpose?

LYNCH v. DONNELLY

465 U.S. 668 (1984), CB 1671-1677

Q: Why in contrast did the Supreme Court in *Lynch v. Donnelly* not view the erection of a crèche by a city and merchant's association as violating the Establishment Clause?

Q: There is little question that the Establishment Clause had a purpose to prohibit the Federal Government from using Federal funds to support a religion. Here, unlike *Lee v. Weisman*, taxpayer dollars were used in part to support the construction of the crèche. Why is that not decisive?

Q: Justice O'Connor characterized two different ways that the Establishment Clause can be violated. Excessive entanglement with religious institutions or government endorsement or disapproval of religion. Why does O'Connor not view the City's erection of a crèche as entanglement with a religion?

Q: Why did Justice Brennan dissent?

Q: Would Justice Brennan prohibit celebrating Christmas as a holiday?

Q: Could a City have an image of Santa Claus or Santa's reindeer in Brennan's view?

Q: In *American Legion v. American Humanist Association*, Price George's County has a 32 foot tall Cross on a public highway. This is permanent and far more expensive than a crèche. Why does this not offend the Establishment Clause?

Q: Why did the Court view the *Lemon* test as inadequate to test cases at least those including monuments?

McCREARY COUNTY v. ACLU OF KENTUCKY

545 U.S. 844 (2005), CB 1682-1687

Q: Why if Pawtucket could erect a crèche could McCrery County not put up in its courthouse the Ten Commandments?

Q: Does this mean that a sacred text can never be integrated into a courthouse display?

Q: Justice Scalia dissented on the ground that it is a false principle that the Government can never favor religion over nonreligion. Does this mean in Scalia's view that the Federal Government can provide financial aid to religions?

TRINITY LUTHERAN CHURCH OF COLUMBIA v. COMER

581 U.S. ___ (2017), CB 1699-1702

Q: Why did Chief Justice Roberts hold that the Missouri Department of Natural Resources could not deny the Trinity Lutheran Church the ability to apply for a State grant to purchase a rubber playground surface?

Q: Why did Justice Sotomayor dissent?