

**Civil Liberties
and the
Bill of Rights
Part I
Professor John E. Finn**



THE TEACHING COMPANY ®

John E. Finn, J.D., Ph.D.

Professor of Government, Wesleyan University

John E. Finn is Professor of Government at Wesleyan University. He received his B.A. in political science from Nasson College, a J.D. from Georgetown University, a Ph.D. in political science from Princeton University, and a degree in culinary arts from the French Culinary Institute. He has taught at Wesleyan since 1986, where his research focuses on constitutional theory, comparative constitutional law, the First Amendment, the legal regulation of terrorism and political violence, and cuisine and popular culture. He is the recipient of four distinguished teaching awards at Wesleyan: the Carol A. Baker '81 Memorial Prize for Excellence in Teaching & Scholarship, awarded in 1989; the Binswanger Prize for Excellence in Teaching in 1994; and on two occasions the Caleb T. Winchester Award for Teaching Excellence, first in 1997, and again in 2004. He was also the recipient of the Association of Princeton Graduate Alumni Teaching Award for distinguished teaching while a graduate student at Princeton. The American Political Science Association described his syllabus for American Constitutional Interpretation as “an ideal model.”

Professor Finn is an internationally recognized expert on constitutional law and political violence. His public lectures include testimony in front of the U.S. House Judiciary Committee, as well as lectures in Chile, Bolivia, Spain, Italy, Canada, England, and France.

Professor Finn has published widely in the fields of constitutional theory and interpretation. Among his publications are *American Constitutional Law: Essays, Cases, and Comparative Notes*, 2nd edition (Rowman & Littlefield, 2004), with Donald P. Kommers of Notre Dame University and Gary Jacobsohn of the University of Texas, once described as “the Cadillac of constitutional law casebooks,” and the highly regarded *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1991).

Professor Finn lives in Hartford, Connecticut, with his wife, Linda, and their two children.

Table of Contents

Civil Liberties and the Bill of Rights

Part I

Professor Biography	i
Course Scope	1
Lecture One What Are Civil Liberties?	3
Lecture Two The Bill of Rights—An Overview	6
Lecture Three Two Types of Liberty—Positive and Negative	9
Lecture Four The Court and Constitutional Interpretation	11
Lecture Five <i>Marbury v. Madison</i> and Judicial Review	14
Lecture Six Private Property and the Founding	17
Lecture Seven <i>Lochner v. New York</i> and Economic Due Process	20
Lecture Eight The Takings Clause of the Fifth Amendment	23
Lecture Nine Fundamental Rights—Privacy and Personhood	25
Lecture Ten Privacy—The Early Cases	28
Lecture Eleven <i>Roe v. Wade</i> and Reproductive Autonomy	31
Lecture Twelve Privacy and Autonomy—From <i>Roe</i> to <i>Casey</i>	33
Timeline of Cases Discussed in the Course	36
Annotated List of Cases (Alphabetical Order)	39
Glossary	Part II
Biographical Notes	Part II
Bibliography	Part III
The Bill of Rights	Part III

Civil Liberties and the Bill of Rights

Scope:

This course is designed to introduce students to a uniquely American invention and, to some ways of thinking, a wonderfully naïve contribution to politics: The written specification of individual liberties and rights that citizens possess and can, through courts, enforce against the state. *Civil Liberties* is not, however, a course on law. It is, instead, a course that has as its subject the relationship of law to the most fundamental sorts of questions about politics, morality, and human nature.

In this course of 36 lectures, we shall see that most of the serious difficulties (and there are many) in the politics of civil liberties arise from conflicts between our commitments to two or more positive values. There are, for example, inevitable and recurrent conflicts (despite our attempts to ignore them) between the values of liberty and equality. As Felix Frankfurter once wrote, these and other such conflicts are “what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs.” We examine these clashes in light of the broader philosophical and institutional problems of the constitutional order. I hope to show that constitutional “answers” to problems like those of abortion, freedom of speech, and affirmative action require a coherent understanding of the U.S. Constitution and of the assumptions it makes about human nature and the proper ends of government and civil society.

We will, therefore, examine the doctrinal development of specific liberties and rights, such as due process and privacy, the ultimate denial of liberty entailed by the death penalty, freedom of speech and religion, and equal protection, but we shall consider them in a broader theoretical context. We shall want to know what overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the Constitution and the polity it both constitutes and envisions.

The course is divided into three sections. We begin with the institutional and interpretive foundations of the American constitutional order. Our purpose here is to provide students with background on the U.S. Supreme Court and its role in the constitutional order, as well as an overview of the process of constitutional interpretation. In our first lecture, for example, we focus on the organization, composition, and decision-making authority of the Court. In our second lecture, we take up the “why” and the “what” of constitutional interpretation. We shall see that interpretation is both a choice and a necessity: a choice because we must choose among many diverse methods and strategies, and a burden because such choices are often difficult to justify or even to explain. In Lectures Three and Four, we take up the intersection of Lectures One and Two by considering how and why the power of constitutional interpretation—and, hence, the power to decide the most pressing issues of civil liberties—came to rest with the Supreme Court through the mechanism of judicial review.

In the second section of the course, we begin our inquiry into the Bill of Rights. In every case that arises under the Bill of Rights, we must reconcile our desire for individual liberty with the need for public order, personal autonomy with the needs of the community. Considered in its totality, and not simply provision by provision, a bill of rights sketches the broad outlines of the relationship between individual liberty and the needs of the community. In this larger sense, a bill of rights indicates how conflicts between liberty and community should be conceived and, to some extent, resolved. In our fifth lecture, we consider the history and theory of the Bill of Rights. Was a bill of rights really necessary? And why, initially, did its protections run only against the federal government, not the states? In the sixth lecture, we take up the fascinating doctrine of *incorporation*, or the torturous and winding road the Court followed to make the Bill of Rights applicable to state and local governments—arguably a constitutional revolution no less significant than the Founding in Philadelphia.

In the third and, by far, the largest section of the course, comprising 30 lectures, we consider the individual provisions of the Bill of Rights and the development of several other specific liberties. In deference to the Founders, we begin with the constitutional right to property. The protection of private property, broadly defined, was a central purpose of the constitutional order, and the rise, fall, and possible resurgence of property as a constitutional right of magnitude has had important implications for civil liberties more generally. After property, we take up the fundamental rights of privacy and personhood, rights that cover a broad spectrum of liberty issues, including procreation and abortion, the definition of family, sexual orientation and preference, capital punishment, and the right to die.

We then devote a series of lectures to the speech and religion clauses of the First Amendment. We start with speech. Among the issues we will consider will be the definition of speech, hate speech and fighting words, indecency and pornography, and freedom of association. Our examination of the religion clauses likewise includes questions concerning the definition of religion, as well as consideration of the meaning of the establishment and free exercise clauses and how they interact.

In the final part of the course, we explore the many intricacies of the equal protection clause of the Fourteenth Amendment. When, if ever, does the equal protection clause allow the state to discriminate on the basis of race? Is there a constitutional difference between malignant discrimination, such as Jim Crow laws, and affirmative action, or so-called “reverse discrimination”? Should the Constitution be colorblind? The equal protection clause also applies to other forms of discrimination; thus, we will want to consider how the Supreme Court has addressed discrimination based on gender, sexual orientation, and national origin.

In addressing these issues, whether under the equal protection clause, the First Amendment, or the Eighth Amendment, we will confront a welter of difficult and controversial questions. It is unlikely that we will succeed in our attempts to answer them fully or finally. What we can hope to achieve, however, is an improved and more sophisticated appreciation of the importance of our commitment to civil liberties and of the sacrifices we must make if we choose to honor that commitment.

Lecture One

What Are Civil Liberties?

Scope: This lecture introduces students to the overall themes of the course and to the methods and materials we will use in our study of civil liberties. We begin with a misleadingly simple question: What are *civil liberties*? There is not an easy or a single answer to this question. We will see, too, I hope, that most of the serious difficulties (and there are many) in civil liberties arise from conflicts between our commitments to two or more positive values. There are, for example, inevitable and recurrent conflicts between the values of liberty and equality. I hope to show that constitutional “answers” to such questions as abortion, freedom of speech, and affirmative action require a coherent understanding of the Constitution and of the assumptions it makes about human nature and the proper ends of government and civil society.

Outline

- I. We begin with an overview of this course and the kinds of questions it will explore. As we shall see, the Constitution is a wonderfully sparse yet complex vision of the ideal polity.
 - A. Part of that complexity results from the Founders’ commitment to several complementary but sometimes conflicting goals. For example, there are inevitable tensions between the Founders’ commitment to democracy and to the protection of individual liberties. The protection of civil liberties is one of the central purposes of the Constitution, but it is not the only one.
 - B. In addition, a sophisticated understanding of the Constitution includes recognition of the assumptions it makes about human nature and the proper ends of government and civil society. We must ask: What overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the Constitution?
 - C. When we ask, “What are *civil liberties*?” we thus ask a number of different but related questions—some technical, some philosophical. In addressing them, we will consult a number of different sources, including the *Federalist Papers* and the occasional work of moral philosophy, but for the most part, our source material will be the decisions of the U.S. Supreme Court.
- II. There are as many approaches to the field of civil liberties as there are professors who teach the material.
 - A. Some professors, for example, prefer to take a doctrinal approach to the material or an approach that focuses on the current state of the law.
 - B. Other professors are grounded more in political science than in law, and they are more inclined to teach about the Constitution and the Court as grounded fundamentally in politics or to treat the Court and constitutional interpretation as political constructs.
 - C. As suggested by my opening remarks, my approach is grounded fundamentally in political theory and the kind of critical inquiry that is the hallmark of a liberal arts education. In other words, I begin with the assumption that a course on civil liberties ought to draw on the skills and strengths that a liberal arts education promotes.
 1. As taught in law school, constitutional law asks students to concentrate on technical rules and doctrines. In my view, a course on civil liberties and the Bill of Rights ought to help students to think critically about the fundamental principles and policies of the constitutional order. A liberal arts approach seeks to push such issues back to their foundation in social, moral, and political theory, thus prompting students to engage the great issues of political life addressed by the Constitution and constitutional interpretation.
 2. Among these issues are questions about the meaning of justice and equality and, ultimately, the meaning of America itself.
- III. The complexity of the topic, and the great number and variety of sources we might consult, means that we must make some difficult choices about what we can cover and what we must omit in this course.
 - A. First, we will limit our coverage to the Bill of Rights and the other amendments to the Constitution, or to what are typically called *civil liberties*, not *civil rights*.
 1. By *civil rights*, we mean those rights established by legislation, not directly by the Constitution itself.

2. For example, we will not have an opportunity to cover such areas as the Civil Rights Act of 1964 or the Voting Rights Act of 1975, even though both acts are of profound importance.
 - B. Similarly, there are some provisions in the Bill of Rights, such as the Second Amendment and the Fourth, Fifth, and Sixth Amendments, that we will not address. These amendments, although obviously important, are typically covered in courses on criminal procedure and would require a full course of their own.
 - C. Finally, we will not have room in this course to consider rights that trace their source to international law or international agreements, though, of course, many of those rights are similar in description and content to counterparts in the American Bill of Rights.
- IV. On the other hand, there is much that we should and will cover in the next 35 lectures.
- A. We will begin with an overview of the Bill of Rights as a whole. As we will see, the Bill of Rights was not inevitable.
 1. The Philadelphia Convention, in fact, failed to submit a bill of rights to the states for ratification.
 2. There were multiple reasons for this failure, some grounded in political theory and others in political strategy.
 - B. We will also spend some time exploring the development of *judicial review*.
 1. The concept itself is neither in the Bill of Rights nor in the Constitution more generally, at least explicitly, but it is central to understanding the relationship between the Supreme Court and the Bill of Rights.
 2. We will also need to spend some time, therefore, discussing the history, composition, and functions of the U.S. Supreme Court.
 - C. Thereafter, we will begin to take up the specific liberties included in the Bill of Rights and other parts of the Constitution, such as the Fourteenth Amendment.
 - D. We begin, fairly conventionally, with an examination of the right to property.
 1. At the Founding, property was perhaps the most significant of constitutional liberties.
 2. In addition, we begin with property because the significance of property has declined dramatically, or, I should say, its weight as a constitutional liberty has declined substantially.
 - E. Following property, I will take up the constitutional right to privacy. This shift is somewhat unusual, but there are good reasons for taking this approach.
 1. First, most of the Court's early privacy cases involved property rights as well.
 2. Second, I will argue that privacy means to our generation what property meant to earlier generations—that it serves the same kind of function in the constitutional order.
 - F. After privacy, we will take up the First Amendment. I have prepared several lectures just on the speech clauses and several on the religion clauses.
 1. These materials are exceptionally complex. We will spend a fair amount of time considering the doctrinal rules that govern speech, but in every case, I want to drive the materials back to larger questions of theory and principle.
 2. For example, we will consider not only specific issues, including hate speech and pornography, but also the larger issues these and other topics raise, such as: What is the definition of *speech*? When, if ever, is it permissible for the state to restrict speech, and for what reasons?
 3. We will spend an equal amount of time considering similar questions when we take up freedom of religion. What is the definition of *religion*? Who should have the authority to decide? Is there a constitutionally relevant distinction between the freedom to believe and the freedom to act on belief?
 - G. After we conclude our treatment of the First Amendment, we will spend several lectures on the equal protection clause of the Fourteenth Amendment.
 1. First, we will consider the various problems in equal protection that are occasioned by racial discrimination.
 2. Second, we will take up other areas of discrimination, such as discrimination based on gender, age, wealth, and sexual orientation.

Essential Reading:

The Constitution of the United States, Article III.

Ralph Ketcham, ed., *The Federalist Papers*, No. 1.

Donald P. Kommers, John E. Finn, and Gary Jacobsohn, *American Constitutional Law: Essays, Cases and Comparative Notes*, Introduction.

Questions to Consider:

1. What assumptions does the Constitution make about human nature and the human condition?
2. Do you agree with those assumptions?

Lecture Two

The Bill of Rights—An Overview

Scope: The document produced by the Philadelphia Convention and submitted to the states for ratification did not include a bill of rights. Some of the Founders, as we shall see in this lecture, believed that a bill of rights was, at best, unnecessary and, at worst, even a threat to liberty. In this lecture, we explore the history of the Bill of Rights, considering, first, whether and why a bill of rights was necessary and, second, why it took the form it did. As we saw in Lecture One, we will not be able to consider every provision of the Bill of Rights, and, sadly, we will not be able to address any single provision in as much depth as we might like. The First Amendment's provisions on speech alone would merit an entire course, as might the religious freedom clauses of the same amendment. And many of the topics we shall consider are not, strictly speaking, a part of the Bill of Rights proper. We shall, for instance, spend a fair amount of time with the due process and equal protection clauses of the Fourteenth Amendment. Like the First Amendment, the Fourteenth is a staple of modern constitutional litigation.

Although it may seem peculiar to modern sensibilities, one of the most important issues surrounding the Bill of Rights concerns its application: Does it protect citizens against the federal government only or also against the actions of state governments? This was the issue in the seminal case of *Barron v. Baltimore* (1833), in which Chief Justice John Marshall, writing for the Court, concluded that the Bill of Rights did not apply to the states. We then consider whether and to what extent that decision was effectively overturned by the passage of the Fourteenth Amendment and how the Court approached that question in the years immediately following the Civil War. We conclude by considering the *doctrine of incorporation*, or the process by which the Supreme Court, over time, finally made individual provisions of the Bill of Rights applicable to the states by incorporating, or including, them in the due process clause of the Fourteenth Amendment.

Outline

- I. The Constitution produced in Philadelphia did not contain a bill of rights. Indeed, the subject came up hardly at all at the convention.
 - A. Its omission became an important part of the ratification debates. Eventually, several states made the addition of a bill of rights a key condition to their decision to ratify—known as *conditional ratification*.
 - B. In other words, several states insisted that they would not ratify the new Constitution without a bill of rights. A bill of rights thus became a precondition for the new Constitution.
- II. The demands for a bill of rights gave rise to an important and sophisticated discussion about the nature and limits of rights in the American constitutional order.
 - A. Alexander Hamilton and James Madison, writing in the *Federalist Papers*, argued that a bill of rights was unnecessary, because the Constitution itself was a limited document of enumerated powers. Hamilton went so far as to suggest that a bill of rights “would even be dangerous.... For why declare that things shall not be done which there is not power to do?”
 - B. Madison argued, in addition, that no list of liberties could ever hope to be complete, and this might lead governments to abridge liberties that were not explicitly listed as protected. Moreover, mere “parchment barriers,” he wrote, could not protect liberty.
 1. This is an interesting argument. If taken to an extreme, its logic—that words alone will not limit power—undercuts the constitutional enterprise.
 2. On the other hand, perhaps it is a mistake to think of the Constitution or the Bill of Rights as “mere parchment barriers.”
 - C. In contrast, anti-Federalists argued that a bill of rights would do no harm, and Jefferson, in particular, argued that such a document might have an important educational purpose. In addition, Jefferson argued that a bill of rights might put “a legal check ... in the hands of the judiciary.”
 1. This is a little ironic—Jefferson was quite skeptical of judicial power, as we shall see when we take up *Marbury v. Madison* (1803).

2. Jefferson's first argument—that a bill of rights might constitute a public reminder of our commitment to liberty—hints at a conception of the Bill of Rights grounded in civic education.
- III. As he had promised in the ratification debates, Madison submitted a bill of rights to the very first Congress, and an amended version was submitted to the states shortly thereafter and ratified in 1791. Before we consider the individual provisions of the Bill of Rights, we need to look at it as a whole.
- A. Considered in its totality, a bill of rights sketches the broad outlines of the relationship between liberty and community. A bill of rights is a blueprint—less a list of liberties than a vision of the ideal relationship between liberty and community.
 - B. In every case that arises under the Bill of Rights, we must reconcile our desire for individual liberty with the need for public order, personal autonomy with the needs of the community.
 - C. In this course, we will address those provisions in the Bill of Rights that have tended to generate the most controversy and case law.
 1. In particular, we will spend a fair amount of time with the First and Eighth Amendments.
 2. In addition, we will spend a great deal of time on provisions that are not, strictly speaking, a part of the Bill of Rights proper, such as the due process and equal protections of the Fourteenth Amendment.
- IV. Passage of the Bill of Rights did not quiet all controversy. The language of the amendments seemed to leave open the question of whether they applied to the federal government alone or also to the states.
- A. Inherent in this unresolved question were two very different conceptions of liberty and community.
 - B. Madison, for example, thought the Bill of Rights ought to apply to both, because the federal and state governments were equally likely to threaten liberty.
 - C. Most anti-Federalists, however, were more fearful of threats by a remote federal government. They believed the proximity of state and local governments to their citizens made those governments less likely to abuse power.
- V. The Supreme Court took up this issue in the very important case of *Barron v. Baltimore* (1833).
- A. Writing for the Court, Chief Justice John Marshall concluded that the Bill of Rights applied only to the national government.
 1. The Bill of Rights reflected the Founders' fears that the new government might exceed its powers. "The Constitution was ordained and established by the people of the United States for themselves ... and not for the government of the individual states."
 2. Implicit in Marshall's decision is a particular understanding about the relationship among the national government, state governments, and citizens.
 - B. *Barron* is an important case, in part because it made clear that the liberties contained in the Bill of Rights did not protect citizens against actions taken by state governments.
- VI. Following the Civil War, Congress ratified the Thirteenth, Fourteenth, and Fifteenth Amendments, or the Reconstruction Amendments. Some judges soon began to ask whether those amendments, in particular the Fourteenth, should be understood as making the Bill of Rights applicable to states, thus overruling, at least in consequence, *Barron*.
- A. The Court rejected the philosophy behind this claim in the important *Slaughter-House Cases* (1873). Here, the Court gave a restricted reading to the privileges and immunities clause of the Fourteenth Amendment, thus denying the proposition that the clause had made the Bill of Rights applicable to state governments.
 - B. But only 30 years later, the question resurfaced in a series of cases concerning the First Amendment and the criminal procedure provisions of the Bill of Rights.
- VII. Under the so-called *incorporation doctrine*, the Supreme Court began to apply individual provisions of the Bill of Rights to the states. In a series of cases, the Court began to conclude that the due process clause of the Fourteenth Amendment includes, or *incorporates*, parts of the Bill of Rights. The states were, thus, bound to observe those amendments as part of due process of law.
- A. The Court considered four different approaches to incorporation:
 1. The fundamental fairness doctrine.
 2. Total incorporation.

3. Total incorporation “plus.”
 4. Selective incorporation.
- B. Eventually, in the critical case of *Palko v. Connecticut* (1937), the Court settled on the selective incorporation approach, which meant that some parts of the Bill of Rights would be incorporated—those “implicit in the concept of ordered liberty”—and others would not.

Essential Reading:

Barron v. Baltimore (1833).

Butchers’ Benevolent Association v. Crescent City Livestock (The Slaughter-House Cases) (1873).

Palko v. Connecticut (1937).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 4.

Ralph Ketcham, ed., *The Federalist Papers*, Nos. 10, 45, 78, 80, 84, 89.

Supplementary Reading:

Theodore Becker, *The Declaration of Independence: A Study in the History of Political Ideas*.

Neal Cogan, *The Complete Bill of Rights*: .

Leonard Levy, *Origins of the Bill of Rights*.

Questions to Consider:

1. Is a bill of rights necessary? Is there a vision of human nature implicit in both the purpose of the Bill of Rights and the specific liberties it singles out for protection?
2. Should we consider the Ninth and Tenth Amendments as part of the Bill of Rights? Is there any practical consequence to doing so?

Lecture Three

Two Types of Liberty—Positive and Negative

Scope: In the last lecture, we considered questions concerning the breadth of the Bill of Rights. We continue that topic here, although in a somewhat different fashion. In this lecture, we will focus heavily on one Supreme Court case—*DeShaney v. Winnebago County* (1989). *DeShaney* is important because it teaches about two other issues concerning the breadth and scope of the Bill of Rights. Our first topic concerns the *state action doctrine*—a principle that holds that the Constitution applies only to public action, or the actions of state actors, and does not apply to the actions of private individuals or organizations. As we shall see, the state action doctrine is an essential part of the constitutional order. Our second question concerns the nature of the rights included in the Constitution. What does it mean to say that a right is guaranteed? Does it mean only that the government may not interfere with the right, save on certain conditions? Or does it mean that the government must make efforts to help citizens realize and exercise those rights? The former, we shall see, are commonly called *negative rights*. The latter are so-called *positive rights*. This lecture will explore which version of the two doctrines of the Bill of Rights the Constitution protects. Finally, *DeShaney* introduces a theme that will run throughout the remainder of this course: What role should the Court play in the protection of civil liberties?

Outline

- I. In our last lecture, we saw that through the doctrine of selective incorporation, the Supreme Court eventually made most of the provisions of the Bill of Rights applicable to the states. Before we begin our examination of specific constitutional liberties, we must first consider a few other basic doctrines, or rules, that have an important effect on civil liberties more generally.
 - A. The first of these is the *state action doctrine*.
 - B. The second is the distinction between *positive* and *negative liberties*.
 - C. The state action doctrine is a principle that holds that the Constitution applies only to public action, or the actions of state actors, and does not apply to the actions of private individuals or organizations.
 - D. For example, there is no such thing as a constitutionally protected right of freedom of speech against private institutions or private individuals.
 - E. Consider the important case of *DeShaney v. Winnebago County* (1989). Here, the Court ruled that the due process clause of the Fourteenth Amendment protects due process rights only against state actors, not against the actions of private persons.
 1. We begin with the facts of the *DeShaney* case, which are exceptionally tragic.
 - a. Randy DeShaney viciously beat his son, Joshua, time and time again; on at least two occasions, emergency room physicians, as they were required to do under Wisconsin state law, notified local child protection and police authorities of their suspicion that Randy DeShaney was abusing his son—who was later committed to an institution in a persistent, vegetative state.
 - b. Melanie DeShaney, Joshua's mother, sued the state, Winnebago County, claiming that the Fourteenth Amendment's due process clause imposed upon the state an obligation to protect her child from the violence inflicted upon him by his father.
 2. We then take up the majority opinion for the Court by Chief Justice Rehnquist. In his opinion, Rehnquist explained that the due process clause of the Fourteenth Amendment guarantees our liberty against the state, as evidenced in part by the language "No State shall..." Consequently, in this case, the state could not be liable because the violence committed against Joshua was done by his father, not by the state.
 3. In addition, Chief Justice Rehnquist argued that no action by the state had left Joshua worse off than before the state's limited involvement in the case.
 4. Finally, the Chief Justice argued that Joshua's case did not fall into one of the rare exceptions to the general rule that the state is under no obligation to protect private persons.

- II. Another basic premise of the constitutional order concerns the distinction between positive and negative liberties.
 - A. What does it mean to say that a right is guaranteed? Does it mean only that the government may not interfere with the right, save on certain conditions? Or does it mean that the government must make efforts to help citizens realize and exercise those rights? The former, we shall see, are commonly called *negative rights*. The latter are so-called *positive rights*.
 - B. *DeShaney* might also be treated as a positive-negative liberties case. Joshua DeShaney, one might argue, claimed a positive right to be free from violence—or to constitutionally protected liberty. The Court rejected this claim, noting that the due process clause protects only a negative version of the liberty.
 - C. Writing for the Court, Chief Justice Rehnquist explained that a constitutional rule embracing positive liberty would expose the state to potentially disruptive and fiscally unsound liability.
- III. Finally, *DeShaney* is important to us because it illustrates a third and vitally important constitutional principle.
 - A. *DeShaney* should remind us that behind abstract constitutional rules and grand theoretical principles are real people. It is sometimes too easy to forget that behind these rules and principles are live human beings and unspeakable tragedies.
 - B. Consider, though, a response: The Court does not necessarily have a roving license to go out and do “good.” And even if it did, is it clear what “justice” demands in the *DeShaney* case?

Essential Reading:

Isiah Berlin, *Four Essays on Liberty*.

DeShaney v. Winnebago County (1989).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, pp. 306–311.

Supplementary Reading:

Sotirios A. Barber, *Welfare and the Constitution*.

Benjamin C. Zipursky, “*DeShaney* and the Jurisprudence of Compassion,” 65 *New York University Law Review* 1101 (1990).

Questions to Consider:

1. In the abstract, it is not difficult to understand the distinction between state action and private action. But why should the protections of the Constitution apply only against the former?
2. Consider the distinction between positive and negative liberties. Is there anything in the actual language of the Bill of Rights that suggests that the state sometimes has an affirmative obligation to protect life, liberty, and property or any other constitutional liberty?

Lecture Four

The Court and Constitutional Interpretation

Scope: In this lecture, we begin with a brief history of the Court's early years. We then take up important institutional issues: How are justices appointed to the Court? What are the nature and limits of judicial power, as derived from Article III of the Constitution? How does the Court actually decide cases? Finally, when, if ever, should the Court refrain from deciding a case? Our primary method in tackling such issues will be to read Supreme Court opinions. This lecture will instruct students in how to find those cases and give some practical advice about how to read and study them. The lecture also introduces students to the complexities of *constitutional interpretation*, which may be defined as the various ways by which judges and others seek to determine what the Constitution actually means. We begin with an obvious but vitally important question: Why is constitutional interpretation necessary? We will consider the various sources and methods of constitutional interpretation, such as *textualism*, *originalism*, *doctrinalism*, *precedent*, and *structuralism*. The definitions of these various terms, we shall see, are also open to dispute. We will also find that constitutional arguments may be drawn from a variety of possible sources.

Outline

- I. Much of the Constitution, at least when applied to hard cases, is sufficiently vague to require some interpretation to get at its meaning. Consequently, what we call *constitutional law* is better thought of as *constitutional interpretation*. There are at least three reasons for this vagueness.
 - A. First, language is always an imperfect and imprecise means of communication, and especially so when the underlying concepts, such as liberty, power, and authority, are themselves controversial and vague.
 - B. Second, sometimes the Founders deliberately sought constitutional ambiguity, in part because vague constitutional provisions allow for compromise and cooperation.
 - C. Third, the Constitution is vague also because the Founders knew that the document would have to incorporate change over time.
- II. There are various methods and sources of constitutional interpretation. In this lecture, we will explore a few of the more common methods, including the following:
 - A. *Textualism*.
 1. Textualism is a method of interpretation that suggests that we consult, first and, perhaps, last, the actual language of the Constitution.
 2. As a method, this has obvious appeal, but it also suffers from a profound flaw: In most cases, it is the language itself—its maddening ambiguity—that is the reason why we need to interpret in the first place.
 - B. *Founders' Intent/Originalism*.
 1. Some justices suggest that in interpreting the Constitution, we should look to the intentions of the Framers. This, too, has an intuitive appeal, but there are problems as well.
 2. Which of the Founders should we consult and why?
 3. Remember, too, that we have little evidence of what they intended—the documentary records are sparse and incomplete.
 4. There are also serious definitional difficulties: Who, exactly, is a Founder? And shouldn't we look to the ratifying conventions as well?
 5. Some justices, such as Scalia, have favored a slightly different approach, typically called *originalism*. Instead of seeking evidence about intentions, originalists ask us to consider and apply the "original" meanings of various provisions of the Constitution.

Balancing and Prudentialism

Two other methods of constitutional interpretation mentioned but not examined in this lecture are balancing and prudentialism.

In *balancing*, judges weigh one set of interests or rights against another set of interests or rights. This method is often found in First Amendment cases. So, for example, in such cases the Court often speaks about the need to reconcile—or to balance—our commitment to freedom of speech with other constitutional values,

such as equality or the dignity of other persons. Critics of this approach, such as Justice Frankfurter, sometimes observe in response that the Constitution itself gives us no guidance about how to weigh or measure different interests, and thus no way to balance them.

Prudentialism counsels judges to avoid setting broad rules for future cases and offers a particular understanding of the limited role courts should play in a constitutional democracy. Justice Frankfurter often counseled such an approach, noting for example, in the two Flag Salute Cases that judges must always be alert to the ways in which exercises of judicial power may be fundamentally undemocratic.

C. *Doctrinalism*.

1. Doctrinal methods of interpretation consider how various parts of the Constitution have been shaped by the Court's own jurisprudence.
2. As we shall see, nearly every area in civil liberties has given rise to a doctrine of one sort or another, and some of our time in this course will be spent learning these doctrines and evaluating them.

D. *Precedent*.

1. Closely related to the interpretive method of doctrinalism is the method of precedent.
2. When a court uses precedent, it simply refers to an earlier case, finding in it a rule or principle that governs the current case as well.

E. *Structuralism*.

1. Although it may seem more complex than other methods of interpretation, structuralism rests on a simple principle—that one can find the meaning of a particular constitutional principle only by reading it against the larger constitutional document or context.
2. There are, as we shall see, several variations of this method.

III. Because so much of our work will consist of reading Supreme Court decisions, we begin with an examination of the Supreme Court and its role in the constitutional order.

- A. Perhaps surprisingly, the Constitution proper actually has very little to say about the makeup of the federal court system in general and of the Supreme Court in particular. Article III of the Constitution provides some of the skeletal material, but much of the operation and functioning of the Court is a consequence of evolution and change.
- B. A study of the Bill of Rights, then, is at least partly an inquiry into the history of the Supreme Court as an evolving institution.

IV. If we are to understand the Court, there are three areas we will need to explore in greater detail.

- A. First, we need to understand the composition of the Court; in particular, we need to know how the Court is staffed and the process and controversies surrounding nominations to the Court.
- B. Second, we need to understand the nature and limits of judicial power, or what we shall call *jurisdiction*, especially as derived from Article III of the Constitution.
- C. Third, we need to know how the Court goes about the business of selecting which cases to hear and deciding them.

1. You can see exactly what rules the Court uses to assess whether a case will be heard at:
<http://www.supremecourtus.gov/ctrules/ctrules.html>

2. Where there is conflict among lower courts over how to rule in a particular case, the Court may be more likely to take the case and to try to settle that conflict.
3. Although there was an earlier point in the Court's history when the Court was theoretically obligated to hear certain kinds of federal cases, the Court has long since discarded that, and now its discretion is full. There is no set of cases that the Court is genuinely obligated to hear.
4. According to the *political question doctrine*, some questions, in their nature, are fundamentally political and not legal; and if a question is fundamentally political and not legal, then the Court may refuse to hear that case.
5. The Court sometimes says that it will not hear a case because the case is not "ripe" (the underlying controversy isn't fully realized yet) or is "moot" (the case dies before it can be heard, e.g., because the parties have reached an agreement). More generally, the Court, indeed all federal courts, only decide concrete, "live" cases.

Essential Reading:

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapters 1–2.

Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, chapters 1–2.

Herbert Weschler, “Toward Neutral Principles of Constitutional Law,” 73 *Harvard Law Review* (1959).

Phillip J. Cooper and Howard Ball, *The United States Supreme Court: From the Inside Out*.

“Federalist No. 9” and “Federalist No. 10,” *The Federalist Papers*.

Supplementary Reading:

William H. Rehnquist, *The Supreme Court: How It Was, How It Is*.

Susan Bloch Low and Thomas Krattenmaker, eds., *Supreme Court Politics: The Institution and Its Procedures*.

William Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*.

Questions to Consider:

1. Why is constitutional interpretation necessary? Should the Founders have sought ways to minimize the need for interpretation?
2. Is there such a thing as a “right” answer to a difficult constitutional question? If so, how can a judge know whether any particular answer is the right answer? If not, then is constitutional interpretation no more than an elaborate ruse for a system in which judges just make it up as they go along?
3. Why does the Constitution say so little about both the makeup of the Court and about how it works?

Lecture Five

***Marbury v. Madison* and Judicial Review**

Scope: This lecture introduces students to the practice of *judicial review*, or the authority of the Supreme Court and other federal courts to declare some governmental action unconstitutional. On some accounts, the power of judicial review is the cornerstone of the American constitutional order. Whether this is true or not, this lecture will trace the early beginnings of the doctrine, beginning with Alexander Hamilton's defense of the doctrine in *Federalist* no. 78. As we shall see, many of Hamilton's arguments were echoed in Chief Justice John Marshall's opinion for the Court in the celebrated case of *Marbury v. Madison* (1803). In this lecture, we explore the logic of *Marbury* in greater detail. We will conclude with criticisms of *Marbury*, especially as developed by Thomas Jefferson. In particular, we consider exactly what kind of claim Marshall made. Did he claim that the Supreme Court is the final, ultimate interpreter of the Constitution? Or did he claim only that the Court must have at least an equal right to interpret? This is still an open, controversial question in constitutional law. Does the American system of judicial review establish judicial supremacy, or does it promote the latter understanding, sometimes called *departmentalism*? The lecture concludes by suggesting that there is probably not a single clear answer to the question, thus underscoring the complexity of the American constitutional order.

Outline

- I. *Judicial review* is one of the cornerstones of the American constitutional order.
 - A. Judicial review, defined in brief, is the authority of a court to nullify any law or policy that violates the Constitution.
 - B. Judicial review is not synonymous with *constitutional review*; the authority to declare a law incompatible with the Constitution need not be vested in courts or judges.
 1. There is nothing in Article III, or any other part of the constitutional text, that clearly gives judges this authority.
 2. The power of constitutional review exists in other constitutional democracies, such as France [via the *Conseil constitutionnel*], but it is not vested in judges.
- II. Although there are colonial antecedents, the doctrine of judicial review in the United States is largely the result of Chief Justice John Marshall's opinion for the Court in the celebrated case of *Marbury v. Madison* (1803).
 - A. As is true of so many of the cases we will consider, it is important to understand the political context of *Marbury*. At stake in the case were different visions of America, as well as different understandings about such important concepts as separation of powers and checks and balances.
 1. We begin with the presidential election of 1800 between John Adams and Thomas Jefferson and the so-called "midnight" judges appointed by Adams in the last moments of his presidency.
 2. Once it was clear that the Federalists had lost control of the presidency and Congress to the Jeffersonians, they reacted, in part, by "retreating," in Jefferson's terms, to the judiciary. As a part of this strategy, the Federalists created several new positions of "justices of the peace" for the District of Columbia, awarded to Federalists.
 3. One of those justices of the peace was William Marbury, who sued the new secretary of state, James Madison, to get his appointment.
 4. The lawsuit invoked the Court's "original" jurisdiction and was of such consequence to lead the new Congress to cancel the Court's 1801–1802 term.
 - B. Chief Justice Marshall wrote the opinion for the Court. The opinion held for Madison insofar as Marshall ruled that the Court did not have jurisdiction to grant Marbury relief. But more broadly, Marshall claimed for the Court the extraordinary authority to declare an act of Congress unconstitutional.
 - C. Marshall's opinion for the Court was deceptively simple: He declared that under the Constitution, "it is emphatically the province and duty of the judicial department to say what the law is."
 1. From this and other premises, Marshall reasoned that the Constitution's status as "supreme Law" must mean that it controls inferior acts and laws and that judges, by warrant of their oaths, their legal

- training, and their authority under Article III to hear cases and controversies, must have the power of judicial review.
2. Marshall offered several other justifications for judicial review, but none goes to the real issue in the case.
- III. Marshall's opinion for the Court, although celebrated by some, met with serious criticism from President Jefferson, as well as from some other judges.
- A. President Jefferson, for example, argued that Marshall's opinion elevated the Court from a branch separate but equal to a branch independent and superior. Jefferson even went so far as to call for the impeachment of federal judges who would dare to disallow acts of the coordinate and equal branches of the federal government.
 - B. In another criticism, Judge John Gibson of the Pennsylvania Supreme Court argued that the doctrine of checks and balances weighed against judicial review. Abuses of the Constitution, he argued, could be forestalled by that system and should be corrected, not by courts, but by the people themselves in their exercise of sovereign power.
- IV. Chief Justice Marshall claimed in *Marbury* that the Supreme Court must have the power of judicial review. But what exactly does that power entail? Two centuries after *Marbury*, judges and scholars alike continue to disagree about both the breadth and the depth of that power.
- A. One understanding of the power suggests a theory known as *judicial supremacy*, or the claim that in any conflict over the Constitution's meaning, judges' interpretations should prevail over the interpretations of other branches. Some passages and suggestions in *Marbury v. Madison* seem to support this account. Alexander Hamilton had first elaborated this position in "Federalist No. 78."
 - B. Another approach, however, suggests that the Court claimed only a co-equal right to interpret the Constitution for itself, not a broader, more final interpretive authority.
- V. These two readings of *Marbury* give rise to two very different understandings about the power of judicial review and, indeed, of the proper role of the Supreme Court in the polity.
- A. *Judicial supremacy* underscores a constitutional order in which conflicts over constitutional meaning are settled largely by judges. In *Cooper v. Aaron* (1958), the Court said, in effect, "We are the final, ultimate interpreter of the Constitution."
 - B. *Departmentalism*, on the other hand, assumes that all branches have an ongoing and equal responsibility for determining what the Constitution means. This is, the Jeffersonian understanding: in cases of genuine conflict, the branches must ultimately seek some kind of political resolution or political compromise amongst themselves, and if they cannot reach a resolution, ultimately, it will revert to the people to make these kinds of decisions
 - C. American constitutional history and ongoing practice teach us that neither understanding of the power of judicial review is the "correct" one.
 1. On a day-to-day basis, most people assume and most constitutional authorities assume that the Court will have the final word.
 2. However, *every* president has asserted an independent authority to interpret the Constitution for himself.
 - D. There is much at stake in choosing between these two approaches, and the choice is influenced as much by everyday politics as it is by the abstractions of constitutional theory.

Essential Reading:

Marbury v. Madison (1803).

Ralph Ketcham, ed., *The Federalist Papers*, No. 78.

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 3.

Supplementary Reading:

Eakin v. Raub (1825).

Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, chapter 1.

Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*.

William Van Alstyne, "A Critical Guide to *Marbury v. Madison*," *Duke Law Journal* 1 (1969).

Mark Tushnet, *Taking the Constitution Away from the Courts*.

Cooper v. Aaron (1958).

Questions to Consider:

1. Marshall wrote that the question of "whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." Do you agree?
2. How would our system of government differ if the Supreme Court could not declare acts of Congress or the executive unconstitutional? Could individual freedom and limited government be preserved under such a system?
3. Does the constitutional text express any preference for a system of judicial supremacy or departmentalism? If so, what is the evidence for such a claim? Is a system of judicial supremacy compatible with a system of checks and balances?

Lecture Six

Private Property and the Founding

Scope: One of the Constitution's central purposes, according to the Preamble, is to secure the "Blessings of Liberty." There is little doubt, as we shall see in this lecture, that chief among those liberties was the right to own private property. Indeed, the original text of the Constitution, before there was a Bill of Rights, was riddled through with protections for property. In this lecture, we ask why the Founders, Federalists and anti-Federalists alike, were so intent on protecting property, and we begin to consider the mechanisms they devised for doing so. What did the Founders mean by *property*? As we review their work and the Court's earliest cases, we will see that the Founders' conceptions of liberty and property were wonderfully rich and complex. We shall see, too, that behind those conceptions were important understandings about what it means to be free, what it means to be a citizen, and what constitutes good government and civic virtue. Among the cases we will explore are *Calder v. Bull* (1798), *Fletcher v. Peck* (1810), and *Charles River Bridge v. Warren Bridge* (1837).

Outline

- I. Before we take up our examination of particular cases, this may be an appropriate time to say a few words about Supreme Court opinions and how to read them.
 - A. A judicial opinion is both an act of explanation and of persuasion.
 - B. Most opinions purport to explain how the judge or judges arrived at a decision, usually by tracing a series of questions, answers, and arguments from a set beginning to a seemingly inevitable end. In this sense, a judicial opinion helps to ensure the accountability of power—a fundamental constitutional imperative—by declaring in public the reasons why a case has been decided in a particular way.
 - C. Every judicial opinion is an exercise in persuasion. Difficult cases, at least, often admit of more than one solution.
 1. A judge who fails to say why his or her solution is preferable to another, no less obvious, solution is a judge who has failed to understand the difference between judicial power, or the capacity to reach a decision, and judicial authority—that is, the circumstances under which it is constitutionally appropriate to reach a decision.
 2. Judicial authority requires an understanding of the proper nature and limits of judicial power in a constitutional democracy as well as an understanding of the reasons that a judge has a constitutional obligation to tell us why, to persuade us, that his or her solution is superior.
 - D. There are other purposes to opinions, as well. [Note: Opinions also have more than one audience—sometimes the litigants alone, sometimes legal scholars, and sometimes the entire polity.] In every case, then, students should read for the following information:
 1. *Legal doctrine*: What question of law does the case raise? How do the judges or justices answer that question? What doctrines of law do they utilize or formulate? Does their answer conform to existing legal doctrine or does it change it?
 2. *Institutional role*: Almost every constitutional case decided by the Supreme Court involves some question about the proper role of the Court in the political process. What understanding of judicial power does the majority embrace? Does the opinion envision a broad or a narrow role for the power of judges? Does that vision rest on a particular understanding of democratic theory and of the authority of the community to govern itself through the means of majoritarian politics? Does it rest on a particular view about when judges should protect individual liberty from regulation by a majority?
 3. *Methods and strategies of constitutional interpretation*: Translating the "majestic generalities" of the Constitution into a practical instrument of governance requires interpretation. What methods and strategies of interpretation do the judges employ? Do they explicitly acknowledge their choices? Do they justify them? What sorts of justifications and evidence does the opinion marshal to support its argument?
 4. *Commentary on the American polity*: As I said earlier, a course on constitutional law should be a commentary on the meaning of America. Judicial opinions can be a rich source for such commentary.

As you read them, consider what an opinion says about American history, about contemporary politics, about political theory, and about the success or failure of the American experiment.

- II. The Preamble to the Constitution includes among its purposes to “secure the Blessings of Liberty.” Chief among those blessings and, hence, foundational to the new constitutional order was the protection of private property.
 - A. When the Founders spoke of property, they meant not a single right but, rather, an expansive collection of liberties. These included the right to own property, as well as the right of propertied men to participate in governance.
 - 1. Indeed, the protection of property was so important that the Founders included several provisions in the original text, including Article I, section 10, which prohibits *ex post facto* laws and laws impairing the obligation of contracts.
 - 2. Nor can we fully appreciate the significance of property without understanding how expansive the definition of *property* was. Madison, for example, wrote: “A man has a property in his opinions and the free communication of those opinions, and he also has a property in his religious opinions.”
 - B. For the Founders, as we shall see, the protection of liberty itself meant protection for property, and, indeed, property was sometimes said to be the first object of liberty.
- III. Why were the Founders so intent on protecting property?
 - A. Most of the Founders believed that property was at risk under the Articles of Confederation, in part because the Articles had left property under the control of state governments, each of which set its own trade and tariff policies, as well as coined its own money.
 - B. Just as important, the Founders believed, albeit for different reasons, that ownership of property was the key to human autonomy and dignity—Jefferson even drafted a constitutional provision for the Virginia state Constitution, which would have given property to every white male who didn’t already possess it.
- IV. The Court’s early cases on property illustrate both its importance and the complexity of the Founders’ views about the definition of property and its role in civic society.
 - A. In the case of *Calder v. Bull* (1798), the Court considered the origins of property and the extent of the state’s authority to regulate it. In this case, the Court proffered a somewhat narrow view of the *ex post facto* clause, limiting it to criminal matters and, thus, making it somewhat less useful as a mechanism for protecting property.
 - 1. In the Court’s judgment, the *ex post facto* guarantee applies only to matters of criminal law and procedure.
 - 2. Elsewhere in the opinions, various justices wax eloquently about the importance and priority of property, with one justice going so far as to suggest that under no conditions may the state take property from A and give it to B.
 - B. In *Fletcher v. Peck* (1810), on the other hand, the Court advanced a definition of property that made it nearly immune from regulation. In the Court’s view, property was so important that it was protected from governmental regulation either by the Constitution or by “the very nature of things.”
 - 1. The significance of this language should not be underestimated. Chief Justice Marshall seems to argue that property must be a protected value even absent a specific constitutional provision saying so.
 - 2. In a separate concurring opinion, Justice William Johnson went even further, claiming that not even God [“the Deity”] can violate the right to property.
 - C. Just over a quarter century later, however, the Court, writing in *Charles River Bridge v. Warren Bridge Company* (1837), advanced a very different understanding of property. Here, the Court stressed that the community has an interest in private property and that private rights must sometimes give way to communal interests.
 - 1. There are important differences between *Fletcher v. Peck* and *Charles River Bridge*. First, Marshall no longer led the Court. He had been replaced by Chief Justice Roger Taney, in his own right a towering figure in American constitutional history. Unlike Marshall, Taney was less inclined to favor national interests over state interests and less inclined to elevate individual liberties over the public welfare.
 - 2. In this case, Taney found for the owners of the second bridge—or against the property interest—writing: “The object and end of all government is to promote the happiness and prosperity of the

community. While the rights of private property are sacredly guarded, we must not forget that the community also have rights.”

3. Taney’s opinion rested explicitly on how a particular definition of property would either inhibit or promote economic growth and expansion in the new country.
4. Justice Joseph Story also wrote an important dissent in this case. An intellectual compatriot of John Marshall, Story held closer to *Fletcher v. Peck* on the relative balance between the community interest and the liberty interest.
5. At issue in the two opinions were different understandings about the nature and importance of property and how those different understandings could lead to different Americas.

V. The cases we will read throughout this course are available in many places and formats.

- A. Full copies of the cases are available at most public libraries and there are several sites on the Internet, including the official site of the U.S. Supreme Court, which has most of the cases.
- B. However, the cases are often extremely long and include information not directly relevant to our inquiry. For this reason, I advise students to purchase a casebook, or a collection of edited cases. Many such collections are available. The readings and cases I have recommended are from Kommers, Finn, and Jacobsohn, *American Constitutional Law*, 2nd edition, volume 2 (2004), but any casebook will have most of the cases.

Essential Reading:

Calder v. Bull (1798).

Fletcher v. Peck (1810).

Charles River Bridge v. Warren Bridge (1837).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 5, pp. 181–187.

Supplementary Reading:

Bruce Ackerman, *Private Property and the Constitution*.

Charles Beard, *An Economic Interpretation of the Constitution*.

Richard Ely, *The Guardian of Every Other Right: The Constitutional History of Property Rights*.

Morton Horwitz, *The Transformation of American Law, 1780–1860*.

Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and the Foundations of the American Constitution*.

C. Peter McGrath, *Yazoo: The Case of Fletcher v. Peck*.

Questions to Consider:

1. There are several places in the Constitution that offer protection for property, but few if any that give us a definition of the term. What does *property* actually mean? And why did the Founders fail to offer a comprehensive definition?
2. It is difficult to resolve the Court’s treatment of property in *Yazoo* and *Charles River*. Assuming that there are important differences between the two cases, which opinion best reflects the constitutional text? Consider as well: How do these different opinions understand the relationship between individual property rights and the public good?

Lecture Seven

***Lochner v. New York* and Economic Due Process**

Scope: As we saw in the last lecture, the Court's protection for private property has waxed and waned. In this lecture, we trace property through the 20th century, from the great case of *Munn v. Illinois* (1877) and the rise of economic due process in the infamous case of *Lochner v. New York* (1905) to the fall of that doctrine in *West Coast Hotel v. Parrish* (1937). We shall see that at its height, economic due process envisioned a Supreme Court aggressively committed to the protection of property. This commitment was premised on a particular understanding of property and of the proper role of the Court in a constitutional democracy. When the Court turned away from *Lochner*, it turned away from these larger understandings as well. The rejection of economic due process thus signaled the end of aggressive judicial scrutiny of state and federal economic activity in favor of an approach that reduces the role of courts in overseeing the regulation of property and, instead, entrusts such matters to legislatures.

Outline

- I. *Charles River Bridge* initiated an era in which the Court was less protective of property rights and, instead, focused on the communal interest in regulating those rights.
 - A. This doctrine was ratified in *Munn v. Illinois* (1877), which involved a lawsuit concerning the Grangers and the owners of grain silos in the state of Illinois. The state had passed a law regulating how much the silo owners could charge for storage of grain in elevators.
 1. The Court ruled that the public interest in this case overrode the property interest and that the property, to the extent that it was dedicated to a public purpose, was consequently subject to public regulation.
 2. In response, the owners argued that the determination of a "reasonable rate" for storage should be settled by judges. The Court ruled that for "abuses" in the regulation of private property, the aggrieved parties must seek resolution in the legislature, not in the courts. Further, "For protection against abuses by legislatures, the people must resort to the polls."
 3. Elaborating on the public use claim, Chief Justice Waite wrote: "Property becomes clothed with a public interest when it is used in a manner to make it of public consequence."
 4. Justice Field wrote an important, sharply worded dissent: "This decision is subversive of private property."
 - B. *Munn* galvanized commercial interests to organize in opposition to state regulation of private property and to promote, instead, the doctrine of laissez-faire economics.
 1. *Laissez-faire economics*, as we shall see, refers to a conception of the marketplace that leaves it free from most state regulation.
 2. The American Bar Association was formed with the purpose of getting the Court to overrule *Munn*.
- II. In the infamous case *Lochner v. New York* (1905), the Court embraced laissez-faire, ruling, under a doctrine known now as *economic due process*, that courts must protect property against "mere meddlesome interferences" by the state.
 - A. *Lochner* is infamous, at least in part, because the majority claimed that it could find "no reasonable ground" for the state law in question.
 1. The law in question, based on *the police power*, limited the number of hours bakers could work in commercial bakeries. The Court found that this law interfered with the employer's and the employees' right to contract.
 2. Justice Peckham's opinion for the majority invoked a type of argument lawyers like to call "the parade of horrors": If we permit the state to regulate the working conditions of bakers, then it will be allowed to regulate the working condition of almost every occupation.
 3. The majority further claimed that the law could not be justified on any "reasonable" ground.
 4. To most critics, the Court appears simply to substitute its judgment about sound public policy for the legislature's assessment.
 - B. In this sense, *Lochner* seems the opposite of *Munn*: Here, we have a Court determined to correct "abuses," instead of counseling the aggrieved interests to resort to the polls.

- C. In a well-known dissent, Justice Holmes argued that the Court had no business deciding the case on an economic theory that was not in the Constitution proper. Holmes also announced that the Constitution “is made for people of fundamentally differing views...”
 - D. *Lochner* is infamous, in other words, because it appears that the Court acted, not on the basis of an identifiable constitutional principle, but, instead, on its own opinion about the utility, desirability, or wisdom of the law.
 - 1. This claim is based partly on the assumption that the Constitution does not privilege laissez-faire economics over any other economic theory.
 - 2. Consequently, the state legislature was well within its constitutional authority to regulate the workplace. A majority of the Court simply disagreed, as a matter of sound public policy, with the legislature’s choice.
 - E. *Lochner* is also important because it stakes out a vision of the relationship between the individual and the community, a vision that reminds us of the Court’s position in such cases as *Fletcher v. Peck*.
 - F. *Lochner* provided much of the ammunition down the road for the Supreme Court to declare key parts of President Roosevelt’s New Deal program unconstitutional. In response to two Supreme Court decisions, President Roosevelt replied that he and the Congress were entitled constitutionally to act on their own understandings about the nature of their constitutional authority.
 - 1. This recalls, of course, our discussion earlier about the differences between departmentalism and judicial supremacy.
 - 2. In addition, the crisis gave rise to Roosevelt’s ill-fated Court-packing plan, of which we shall hear more shortly.
- III. Eventually, in the case of *West Coast Hotel v. Parrish* (1937), the Court rejected *Lochner* and the doctrine of economic due process, or the doctrine that judges must take special care to protect property rights.
- A. Chief Justice Hughes, writing for the majority, specifically noted that the liberty protected by the due process clause is a “liberty in a social organization which requires the protection of laws against the evils that menace the health, safety, morals, and welfare of the people.”
 - B. In addition, the Court noted, “Even if the wisdom of the policy ... is debatable ... still the legislature is entitled to its judgment.”
- IV. How do we explain the difference between *Lochner* and *West Coast Hotel*? Between the two cases is the Great Depression, and the Court took up *West Coast Hotel* in the midst of the controversy of President Roosevelt’s Court-packing plan.
- A. The Court-packing plan was a reaction to several decisions following the logic of *Lochner*, in which the Court had declared unconstitutional key parts of President Roosevelt’s New Deal.
 - B. The Court reversed course after Roosevelt announced the plan, but there is evidence that the decision was made before the plan was announced.
- [**Correction to lecture:** Newspaper reports of the 1930s referring to the Supreme Court’s reversal as “the switch in time that saved nine” played off, but did not predate, the much older, more familiar saying, “a stitch in time saves nine.”]
- C. Perhaps the better explanation lies in the changing nature of society and changing beliefs about the proper relationship between the state and the market.

Essential Reading:

Munn v. Illinois (1877).

Lochner v. New York (1905).

West Coast Hotel v. Parrish (1937).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 5, pp. 188–192.

Supplementary Reading:

Howard Gillman, *The Constitution Besieged*.

Bernard Siegan, *Economic Liberties and the Constitution*.

Cass R. Sunstein, “*Lochner*’s Legacy,” 87 *Columbia Law Review* 873 (1987).

Questions to Consider:

1. Does the Constitution give us any clear guidance about when the Court should defer to legislative choices or where to draw the line between private property and the public good? Why did Chief Justice Waite conclude in *Munn* that the Court should defer to the legislature? Why did the Court not defer to the legislature in *Lochner*?
2. Few decisions have been as sharply criticized as Peckham's majority opinion in *Lochner*. But what, precisely, was wrong with *Lochner*? Was the Court wrong to protect property against the powers of the state? Was it wrong because the Court substituted its judgment about sound public policy for the legislature's?

Lecture Eight

The Takings Clause of the Fifth Amendment

Scope: The Court's rejection of economic due process has meant that the right to property, arguably the most important of rights at the Founding, is substantially less important than it once was. As we shall see in this lecture, however, a few cases arising under the Fifth Amendment's takings clause suggest that the right to property may be more robust. In such cases as *Nollan v. California Coastal Commission* (1987), *Lucas v. South Carolina Coastal Council* (1992), and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002), the Court hinted that it may begin to scrutinize takings more closely, though it has yet to agree about exactly what standard it should employ or why. In contrast, in *Kelo v. New London* (2005), a sharply divided Court upheld a decision by a municipal government to use its power of eminent domain to take private property and to transfer it to private developers, based on the assumption that the economic benefits of such development would accrue to all residents.

Outline

- I. The Court's position of deference to legislative choices has remained largely unchanged since *West Coast Hotel*. As a consequence, many critics contend that property, once the most prominent of rights, is of little constitutional weight.
 - A. The rejection of economic due process, like the Court's earlier contraction of the contracts clause, is grounded partly in a particular understanding of the relationship between the individual and the community.
 - 1. The current doctrinal rules tell us that in property cases, the Court asks but one question: Is the regulation at issue rational?
 - 2. This test is about as relaxed as one can imagine. The test is not whether the legislature had a rational purpose in mind when it passed the legislation but whether any sane adult can provide a rational reason for the policy or rule.
 - B. As we have seen, this test is grounded on a particular and limited understanding about the authority of judges in a constitutional democracy.
- II. In a few cases, however, the Court has seemed to suggest that some elements of private property warrant greater judicial protection.
 - A. Three cases in particular seem to show a Court intent upon giving weight to another provision in the Constitution, the takings clause, designed to protect private property.
 - 1. The clause states: "Private property may not be taken for public use without just compensation."
 - 2. What does it mean to "take" property?
 - 3. What constitutes a public use as opposed to a private use?
 - 4. Is there any constitutionally derived standard that would allow us to distinguish between just compensations and unjust compensations?
 - B. These are difficult questions. But there is another issue, at least as important, that we must also consider: Who gets to decide?
 - C. In *Nollan v. California Coastal Commission* (1987), the Supreme Court concluded that there was not a substantial "nexus" between a condition imposed on a homeowner seeking to expand his beachfront cottage and the end this condition was meant to promote, in this case, greater beachfront access for the community.
 - 1. The commission had imposed an easement as a condition for a permit to improve a beachfront property. The easement was intended to preserve public access to the beachfront.
 - 2. As I said, the Court struck down the easement. In doing so, it seemed to use a somewhat more stringent version of the rationality test.
 - D. In *Lucas v. South Carolina Coastal Council* (1992), the Court again seemed to give more teeth to the takings clause, this time holding that it would require local officials to "do more than proffer the legislature's declaration" as a reason for regulation.

1. *Lucas* involved a property owner who sought to develop a coastal lot in South Carolina. The state, however, had put a moratorium on development, ostensibly to protect the dune environment and to prevent beach erosion.
 2. Lucas claimed that the moratorium in effect had “taken” his property—even though Lucas still owned it, and the state did not physically take his property, e.g., through the power of eminent domain.
 3. The Court, writing through Justice Scalia, agreed. The Court announced that such “temporary takings,” if they deprived an owner of 100 percent of the value of his land, would run afoul of the takings clause.
- E. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002), the Court concluded that a moratorium on housing development was not necessarily a “temporary” taking under *Lucas*.
- III. The divisions evidenced in these cases continue to fracture the Court, as witnessed in *Kelo v. New London* (2005).
- A. In this case, a sharply divided Court ruled, 5–4, that a city may take private property and transfer it to a private corporation for development and, in so doing, satisfy the “public use” requirement of the Fifth Amendment.
 - B. Writing for the majority, Justice Stevens concluded: “The city has carefully formulated an economic development that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”
 - C. The Court also noted: “For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”
 - D. In a sharply worded dissent, Justice O’Connor, joined by Rehnquist, Scalia, and Thomas, wrote: “Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random.” There are two important claims here.
 1. First, it might now be the case that you can, in fact, take property from A and give it to B, but I suspect that is a gross overstatement. In this case, the city did appear to have a plan for economic development.
 2. Second, *Kelo* appears to have started up the process of constitutional dialogue, thus reminding us that it is not courts alone that give the Constitution meaning. Following *Kelo*, several states have begun to consider legislation that would limit the authority of public officials to take property to facilitate economic development.
- IV. This concludes our examination of the right to property. Here, then, we should ask: What is the status of property as a constitutional liberty? We can say with reasonable accuracy, I think, that property is no longer the “great fence to liberty” that it was at the Founding. If it is no longer the lynchpin to the constitutional order, then what, if anything, is?

Essential Reading:

Nollan v. California Coastal Commission (1987).

Lucas v. South Carolina Coastal Council (1992).

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002).

Kelo v. New London (2005).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 5, pp. 192–193.

Supplementary Reading:

Richard Epstein, *Takings: Private Property and the Power of Eminent Domain*.

Questions to Consider:

1. All property cases involve disputes about the limits of individual liberty and the demands of community. How does the Court weigh the balance in these three takings cases? Should the balance differ depending on whether the case arises under the takings clause or the due process clause of the Fourteenth Amendment?
2. Consider the majority opinion and the dissent by Chief Justice Rehnquist in the *Tahoe* case: Which opinion best advances sound public policy? Should the Court consider such issues?

Lecture Nine

Fundamental Rights—Privacy and Personhood

Scope: In this lecture, we continue to examine the relationship between liberty and community, but our focus broadens to a study of the development of the constitutional right to privacy. For the Founders, and throughout much of American history, the tension between these two values manifests itself most clearly in the Supreme Court's property cases. As we shall see in the next few lectures, these issues are not limited to questions of property but, instead, extend to the most fundamental questions of what it means to be an individual and what it means to be a member of a larger community. Should the community have a say in determining what rights, if any, a woman has toward the fetus she carries? Is the moral sense of the community reason enough to prohibit certain sexual practices? Implicit in these questions, and in the many others surrounding "privacy," are fundamental notions about what it means to be a person and what rights are, as well as questions about the nature and limits of judicial power in finding or creating constitutional rights.

Outline

- I. In this lecture, we begin our study of the Court's complicated privacy jurisprudence.
 - A. We begin with the Court's earliest privacy cases, almost all of which concern rights to privacy in the marriage relationship.
 - B. We will then turn to the abortion and reproductive rights cases, followed in turn, by a series of cases involving family rights.
 - C. Thereafter, we take up cases involving sexual privacy and same-sex marriages.
 - D. We will conclude with the so-called "right-to-die" cases, which also address privacy issues.
- II. Although we say these cases involve the right to privacy, in some ways, this statement is misleading. The Court's privacy cases cover a wide variety of different kinds of issues and interests.
 - A. It might be more accurate to say that these cases are about autonomy, or human personality, or self-determination.
 - B. Before we address specific cases, however, we should understand some of the broader concepts associated with the right to privacy more generally.
 - C. The first of these issues is simply this: Why should we turn from the property cases to the privacy cases?
 1. This transition is unconventional, but there are at least two good reasons for approaching the material in this fashion.
 - a. First is a reason grounded in historical convenience. The Court's earliest privacy cases almost always involved a property interest as well.
 - b. Second, property and privacy are similar in that both ultimately refer to larger questions about the nature of what it means to be a person and what it means to seek the good life in community with others.
 2. Like the right to property, cases involving the constitutional right to privacy and related interests raise important and complex issues concerning the boundaries between liberty and community.
- III. Finally, there is yet another connection between the right to property and the right to privacy.
 - A. Recall our discussion of *Lochner*. We saw that a critical issue in *Lochner* was concerned with the limits of judicial authority and the rise of economic due process.
 - B. There were always two strands of substantive due process—the strand we saw in *Lochner*, concerned with matters of property, and a second strand concerned with liberties that might be described as *noneconomic*.
 - C. Although the first strand has long since been discarded, the second continues to exist in the privacy cases.
 1. This does not mean that the doctrine of substantive due process in noneconomic cases is not profoundly controversial.
 2. Indeed, as we shall see, the same kinds of concerns that led the Court to reject *Lochner* as unsound continue to haunt the Court's work in the area of privacy.

- D. Thus, at a certain level of abstraction, the kinds of issues we confronted in the property line of cases will occupy us with the privacy cases.
 - E. There is, however, also an important difference between the two lines of case law.
 - 1. Unlike property, which is clearly tethered to the constitutional text, the right to privacy is perhaps less obviously grounded in the Constitution.
 - 2. There is room for disagreement here—much depends on how narrowly or broadly we read the text or even what we choose to “include” in the definition of the Constitution.
- IV. There is another issue we should address before we move to specific cases. Earlier in the course, in Lecture 2, we considered the case of *Palko v. Connecticut* (1937).
- A. In *Palko*, the Court adopted the doctrine of selective incorporation, through which some parts of the Bill of Rights became applicable to the states.
 - 1. In particular, those parts of the Bill of Rights that are “implicit in the concept of ordered liberty” apply to the state governments.
 - 2. At bottom, *Palko* stands for the claim that some parts of the Bill of Rights are more important than others. Some rights, to use more contemporary language, are “fundamental,” and others are not.
 - 3. It is easy to criticize such claims, but we need to fully understand them to appreciate the Court’s work in the field of privacy.
 - B. When the Court repudiated *Lochner*, it decided that the test to use in assessing the constitutionality of “economic” legislation, or policies that touch property, is the rationality test. And as we saw, the definition of *rationality* is extremely elastic.
 - C. Now connect this test with the decision in *Palko*. *Palko* tells us that there are two classes of constitutional rights—the fundamental and the nonfundamental. Property is nonfundamental and, hence, warrants the rationality test.
 - D. Fundamental rights, however, receive more aggressive judicial scrutiny. When a right is fundamental, such as privacy, as we shall see, the Court asks: Is the state’s interest “compelling”?
 - 1. Note how different—how much more searching—this test, the *compelling state interest test*, is than the simple rationality test.
 - 2. Consider, for example, a state that wants to prohibit abortions in all instances. It will not be enough for the state to advance a rational set of reasons for its decision. Instead, the Court will require the state to produce a compelling reason.
 - E. What kinds of reasons are compelling?
 - 1. Can the state advance a compelling interest in regulating the sexual activities of same-sex partners? To answer this, we must be able to articulate the state’s interests in a fair amount of detail.
 - 2. Would a state interest grounded in expressions of religious faith be enough?
 - 3. Would an interest grounded in concern for public health fare better?
 - 4. It is important to remember that states possess the police power, traditionally defined as the power to protect the “health, safety, welfare, and morals of society.”
 - F. Consequently, it is often perfectly legitimate for the state to regulate individual conduct on the basis of some larger communal interest, and sometimes, that interest extends to the moral sensibilities of the community.
 - G. But to say that an interest is legitimate is not to say that it is, necessarily, compelling. As we read the cases on privacy, then, try to identify precisely what interest the state seeks to advance and what gravity we should attach to that interest.

Essential Reading:

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 233–234.

Jed Rubinfeld, “The Right of Privacy,” 102 *Harvard Law Review* 737 (1989).

Palko v. State of Connecticut (1937).

Supplementary Reading:

Alinda Brill, *Nobody’s Businesses: Paradoxes of Privacy*.

Ronald Dworkin, *Life's Dominion*.

John Mill, *On Liberty*.

Rogers Smith, "The Constitution and Autonomy," 60 *Texas Law Review* 175 (1982).

Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).

Questions to Consider:

1. What, if anything, is the relationship between the right to property and the right to privacy? Why did the Founders fail to include a general right to privacy in the Bill of Rights?
2. In modern states, the many interests that might fall under the rubric of "privacy," such as protecting information about oneself or making decisions for oneself, must be strongly influenced by technology and society. Is the Supreme Court the appropriate forum for resolving such issues?

Lecture Ten

Privacy—The Early Cases

Scope: There is no explicit provision in the Constitution that protects a comprehensive right to privacy. Nevertheless, some concern for privacy does seem to appear in several places, including the Fourth Amendment, which protects against unreasonable searches and seizures, and the Fifth Amendment, which protects against self-incrimination. Other aspects of privacy intersect with the First Amendment's freedom of association. As we shall see in this lecture, the Court's earliest decisions on privacy tended to emphasize privacy as a right to exclude others from one's property, as in *Olmstead v. United States* (1928). In his dissent in that case, Justice Brandeis argued for a more expansive conception of privacy, untethered from notions of private property. The Court's first significant move toward this larger understanding began in the famous case of *Griswold v. Connecticut* (1965) and was further developed in *Eisenstadt v. Baird* (1972) and other cases.

Outline

- I. As we saw in the last lecture, there is no explicit provision in the Constitution that protects a comprehensive right to privacy.
 - A. Nevertheless, some concern for privacy does seem to appear in several places, including the Fourth Amendment, which protects against unreasonable searches and seizures, and the Fifth Amendment, which protects against self-incrimination. Other aspects of privacy intersect with the First Amendment's freedom of association.
 - B. The Court's early decisions concerning privacy tended to emphasize privacy as a right to exclude others from one's property, thus underscoring the connection between property and privacy.
- II. Thus, in the seminal case of *Olmstead v. United States* (1928), the Court ruled that the Fourth Amendment did not prevent the use of wiretaps on private telephone conversations, although the defendant had argued that they constituted a trespass.
 - A. In his dissent, Justice Brandeis argued for a more expansive conception of privacy, one largely free of property.
 - B. Justice Brandeis also wrote, "The Founders conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."
 - C. In 1890, Brandeis had written, with his law partner (Samuel D. Warren) in Boston, a famous article in the *Harvard Law Review* proposing that there should be a right to privacy.
- III. The Court did not act on Brandeis's suggestion until the 1960s. In the landmark case of *Griswold v. Connecticut* (1965), the Court, speaking through Justice Douglas, concluded that there is a right to privacy of one sort or another.
 - A. I say "one sort or another" because the actual holding in *Griswold* is a matter of some uncertainty. Part of this uncertainty is a consequence of the Court's reasoning.
 - B. Before we take up the various opinions in *Griswold*, it might be a good idea to consider the different kinds of opinions that justices can write in any case.
 1. A *majority opinion* represents the collective judgment of a majority of the sitting justices. It represents a binding precedent, or a statement of what the law is and what it requires.
 2. A *per curiam opinion* also typically has the force of law, but in these opinions, no single justice is identified as the author.
 3. A *plurality opinion*, an opinion in which a plurality of justices joins but does not amount to a majority of the Court, does not constitute a precedent, though it does resolve that particular case.
 4. A *concurring opinion* is an opinion by one or more justices that expresses agreement with the result in the case, but some disagreement with the method or reasoning used to reach that result.
 5. Finally, a *dissenting opinion* is an opinion by one or more justices that disagrees with the result reached by the majority.

- IV. Now, returning to *Griswold*, we see a fair amount of disagreement within the Court and a wide variety of concurring and dissenting opinions.
- A. In this case, Justice Douglas, writing for the majority, concluded that the Constitution does protect a privacy right of one kind or another. Again, I say of “one kind or another” because the opinion is unclear about the precise location of the right and, indeed, unclear about the nature of the right.
 - 1. In particular, Douglas declined to find privacy in the Fourth Amendment alone or in any single constitutional provision. Instead, he found it in the “penumbras and emanations” of several different constitutional provisions.
 - 2. The right to privacy, in other words, results from the confluence of a number of more specific constitutional provisions.
 - 3. In addition, Douglas wrote: “We deal with a right of privacy older than the Bill of Rights. To allow the state to regulate the sacred precincts of the marital bedroom would be repulsive to the notions of privacy surrounding the marital relationship.”
 - B. Another uncertainty concerns the actual dimension, or breadth, of the right in *Griswold*. In some places, the Court speaks about a broad right to privacy, but in others, it seems to focus on the narrower category of “marital” privacy.
 - C. The issue was settled in the subsequent case of *Eisenstadt v. Baird* (1972), in which the Court concluded that the right to privacy “must be the same for married and unmarried alike.”
- V. In an interesting concurring opinion, Justice Goldberg sought help in establishing the privacy right from the Ninth Amendment.
- A. The Ninth, he argues, tells us that there must be implicit constitutional rights beyond those specifically articulated in the Bill of Rights.
 - B. In response, Justice Black accused Goldberg of Lochnerizing—of using the Ninth as a way of simply reading into the Constitution protection of those rights that are important to judges or society, even though there is no secure constitutional warrant for doing so.
- VI. There are important dissents in *Griswold*. As the dissents observed, the Court seemed to create the right of privacy from the scarcest of constitutional materials.
- A. As Justice Black wrote, “I like my privacy as well as the next one, but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision.”
 - B. Justice Stewart voiced another important criticism: Absent any clear constitutional directive, the Court’s “creation of the right to privacy represents an unwarranted judicial intrusion into the powers of state legislatures.”
- VII. One final point about *Griswold*: If the right to privacy is fundamental, we must then ask whether the state had, in this case, a compelling reason that would save the legislation. In this case, the majority was unable to find such a reason.

Essential Reading:

Olmstead v. United States (1928).

Griswold v. Connecticut (1965).

Eisenstadt v. Baird (1972).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 5, pp. 239–242.

Supplementary Reading:

Robert Bork, “Neutral Principles and Some First Amendment Problems,” 47 *Indiana Law Journal* 1 (1971).

Thomas Kauper, “Penumbras, Peripheries, Things Fundamental and Things Forgotten,” 64 *Michigan Law Review* 235 (1965).

Questions to Consider:

1. How persuasive is the majority's claim that the right to privacy is actually a part of the Constitution and not simply a creation of judicial imagination? Where in the Constitution does the Court find the right to privacy? Would the opinion be more or less persuasive if the majority had simply said that privacy is an "implied right"?
2. What is the significance of Justice Douglas's emphasis on the sanctity of marriage and "the intimate relation between husband and wife"?
3. In his strongly worded dissent, Justice Stewart argued that the majority had simply written its personal preferences, preferences he shared, into the Constitution. "But we are not asked to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates ... the Constitution. And that I cannot do." Why not? Is this position based on an understanding of judicial power?

Lecture Eleven

***Roe v. Wade* and Reproductive Autonomy**

Scope: Few topics in American law are as emotionally charged, and as doctrinally confused, as the discussion of abortion rights. As we shall see in this lecture, the doctrinal confusion surrounding *Roe v. Wade* (1973) is intricately caught up with the profound moral and political issues involved in abortion but equally with important questions about the role of the Supreme Court in American society. In this lecture, we explore how and why *Roe* came to the Court; the reasons offered by Justice Blackmun, writing for the Court's 7–2 majority, for finding that a right to terminate a pregnancy exists in the Constitution; and the many criticisms of the decision by the Court's dissenters, Justices White and Rehnquist. Of course, dissents to *Roe* extend well beyond the courts, and we shall explore the social and political consequences of *Roe*, as well.

Outline

- I. *Roe* involved a challenge to a Texas statute that prohibited abortion at any point in a pregnancy except to save the life of the mother. In 1970, Jane Roe (a pseudonym) was 25, unmarried, and pregnant. She filed a *class action* lawsuit, asking the court to declare the statute unconstitutional as a violation of her right to privacy.
 - A. The case might have been dismissed on grounds of mootness or ripeness, two important doctrines designed to promote the prudential use of judicial power.
 - B. A companion case, *Doe v. Bolton*, presented a challenge to a Georgia statute that required all abortions to be approved by a “hospital abortion committee.”
- II. In his opinion for the majority (7–2), Justice Blackmun agreed that the right to privacy, whatever its source, is “broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.”
 - A. Note that Blackmun was not precise about where the right to privacy is located in the Constitution.
 - B. Equally important, Blackmun offered no support at all for his conclusion—hardly self-evident—that the right includes a decision to terminate a pregnancy. He wrote: “This right of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty, as we feel it is, or as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.”
 1. This is an important point. It is not enough to establish, in this case, that the Constitution includes a right to privacy, if it does.
 2. The critical next step is to show that such a right includes this particular set of decisions or conduct—and the majority offers no support at all for the conclusion that it does.
- III. Although the Court concluded that there is a right to privacy and that the right is broad enough to encompass a decision to terminate a pregnancy, the Court also denied the claim that such a right is absolute.
 - A. Consequently, there are times when the state’s interests in regulating or prohibiting abortions will be strong enough to overcome the right.
 - B. Originally, the state of Texas acknowledged that one of the reasons why the state prohibited abortion was to reinforce what it called a “Victorian sense” of social morality about proper sexual conduct; however, the state refused to articulate that or to press that as a reason before the Supreme Court.
 - C. The state’s interests are therefore two: protecting the fetus, and protecting maternal health.
 - D. These are interesting and important claims, and both are problematic.
 1. For example, the state’s interest in protecting fetal health might lead us to address the question of when life begins. One might argue that if the fetus is a life, then it ought to be constitutionally vested with certain rights, including rights to life and liberty.
 2. The Court declined to address this question, noting that the critical question is, instead: Is the fetus a person?
 - E. At some point in the pregnancy, the state’s interests in protecting the fetus and protecting maternal health are sufficiently strong, or compelling, to override a woman’s “fundamental” right.

1. As regards the fetus, that point is at the moment of “viability.”
2. As regards maternal health, that moment is at the end of the second trimester.

IV. The dissents in *Roe* attacked the decision on two grounds.

- A. Justice White anticipated one of the primary criticisms of *Roe*, complaining that the Court had simply announced “a new right ... with scarcely any reason or authority for its action.”
- B. Justice Rehnquist similarly complained that the “privacy” right in *Roe* had little or nothing in common with the Court’s earlier privacy cases.
- C. A second set of criticisms, related to the first, concerns issues of judicial power and accountability.
 1. Many critics of *Roe* think the decision is indistinguishable from *Lochner* and like cases—just another example of the majority making it up.
 2. On this understanding, *Roe* is symbolic of the dangers implicit in substantive due process, whether economic or noneconomic.
- D. *Roe* is also intensely controversial for reasons that are not essentially doctrinal in nature, in part because *Roe* touches on sensitive, complex areas of human life at the intersection of morality, faith, and law.
- E. But *Roe* is also controversial because it seems to many to highlight the dangers of a Court untethered from the actual text of the Constitution.
 1. Let’s ask a counter-factual: where would we be if the Court had never decided *Roe*? Several states had already begun to liberalize their abortion laws. Would that trend have continued, or would it have been forestalled in the absence of *Roe*?
 2. Some scholars suggest that the debate in the U.S. is volatile, angry, and sometimes violent precisely because, as citizens, there is nothing we can do about abortion.

Essential Reading:

Roe v. Wade (1973); *Doe v. Bolton* (1973).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 242–244.

John Hart Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale Law Journal* 920 (1973).

Supplementary Reading:

Robert H. Bork, *The Tempting of America*.

David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*.

Mary Ann Glendon, *Abortion and Divorce in Western Law*.

Laurence H. Tribe, *Abortion: The Clash of Absolutes*.

Questions to Consider:

1. What right, precisely, did the majority in *Roe* claim to advance? Was it a right of self-determination? Or did the Court advance the right of women as equals to participate in the full life of the community? Is the right one of sexual liberty or lifestyle?
2. Is the issue in *Roe* less about privacy than reproductive autonomy? What difference does it make constitutionally?
3. Is the issue, ultimately, about who has the authority to decide who is and who is not a member of the community, vested with constitutional rights?
4. Is there a role for Courts to play in the resolution of such issues? Or is judicial involvement here just another instance of judges usurping popular authority in the absence of a clear constitutional command?

Lecture Twelve

Privacy and Autonomy—From *Roe* to *Casey*

Scope: At the end of our last lecture, we briefly considered the larger political and social reactions to *Roe*. We continue our examination of the consequences of *Roe* in this lecture by exploring litigation after *Roe*. The most recent cases involving abortion and reproductive autonomy have highlighted the issues of judicial power and accountability. As we saw last time, *Roe* did not completely prohibit the states from regulating abortion, and in the decade following *Roe*, the Court was called upon to determine the constitutionality of a great variety of such restrictions. For example, in *Planned Parenthood of Missouri v. Danforth* (1976), the Court struck down a state law requiring minors to obtain the consent of their parents and wives of their husbands before an abortion. In many of these cases, the Court began to criticize the logic of *Roe*. Some judges, notably Justice Scalia, also campaigned for the reversal of *Roe*. The Court considered a direct challenge to *Roe* in the important and controversial case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), but the Court could not find a majority to overrule *Roe*. The Court's internal divisions continue to manifest themselves, as we shall see when we take up the recent decision in *Stenberg v. Carhart* (2000), in which the Court addressed Nebraska's ban on partial-birth abortions.

Outline

- I. *Roe* did not settle the debate over the Constitution and abortion. Instead, it inaugurated a debate that has lasted more than 30 years and shows no sign of diminishing.
 - A. This is partly because the Court acknowledged in *Roe* that there is room for state regulation in the area of abortions. The questions inevitably were redrawn to determine which state regulations could pass constitutional muster and which were unconstitutional infringements on a woman's constitutional right to privacy. Under the framework, a state may regulate an abortion when it has a compelling interest.
 - B. In *Planned Parenthood v. Danforth* (1976), the Court struck down a state regulation that required minors to obtain the consent of their parents and wives to obtain the consent of their husbands before an abortion.
 - C. In *Planned Parenthood v. Ashcroft* (1983), the Court appeared to modify its position by sustaining a parental consent statute for "unemancipated" minors, provided there was a provision that allowed some minors alternatively to obtain a judge's approval.
- II. In *Akron v. Akron Center for Reproductive Health* (1983), the Court reaffirmed its broad commitment to *Roe*. In a strongly worded dissent, Justice O'Connor argued that the "*Roe* framework ... is clearly on a collision course with itself...."
 - A. What O'Connor refers to is a problem concerning the two "timelines" we saw in *Roe*. The first timeline concerned fetal viability. That point was different in 1983 than in 1973, thus illustrating a larger problem: Advances in medical technology meant that the point of viability would inevitably be pushed closer and closer to the point of conception.
 - B. In contrast, the second line—the line concerning maternal health—was also undergoing change driven by medical technology. Advances in technology made it safer to conduct abortions later and later in the pregnancy.
 - C. Thus, the state's ability to regulate a pregnancy was simultaneously being pushed back to the moment of conception and forward to the moment of birth.
 - D. Six years later, Chief Justice Rehnquist advanced a similar complaint [in *Webster v. Reproductive Health Services*], noting that the trimester framework adopted in *Roe* is "hardly consistent with the notion of a Constitution cast in general terms...."
 - E. The *Akron* Court could muster only a plurality, but the opinion is important because a plurality of justices seemed prepared to rule, in contrast to *Roe*, that a state's interest in potential life began not at the point of viability but at the point of conception.
 1. Scalia, who accused the Court of acting irresponsibly by not overruling *Roe* outright, noted the significance of the potential change.
 2. Justice Blackmun was equally distressed, noting that a "chill wind blows. I dissent."

- III. The Court's turmoil over *Roe* continued in the significant case of *Planned Parenthood v. Casey* (1992). Again, the Court could not muster a majority opinion.
- A. Justice O'Connor wrote for a three-person plurality. She rejected the government's invitation to overrule *Roe*, instead explaining at great length why the Court's reliance on precedent and concern for its own legitimacy counseled a reaffirmation of *Roe*'s central holding.
 1. O'Connor began by noting:

Liberty finds no refuge in a jurisprudence of doubt. After considering the fundamental questions resolved by *Roe*, principles of institutional integrity and the rule of *stare decisis*, we are led to conclude this: The essential holding of *Roe v. Wade* should be retained.
 2. She continued:

A decision to overrule *Roe* would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the nation's commitment to the rule of law."
 3. In response, Justice Scalia said:

I cannot agree with, indeed, I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated.
 4. He continued:

That is appalling. The Court's decision, presumably, should be governed by only one factor, and that factor should be to get the Constitution right, and if getting it right means that we acknowledge that we got it wrong once before, then so be it, because our constitutional obligation is to the Constitution itself, not to our own constitutional integrity....*Roe* has created a national politics plagued by abortion protests, national abortion lobbying, and abortion marches on Congress.
 - B. Although the plurality did not overrule *Roe*, it did make potentially substantial changes in the regulatory framework governing abortions.
 1. For example, the plurality seemed to eschew the fundamental right/compelling state interest framework in favor of an important or a substantial liberty interest (a new category of liberty) and a rule that permits states to regulate abortions at any point in a pregnancy, so long as such regulations are not an "undue burden" on the woman's right.
 2. One difficulty is that the plurality did not define "undue burden."
 - C. Justice Blackmun, concurring in part and dissenting in part, praised the plurality opinion as an "act of personal courage and constitutional principle."
 - D. In contrast, Justice Scalia, dissenting, argued that to praise the plurality opinion as an act of "statesmanship" was "nothing less than Orwellian": "The issue is whether it [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not."
- IV. As a practical matter, one consequence of the Court's inability to muster a majority opinion in *Akron* or, later, in *Casey* is a continued and contentious role for the Court in overseeing the politics of abortion.
- A. The new "undue burden" standard, for example, seems to many observers an open invitation for states to continue to test out new regulations on abortion.
 - B. One such recent case is *Stenberg v. Carhart* (2000), in which the Court declared unconstitutional Nebraska's ban on partial-birth abortions. Once again, however, the Court proved itself deeply divided. The case produced no less than eight separate opinions.
 1. Justice Scalia wrote, "Today's decision, that the Constitution prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of controversy, as well it should."
 2. If *Stenberg* is a guide for future cases, then we should assume, I think, that those future cases will show a Court as deeply divided as this one.
 - C. These are issues of politics, not necessarily or simply issues of law—and issues of politics are what it means to live in a constitutional democracy.

Essential Reading:

Planned Parenthood of Missouri v. Danforth (1976).

Planned Parenthood v. Ashcroft (1983).

Akron v. Akron Center for Reproductive Health (1983).

Planned Parenthood v. Casey (1992).

Stenberg v. Carhart (2000).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 244–248.

Supplementary Reading:

Ruth Bader Ginsburg, “Speaking in a Judicial Voice,” 67 *New York University Law Review* 1185 (1993).

Questions to Consider:

1. Does the plurality in *Casey* make a more persuasive argument for the privacy right than the majority in *Roe*? How, if at all, do the arguments differ?
2. When, if ever, is it appropriate for the Court—as the plurality seemed to do—to consider its own legitimacy in resolving difficult constitutional questions?
3. Justice Scalia suggested that *Roe* is similar to *Dred Scott*. Do you agree?
4. Why did the plurality use the undue burden test and not the more familiar fundamental rights/compelling state interest test? Is there any practical consequence to the distinction?
5. Justice Blackmun wrote that the decision should be a “warning to all who have tried to turn this Court into yet another political branch.” What did he mean?

Timeline of Cases Discussed in the Course

All cases were before the U.S. Supreme Court unless otherwise noted.

- Chief Justices of the U.S. Supreme Court are listed before cases during which they held office. Chief Justices who died in office are marked †.
- Winning parties are indicated in **boldface italics**.
- A case marked with an asterisk (*) offered rulings so mixed or so complicated that the designation of an overall winner may be misleading.
- Informal names for some cases are noted in parentheses.

Chief Justice Oliver Ellsworth, March 8, 1796–December 15, 1800

1798 *Calder v. Bull*, 3 U.S. 386*

Chief Justice John Marshall, February 4, 1801–July 6, 1835†

1803 *Marbury v. Madison*, 5 U.S. 137*

1810 *Fletcher v. Peck*, 10 U.S. 87 (Yazoo Land Fraud Case)

1825 *Eakin v. Raub*, 12 Sergeant & Rawle 330* (Pennsylvania State Supreme Court)

1833 *Barron v. Baltimore*, 32 U.S. 243

Chief Justice Brooke Taney, March 28, 1836–October 12, 1864†

1837 *Charles River Bridge v. Warren Bridge*, 36 U.S. 420

1857 *Dred Scott v. Sandford*, 60 U.S. 393*

Chief Justice Salmon Portland Chase, December 15, 1864–May 7, 1873†

1873 *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Company*, 83 U.S. 36 (Slaughter-House Cases)

1873 *Bradwell v. State of Illinois*, 83 U.S. 130

Chief Justice Morrison Remick Waite, March 4, 1874–March 23, 1888†

1874 *Minor v. Happersett*, 88 U.S. 162

1877 *Munn v. Illinois*, 94 U.S. 113 (Granger Cases)

1878 *Reynolds v. United States*, 98 U.S. 145

Chief Justice Melville Weston Fuller, October 8, 1888–July 4, 1910†

1890 *Davis v. Beason, Sheriff*, 133 U.S. 333

1896 *Plessy v. Ferguson*, 163 U.S. 537

1905 *Lochner v. New York*, 198 U.S. 45

Chief Justice Edward Douglass White, December 19, 1910–May 19, 1921†

1919 *Schenck v. United States*, 249 U.S. 47

Chief Justice William Howard Taft, July 11, 1921–February 3, 1930

1923 *Meyer v. Nebraska*, 262 U.S. 390

1925 *Pierce v. Society of Sisters*, 268 U.S. 510

1925 *Gitlow v. New York*, 268 U.S. 652

1927 *Buck v. Bell*, 274 U.S. 200

1927 *Whitney v. California*, 274 U.S. 357

1928 *Olmstead v. United States*, 277 U.S. 438

Chief Justice Charles Evans Hughes, February 24, 1930–June 30, 1941

1937 *West Coast Hotel v. Parrish*, 300 U.S. 379

1937 *Palko v. Connecticut*, 302 U.S. 319

1938 *Missouri ex rel. Gaines v. Canada* 305 U.S. 337

1940 *Minersville v. Gobitis*, 310 U.S. 586 (Flag Salute Case I)

Chief Justice Harlan Fiske Stone, July 3, 1941–April 22, 1946†

1942 *Chaplinsky v. New Hampshire*, 315 U.S. 568

1942 *Jones v. Opelika*, 316 U.S. 584

- 1943 *West Virginia v. Barnette*, 319 U.S. 624 (Flag Salute Case II)
 1944 *Korematsu v. United States*, 323 U.S. 214

Chief Justice Frederick Moore Vinson, June 24, 1946–September 8, 1953†

- 1947 *Everson v. Board of Education*, 330 U.S. 1
 1948 *McCullum v. Illinois*, 333 U.S. 203
 1950 *Sweatt v. Painter*, 339 U.S. 629
 1951 *Dennis v. United States*, 341 U.S. 494
 1952 *Beauharnais v. Illinois*, 343 U.S. 250

Chief Justice Earl Warren, October 5, 1953–June 23, 1969

- 1954 *Brown v. Board of Education I*, 347 U.S. 483 (School Desegregation Case I, Brown I)
 1955 *Brown v. Board of Education II*, 349 U.S. 294
 1957 *Yates v. United States*, 354 U.S. 298
 1957 *Roth v. United States*, 354 U.S. 476
 1958 *Cooper v. Aaron*, 358 U.S. 1
 1960 *Talley v. California*, 362 U.S. 60
 1961 *Noto v. United States*, 367 U.S. 290
 1961 *Hoyt v. Florida*, 368 U.S. 57
 1962 *Engel v. Vitale*, 370 U.S. 421* (School Prayer Case)
 1963 *Abington Township School District v. Schempp*, 374 U.S. 203 (School Prayer Case)
 1963 *Sherbert v. Verner*, 374 U.S. 398
 1965 *Griswold v. Connecticut*, 381 U.S. 479
 1966 *Harper v. Virginia Board of Elections*, 383 U.S. 663
 1967 *Loving v. Virginia*, 388 U.S. 1
 1968 *United States v. O'Brien*, 391 U.S. 367 (Draft Card Case)
 1969 *Tinker v. Des Moines School District*, 393 U.S. 503
 1969 *Brandenburg v. Ohio*, 395 U.S. 444

Chief Justice Warren Earl Burger, June 23, 1969–September 26, 1986

- 1971 *Cohen v. California*, 403 U.S. 15
 1971 *Lemon v. Kurtzman*, 403 U.S. 602*
 1971 *Reed v. Reed*, 404 U.S. 71
 1972 *Eisenstadt v. Baird*, 405 U.S. 438
 1972 *Wisconsin v. Yoder*, 406 U.S. 205 (Amish School Case)
 1972 *Furman v. Georgia*, 408 U.S. 238
 1973 *Roe v. Wade*, 410 U.S. 116 (Abortion Case)
 1973 *Doe v. Bolton*, 410 U.S. 179
 1973 *San Antonio School District v. Rodriguez*, 411 U.S. 1
 1973 *Frontiero v. Richardson*, 411 U.S. 677
 1973 *Miller v. California*, 413 U.S. 15*
 1973 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49
 1976 *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307
 1976 *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52
 1976 *Gregg v. Georgia*, 428 U.S. 153*
 1976 *Craig v. Boren*, 429 U.S. 190
 1977 *Moore v. City of East Cleveland*, 431 U.S. 494
 1977 *Trimble v. Gordon*, 430 U.S. 762
 1977 *Wooley v. Maynard*, 430 U.S. 705
 1978 *Regents of the University of California v. Bakke*, 438 U.S. 265*
 1981 *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464
 1981 *Thomas v. Review Board*, 450 U.S. 707
 1982 *Mississippi University for Women v. Hogan*, 458 U.S. 718

1983 *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416
 1983 *Planned Parenthood v. Ashcroft*, 462 U.S. 476
 1984 *Lynch v. Donnelly*, 465 U.S. 668
 1984 *Clark v. Community for Creative Nonviolence*, 468 U.S. 288
 1985 *Wallace v. Jaffree*, 472 U.S. 38
 1985 *Cleburne v. Cleburne Living Center*, 473 U.S. 432
 1985 *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (U.S. Court of Appeals, 7th Circuit)
 1986 *Bowers v. Hardwick*, 478 U.S. 186 (Homosexual Sodomy Case I)

Chief Justice William Hubbs Rehnquist, Sept. 26, 1986–Sept. 3, 2005†

1987 *McCleskey v. Kemp*, 481 U.S. 279
 1987 *Nollan v. California Coastal Commission*, 483 U.S. 825
 1989 *DeShaney v. Winnebago County*, 489 U.S. 189
 1989 *Michael H. v. Gerald D.*, 491 U.S. 110
 1989 *Texas v. Johnson*, 491 U.S. 397
 1990 *Employment Division, Ore. Dept. of Human Resources v. Smith*, 494 U.S. 872 (Peyote Case)
 1990 *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261
 1991 *Barnes v. Glen Theatre*, 501 U.S. 560
 1992 *RAV v. City of St. Paul*, 505 U.S. 377
 1992 *Lee v. Weisman*, 505 U.S. 577
 1992 *Planned Parenthood v. Casey*, 505 U.S. 833*
 1992 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003
 1993 *Herrera v. Collins*, 506 U.S. 390
 1993 *Baehr v. Lewin*, 74 Haw. 645 (Hawaii State Supreme Court)
 1993 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520
 1993 *Wisconsin v. Mitchell*, 508 U.S. 476
 1993 *Heller v. Doe*, 509 U.S. 312
 1994 *Callins v. Collins*, 510 U.S. 1141
 1996 *Romer v. Evans*, 517 U.S. 620
 1996 *United States v. Virginia*, 518 U.S. 515
 1997 *Boerne v. Flores*, 521 U.S. 507
 1997 *Vacco, Attorney General of New York v. Quill*, 521 U.S. 793
 1997 *Reno v. American Civil Liberties Union*, 521 U.S. 844
 1997 *Washington v. Glucksberg*, 521 U.S. 702
 1999 *Baker v. Vermont*, 170 Vt 194, 744 A. 2d 864 (Vermont State Supreme Court)
 2000 *Erie v. Pap's A.M.*, 529 U.S. 277
 2000 *Troxel v. Granville*, 530 U.S. 57
 2000 *Stenberg v. Carhart*, 530 U.S. 914 (Partial Birth Abortion Case)
 2002 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234
 2002 *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302
 2002 *Atkins v. Virginia*, 536 U.S. 304
 2002 *Zelman v. Simmons-Harris*, 536 U.S. 639
 2003 *Virginia v. Black*, 538 U.S. 343*
 2003 *Gratz v. Bollinger*, 539 U.S. 244
 2003 *Grutter v. Bollinger*, 539 U.S. 306
 2003 *Lawrence v. Texas*, 539 U.S. 558 (Sodomy Case II)
 2003 *Goodridge v. Mass. Dept. of Public Health*, 798 N.E.2d 241 (Massachusetts State Supreme Court)
 2005 *Roper v. Simmons*, 543 U.S. 551
 2005 *Kelo v. New London*, 545 U.S. ____
 2005 *McCreary County v. ACLU*, 545 U.S. ____
 2005 *Van Orden v. Perry*, 545 U.S. ____

Chief Justice John Roberts, Sept. 29, 2005–

Annotated List of Cases—Alphabetical Order

types of opinions

Opinion of the Court: an opinion supported by a majority of the voting justices.

Judgment of the Court: a decision supported by a plurality of the justices voting; does not become a binding precedent for future courts.

Concurring opinion: an opinion by one or more justices that agrees with the result reached by the majority but disagrees with part of the reasoning.

Opinion concurring in judgment: an opinion by one or more justices that agrees with the result reached by a majority or plurality of the Court but offers a different opinion in support of that conclusion.

Dissenting opinion: an opinion by one or more justices that disagrees with the result reached by the majority.

Seriatim opinion: a judicial decision with separate opinions from each judge instead of a majority or plurality opinion announced by the Court.

Note: winning parties are indicated in ***boldface italics***, except for cases with rulings so mixed or so complicated—marked with an asterisk (*)—that the designation of an overall winner may be misleading.

*Abington Township School District v. **Schempp***, 374 U.S. 203 (1963) (School Prayer Case): Vote 7 (White, Brennan, Goldberg, Black, Warren, Douglas, Harlan II)—1 (Stewart)

Opinion of the Court: Clark; Concurring opinions: Goldberg (Harlan II), Douglas; Dissenting opinion: Stewart

The Court upheld the school prayer decision in *Engel v. Vitale* (370 U.S. 412, 1962) by confirming that a state may not impose any sort of religious requirement in schools.

*Akron v. **Akron Center for Reproductive Health***, 462 U.S. 416 (1983): Vote 5 (Stevens, Powell, T. Marshall, Brennan, Burger)—4 (O'Connor, Rehnquist, White, Blackmun)

Opinion of the Court: Powell; Dissenting opinion: O'Connor (Rehnquist)

The Court found that parts of the city of Akron's 1978 ordinance imposing several regulations on abortion violated a woman's reproductive rights under *Roe v. Wade*.

American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (U.S. Court of Appeals, 7th Circuit, 1985):

Opinion of the Court: Easterbrook (Cudahy); Concurring opinion: Swygert

The 7th Circuit Court of Appeals ruled that an Indianapolis ordinance that criminalized some forms of pornography as a civil rights violation itself violated the First Amendment.

*Ashcroft v. **Free Speech Coalition***, 535 U.S. 234 (2002): Vote 6 (Stevens, Kennedy, Souter, Thomas, Ginsburg, Breyer)—3 (Rehnquist, O'Connor, Scalia)

Opinion of the Court: Kennedy; Opinion concurring in judgment: Thomas; Dissenting opinions: Rehnquist (Scalia), O'Connor (Rehnquist, Scalia)

The Court agreed with the 9th Circuit that the provisions of the Child Pornography Prevention Act of 1996 were insufficiently related to the state's legitimate interest in prohibiting pornography that actually involved minors.

*Atkins v. **Virginia***, 536 U.S. 304 (2002): Vote 6 (Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer)—3 (Rehnquist, Scalia, Thomas)

Opinion of the Court: Stevens; Dissenting opinions: Rehnquist (Scalia, Thomas), Scalia (Rehnquist, Thomas)

The Court decided that the execution of a mentally retarded person would violate the Eighth Amendment's ban on cruel and unusual punishment.

*Baehr v. **Lewin***, 74 Haw. 645 (Hawaii State Supreme Court) (5 May 1993):

Opinion of the Court: Levinson; Concurring opinion: J. Burns; Dissenting opinion: Heen

The Hawaii Supreme Court ruled that the state must show compelling reason for denying same-sex couples equal access to legal marriage.

*Baker v. **Vermont***, 170 Vt 194, 744 A. 2d 864 (Vermont State Supreme Court, 1999):

Opinion of the Court: Amestoy; Concurring opinion: Dooley; Opinion concurring in part and dissenting in part: Johnson

In this case, the Vermont Supreme Court ruled that the exclusion of same-sex couples from the benefits and protections of marriage under state law violated the common benefits clause of the Vermont Constitution.

*Barnes v. **Glen Theatre***, 501 U.S. 560 (1991): Vote 5 (Rehnquist, O'Connor, Scalia, Kennedy, Souter)—4 (B. White, T. Marshall, Blackmun, Stevens)

Judgment of the Court: Rehnquist; Opinions concurring in judgment: Scalia, Souter; Dissenting opinion: B. White (T. Marshall, Blackmun, Stevens)

In this case, a majority ruled that an Indiana law prohibiting nude dancing performed as entertainment did not violate the First Amendment.

Barron v. Baltimore, 32 U.S. 243 (7 Pet. 243) (1833): Unanimous vote (J. Marshall, W. Johnson, Duvall, Story, Thompson, McLean, Baldwin)

Opinion of the Court: J. Marshall

In this case, the Court ruled that the Fifth Amendment, in particular, and the Bill of Rights, more generally, did not apply to the actions of state governments.

Beauharnais v. Illinois, 343 U.S. 250 (1952): Vote 5 (Vinson, Frankfurter, Burton, Clark, Minton)—4 (Black, Reed, Douglas, R. Jackson)

Opinion of the Court: Frankfurter; Dissenting opinions: Black (Douglas), Reed (Douglas), Douglas, R. Jackson

The Court upheld a state law that prohibited libelous statements about certain groups against a claim that the statute violated the First Amendment.

Boerne v. Flores, 521 U.S. 507 (1997): Vote: 6 (Ginsberg, Thomas, Scalia, Stevens, Rehnquist, Kennedy)—3 (Souter, Breyer, O'Connor)

Opinion of the Court: Kennedy; Concurring opinions: Stevens, Scalia; Dissenting opinions: Souter, Breyer, O'Connor

The Court ruled that Congress exceeded its Fourteenth Amendment enforcement powers by enacting the Religious Freedom Restoration Act (RFRA).

Bowers v. Hardwick, 478 U.S. 186 (1986) (Homosexual Sodomy Case I): Vote 5 (Burger, B. White, Powell, Rehnquist, O'Connor)—4 (Brennan, T. Marshall, Blackmun, Stevens)

Opinion of the Court: B. White; Concurring opinions: Burger, Powell; Dissenting opinions: Blackmun (Brennan, T.

Marshall, Stevens), Stevens (Brennan, T. Marshall)

The Court upheld a Georgia statute that criminalized consensual sodomy. Later overruled in *Lawrence v. Texas*.

Bradwell v. State of Illinois, 83 U.S. 130 (1873): Vote 8 (Clifford, Swayne, Miller, Davis, Field, Strong, Bradley, Hunt)—1 (S. P. Chase)

Opinion of the Court: Miller; Concurring opinion: Bradley (Swayne, Field); Dissenting without opinion: S. P. Chase

The Court maintained that the right to admission to practice in the courts of a state is not a privilege or immunity of a citizen of the United States.

Brandenburg v. Ohio, 395 U.S. 444 (9 June 1969): Unanimous vote (Warren, Black, Douglas, Harlan II, Brennan, Stewart, White, T. Marshall); Did not participate: Fortas

Opinion of the Court: *Per curiam*; Concurring opinions: Black, Douglas (Black)

The Court ruled that if speech incites imminent unlawful action, it may be restricted, but the burden of proof in all speech cases rests on the state to show that action will result, rather than on the defendant to show that it will not.

Brown v. Board of Education I, 347 U.S. 483 (1954) (School Desegregation Case/Brown I): Unanimous vote (Warren, Black, Reed, Frankfurter, Douglas, R. Jackson, Burton, Clark, Minton)

Opinion of the Court: Warren

The Court decided that segregation in public education is inherently unequal and, thus, a violation of the equal protection clause of the Fourteenth Amendment.

Brown v. Board of Education II, 349 U.S. 294 (1955): Unanimous vote (Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan II)

Opinion of the Court: Warren

The Court ordered the states to end segregation in public elementary schools with “all deliberate speed.”

Buck v. Bell, 274 U.S. 200 (1927): Vote: 8 (Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Sanford, Stone)—1 (Butler)

Opinion of the Court: Holmes; Dissenting without opinion: Butler

The Court upheld a Virginia law that permitted involuntary sterilization in some cases.

Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Company, 83 U.S. 36 (1873) (Slaughter-House Cases): Vote 5 (Miller, Clifford, Strong, Hunt, Davis)—4 (Field, Chase, Swayne, Bradley)

Opinion of the Court: Miller; Dissenting opinions: Field, Bradley, Swayne

The Court ruled that the privileges and immunities clause of the Fourteenth Amendment did not make the Bill of Rights applicable to the states.

Calder v. Bull, 3 U.S. 386 (1798)*: Vote 4 (Cushing, Iredell, Paterson, S. Chase)—0

Seriatim opinions: Cushing, Iredell, Paterson, S. Chase; Did not participate: Ellsworth, Wilson

The Court held that the *ex post facto* clause in Article I applies only to laws that address the criminal law, not to civil matters or cases involving the right to property.

Callins v. Collins, 510 U.S. 1141 (1994): No vote recorded because no overall opinion issued—just a denial of a cert petition for the case to be heard.

Concurring opinion (concurring with the denial): Scalia; Dissenting opinion: Blackmun

In this denial of a *certiorari* petition, the Supreme Court refused to accept an appeal from a defendant who had been sentenced to death by a Texas jury.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942): Unanimous vote (Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, R. Jackson)

Opinion of the Court: Murphy

The Court ruled that the First Amendment does not protect fighting words. The Court also held that lewd, obscene, profane, and libelous words are not protected under the First Amendment.

Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837): Vote 4 (Taney, Baldwin, Wayne, Barbour)—3 (McLean, Story, Thompson)

Opinion of the Court: Taney; Concurring opinion: Baldwin; Dissenting opinions: McLean, Story, Thompson

In this case involving the right to property, the Taney Court stressed the authority of the state to regulate private property in the public interest by noting the states' need to respond to changing technologies and economic realities in the early 19th century.

Church of the Lukumi Babulu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993): Unanimous vote (Rehnquist, B. White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas)

Opinion of the Court: Kennedy; Concurring opinion: Scalia (Rehnquist); Opinions concurring in judgment: Blackmun (O'Connor), Souter

The Court ruled that a city ordinance designed to prohibit certain kinds of animal sacrifice by members of the Santeria religion violated the free exercise clause.

Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984): Vote 7 (White, Burger, Blackmun, Powell, Rehnquist, Stevens, O'Connor)—2 (Brennan, J. Marshall)

Opinion of the Court: White; Concurring opinion: Burger; Dissenting opinion: J. Marshall (Brennan)

The Court decided that National Park Service regulations prohibiting overnight camping did not violate the First Amendment, although it conceded that, in some circumstances, sleeping might be considered expressive conduct.

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985): Unanimous vote (Stevens, Powell, Rehnquist, O'Connor, T. Marshall, Brennan, Burger, White, Blackmun)

Opinion of the Court: White; Concurring opinions: Marshall (Blackmun), Stevens (Burger)

The Court ruled that the denial of a special use permit to Cleburne Living Center, Inc., discriminated against the mentally retarded and violated the equal protection clause of the Fourteenth Amendment.

Cohen v. California, 403 U.S. 15 (1971): Vote 5 (Douglas, Harlan II, Brennan, Stewart, T. Marshall)—4 (Burger, Black, B. White, Blackmun)

Opinion of the Court: Harlan II; Dissenting opinion: Blackmun (Burger, Black, B. White)

In deciding whether a state can outlaw an "offensive" word altogether, the Court decided that "the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish."

Cooper v. Aaron, 358 U.S. 1 (1958): *Per curiam* vote (signed by all nine justices)

Concurring opinion: Frankfurter

This case reaffirmed the Court's position in *Brown v. Board of Education*, 347 U.S. 483 (1954), and reinstated the Court's authority as the ultimate interpreter of the Constitution.

Craig v. Boren, 429 U.S. 190 (1976): Vote 7 (Brennan, Stewart, B. White, T. Marshall, Blackmun, Powell, Stevens)—2 (Burger, Rehnquist)

Opinion of the Court: Brennan; Concurring opinions: Powell, Stevens, Blackmun; Opinion concurring in judgment: Stewart;

Dissenting opinions: Burger, Rehnquist

The Court struck down an Oklahoma law prohibiting the sale of 3.2 percent beer to males under 21 and women under 18 as a violation of the equal protection clause.

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990): Vote 5 (Rehnquist, B. White, O'Connor, Scalia, Kennedy)—4 (Brennan, T. Marshall, Blackmun, Stevens)

Opinion of the Court: Rehnquist; Concurring opinions: O'Connor, Scalia; Dissenting opinions: Brennan (Marshall, Blackmun), Stevens

In this case, the Court ruled that under the Fourteenth Amendment's due process clause, every person has a right to refuse medical treatment, even if that decision would lead to death. However, the Court found that this right may be limited by the state's interest in preserving life.

Davis v. Beason, Sheriff, 133 U.S. 333 (1890): Unanimous vote (Fuller, Miller, Field, Bradley, Harlan I, Gray, Blatchford, L. Lamar, Brewer)

Opinion of the Court: Field

The Court upheld an Idaho territorial law that denied the right to vote to any person who advocated or practiced polygamy or who belonged to an organization that did so.

Dennis v. United States, 341 U.S. 494 (1951): Vote 7 (Vinson, Reed, Frankfurter, R. Jackson, Burton, Clark, Minton)–2 (Black, Douglas)

Opinion of the Court: Vinson; Opinion concurring in judgment: Frankfurter; Concurring opinion: R. Jackson; Dissenting opinions: Black, Douglas; Did not participate: Clark

In this case, the Court examined the constitutionality of the Smith Act as applied to 11 leaders of the Communist party. The Court concluded that the government could not only limit speech directly inciting unlawful action, or conspiring to promote such action, or teaching that such action should occur but may also penalize the act of conspiring to organize a group that would teach that such action ought to occur.

DeShaney v. Winnebago County, 489 U.S. 189 (1989): Vote 6 (Scalia, Stevens, O'Connor, Kennedy, Rehnquist, White)–3 (T. Marshall, Brennan, Blackmun)

Opinion of the Court: Rehnquist; Dissenting opinions: Brennan (T. Marshall), Blackmun

In this case, the Court ruled that a state's failure to protect an individual against private violence does not violate the Fourteenth Amendment.

Dred Scott v. Sandford, 60 U.S. 393 (1856–1857): Vote 7 (Taney, Wayne, Catron, Daniel, Nelson, Crier, Campbell)–2 (McLean, Curtis)

Opinion of the Court: Taney; Concurring opinions: Wayne, Nelson (Grier), Grier, Daniel, Campbell, Catron; Dissenting opinions: McLean, Curtis

In this case from its December 1856 term, the Court ruled in March 1857 that no person of African descent can be a citizen of the United States or any state.

Eakin v. Raub, 12 Sergeant & Rawle 330 (Pennsylvania State Supreme Court) (1825)*:

Opinion of the Court: Chief Justice Tilghman; Dissenting opinion: Gibson

In this case, the Supreme Court of Pennsylvania considered a case of adverse possession. It is important because in his well-known dissent, Justice Gibson criticized John Marshall's opinion in *Marbury v. Madison* (1803).

Eisenstadt v. Baird, 405 U.S. 438 (1972): Vote 6 (Douglas, Brennan, Stewart, B. White, T. Marshall, Blackmun)–1 (Burger)

Opinion of the Court: Brennan; Concurring opinions: Douglas, B. White (Blackmun); Dissenting opinion: Burger; Did not participate: Powell, Rehnquist

The Court decided that the Massachusetts statute that allowed only licensed physicians or pharmacists to distribute contraceptives for the purpose of preventing pregnancy to married persons violated the equal protection clause.

Employment Division, Ore. Dept. of Human Resources v. Smith, 494 U.S. 872 (1990): Vote 6 (Rehnquist, White, Stevens, O'Connor, Scalia, Kennedy)–3 (Brennan, Marshall, Blackmun)

Opinion of the Court: Scalia; Opinion concurring in judgment: O'Connor (Brennan, Marshall, Blackmun); Dissenting opinion: Blackmun (Brennan, Marshall)

The Court upheld a drug conviction against a claim that the use of the drug was protected by the free exercise clause. In so ruling, the Court also held that neutral state laws with an adverse impact on the free exercise clause need not be measured against the compelling state interest test.

Engel v. Vitale, 370 U.S. 421 (1962) (School Prayer Case)*: Vote 6 (Warren, Black, Douglas, Clark, Harlan II, Brennan)–1 (Stewart)

Opinion of the Court: Black; Concurring opinion: Douglas; Dissenting opinion: Stewart; Did not participate: Frankfurter, B. White

In this case, the Court ruled that a state law requiring prayers in public schools was a violation of the establishment clause of the First Amendment.

Erie v. PAP's A.M., 529 U.S. 277 (2000): Vote 7 (O'Connor, Rehnquist, Kennedy, Souter, Breyer, Scalia, Thomas)–2 (Ginsberg, Stevens)

Opinion of the Court: O'Connor; Concurring opinion: Scalia (Thomas); Opinion concurring in part and dissenting in part: Souter; Dissenting opinion: Stevens (Ginsburg)

The Court held that a public indecency ordinance applied to prohibit nude dancing did not violate the First Amendment.

Everson v. Board of Education, 330 U.S. 1 (1947): Vote 5 (Vinson, Black, Reed, Douglas, Murphy)–4 (Frankfurter, R. Jackson, W. Rutledge, Burton)

Opinion of the Court: Black; Dissenting opinions: R. Jackson (Frankfurter), W. Rutledge (Frankfurter, R. Jackson, Burton)

The Court affirmed that the establishment clause of the First Amendment applied to the states by incorporation through the Fourteenth Amendment and that the framers had intended the clause to create a wall of separation between church and state.

Fletcher v. Peck, 10 U.S. 87 (1810) (Yazoo Land Fraud Case): Vote 5 (J. Marshall, Washington, W. Johnson, Livingston, Todd)—0

Opinion of the Court: J. Marshall; Concurring opinion: W. Johnson; Did not participate: Cushing, S. Chase
In this case, the Court ruled that a Georgia statute designed to set aside the Yazoo land frauds was unconstitutional because it infringed on the property rights of innocent third-party purchasers.

Frontiero v. Richardson, 411 U.S. 677 (1973): Vote 8 (Burger, Douglas, Brennan, Stewart, B. White, T. Marshall, Blackmun, Powell)—1 (Rehnquist)

Judgment of the Court: Brennan; Opinions concurring in judgment: Stewart, Powell (Burger, Blackmun); Dissenting opinion: Rehnquist

In this case, the Court ruled that discrimination on the basis of sex ought to be considered semi-suspect, not a suspect classification, like race.

Furman v. Georgia, 408 U.S. 238 (1972): Vote 5 (Douglas, Brennan, Stewart, B. White, T. Marshall)—4 (Burger, Blackmun, Powell, Rehnquist)

Opinion of the Court: *Per curiam*; Opinions concurring in judgment: Douglas, Brennan, Stewart, B. White, T. Marshall; Dissenting opinions: Burger (Blackmun, Powell, Rehnquist), Blackmun, Powell (Burger, Blackmun, Rehnquist), Rehnquist (Burger, Blackmun, Powell)

The Court held that the death penalty schemes in Georgia and Texas were cruel and unusual in violation of the Eighth Amendment, but that the death penalty itself was not, by definition, such a violation.

Gitlow v. New York, 268 U.S. 652 (1925): Vote 7 (Taft, Van Devanter, McReynolds, Sutherland, Butler, Sanford, Stone)—2 (Holmes, Brandeis)

Opinion of the Court: Sanford; Dissenting opinion: Holmes (Brandeis)

In this case, the Court for the first time put forward the doctrine of incorporation, by which the Fourteenth Amendment “incorporated” some of the liberties protected in the Bill of Rights and applied them to the states.

Goodridge v. Mass. Dept. of Public Health, 798 N.E. 2d 941 (Mass. State Supreme Court, 2003):

Opinion of the Court: Marshall; Concurring opinion: Greaney; Dissenting opinions: Spina, Sosman, Cordy

The Massachusetts Supreme Court found that the state may not deny the benefits of civil marriage to two individuals of the same sex.

Gratz v. Bollinger, 539 U.S. 244 (2003): Vote 6 (Rehnquist, O’Connor, Scalia, Kennedy Thomas; Breyer)—3 (Stevens, Souter, Ginsburg)

Opinion of the Court: Rehnquist; Concurring opinions: Thomas, O’Connor; Opinion concurring in judgment: Breyer; Dissenting opinions: Stevens, Ginsberg, Souter

The Court ruled that the use of racial preferences in the University of Michigan’s undergraduate admissions violated the equal protection clause of the 14th Amendment.

Gregg v. Georgia, 428 U.S. 153 (1976)*: Vote 7 (Stewart, Powell, Stevens; B. White, Burger, Rehnquist, Blackmun)—2 (Brennan, T. Marshall)

Judgment of the Court: Stewart; Concurring opinion: B. White (Burger, Rehnquist); Opinions concurring in judgment: White (Burger, Rehnquist), Blackmun; Dissenting opinions: Brennan, T. Marshall

The Court ruled that the death penalty does not violate the cruel and unusual punishment clause when states take steps to ensure that its application is not arbitrary and capricious.

Griswold v. Connecticut, 381 U.S. 479 (1965): Vote 7 (Warren, Douglas, Clark, Harlan II, Brennan, B. White, Goldberg)—2 (Black, Stewart)

Opinion of the Court: Douglas; Concurring opinion: Goldberg (Warren, Brennan); Opinions concurring in judgment: Harlan II, B. White; Dissenting opinions: Black (Stewart), Stewart (Black)

The Court found that a Connecticut statute regulating access to information about contraceptives violated the right of marital privacy as protected by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

Grutter v. Bollinger, 539 U.S. 306 (2003): Vote 5 (Ginsberg, Souter, Breyer, Stevens, O’Connor)—4 (Scalia, Thomas, Rehnquist, Kennedy)

Opinion of the Court: O’Connor; Concurring opinion: Ginsberg; Dissenting opinions: Kennedy, Thomas, Scalia

The Court found that the University of Michigan’s law school did not violate the equal protection clause by considering race as a factor in the admissions process.

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966): Vote 6 (Warren, Douglas, Clark, Brennan, B. White, Fortas)—3 (Black, Harlan II, Stewart)

Opinion of the Court: Douglas; Dissenting opinions: Black, Harlan II (Stewart)

The Court declared the use of a poll tax in Virginia elections unconstitutional under the equal protection clause.

Heller v. Doe, 509 U.S. 312 (1993): Vote 6 (Kennedy, O'Connor, Rehnquist, White, Scalia, Thomas)—3 (Blackmun, Souter, Stevens)

Opinion of the Court: Kennedy; Concurring in opinion in part: O'Connor; Dissenting opinions: Blackmun, Souter (Blackmun, Stevens)

The Court ruled that Kentucky's involuntary commitment of mentally retarded persons did not violate the equal protection clause under the Fourteenth Amendment.

Herrera v. Collins, 506 U.S. 390 (1993): Vote 6 (Rehnquist, B. White, O'Connor, Scalia, Kennedy, Thomas)—3 (Blackmun, Stevens, Souter)

Opinion of the Court: Rehnquist; Concurring opinions: O'Connor (Kennedy), Scalia (Thomas); Opinion concurring in judgment: B. White; Dissenting opinion: Blackmun (Stevens, Souter)

The Court considered whether the Constitution permits the government to execute a person who claimed that new evidence had emerged that would prove him not guilty of the crime. The plaintiff filed a petition for *habeas corpus* relief, but the Court struck down his request, claiming that federal *habeas corpus* relief was limited to constitutional issues only.

Hoyt v. Florida, 368 U.S. 57 (1961): Unanimous vote (Warren, Black, Frankfurter, Douglas, Clark, Harlan II, Brennan, Whittaker, Stewart)

Opinion of the Court: Harlan II; Concurring opinion: Warren, Black, Douglas

The Court upheld a Florida law that did not require women to serve on juries because Florida had no deliberate intent to exclude women from jury participation.

Jones v. Opelika, 316 U.S. 584 (1942): Vote: 5 (Roberts, Reed, Frankfurter, Byrnes, R. Jackson)—4 (Stone, Black, Douglas, Murphy)

Opinion of the Court: Reed; Dissenting opinions: Stone (Black, Douglas, Murphy), Murphy (Stone, Black, Douglas), Black, Douglas, Murphy

The Court ruled that Alabama's ordinance prohibiting the selling of books without a license did not violate the plaintiff's First Amendment rights to freedom of press and religion because by selling some of the books, the plaintiff was engaging in commercial activity.

Kelo v. New London, 545 U.S. __ (2005): Vote 5 (Stevens, Kennedy, Souter, Ginsburg, Breyer)—4 (O'Connor, Rehnquist, Scalia, Thomas)

Opinion of the Court: Stevens; Concurring opinion: Kennedy; Dissenting opinions: O'Connor (Rehnquist, Scalia, Thomas), Thomas

The Court ruled that municipal governments may take private property and transfer it to other private parties without violating the takings clause, provided that the transfer is part of an overall plan for economic development.

Korematsu v. United States, 323 U.S. 214 (1944): Vote: 6 (Stone, Black, Reed, Frankfurter, Douglas, W. Rutledge)—3 (Roberts, Murphy, R. Jackson)

Opinion of the Court: Black; Concurring opinion: Frankfurter; Dissenting opinions: Roberts, Murphy, R. Jackson

The Court held that the Executive Order for relocation that only applied to Japanese Americans did not deprive the plaintiff of his due process rights.

Lawrence v. Texas, 539 U.S. 558 (2003) (Sodomy Case II): Vote 6 (Kennedy, Stevens, Souter, Ginsburg, Breyer, O'Connor)—3 (Scalia, Rehnquist, Thomas)

Opinion of the Court: Kennedy; Concurring opinion: O'Connor; Dissenting opinions: Scalia (Rehnquist, Thomas), Thomas

The Court overruled its decision in *Bowers v. Hardwick* and declared prohibition of homosexual sodomy unconstitutional in *Lawrence v. Texas*.

Lee v. Weisman, 505 U.S. 577 (1992): Vote 5 (Blackmun, Stevens, O'Connor, Kennedy, Souter)—4 (Rehnquist, B. White, Scalia, Thomas)

Opinion of the Court: Kennedy; Concurring opinions: Blackmun (Stevens, O'Connor), Souter (Stevens, O'Connor);

Dissenting opinion: Scalia (Rehnquist, B. White, Thomas)

The Court upheld its decision in *Engel* by ruling that a school policy of including a prayer as part of an official school ceremony violated the establishment clause.

Lemon v. Kurtzman, 403 U.S. 602 (1971)*: Multiple votes

Opinion of the Court: Burger; Concurring opinions: Douglas (Black, T. Marshall), Brennan; Opinion concurring in judgment (Pennsylvania case): B. White; Dissenting opinion (Rhode Island cases): B. White; Did not participate

(Pennsylvania case): T. Marshall

In this case, the Court developed a test for determining whether a state statute violates the establishment clause of the Constitution by aiding religion. The Court defined the three prongs of the test as follows: a state must have a secular legislative purpose; the principal or primary effect must be one that neither advances nor inhibits religion; and the statute must not foster an excessive government entanglement with religion.

Lochner v. New York, 198 U.S. 45 (1905): Vote 5 (Fuller, Brewer, Brown, Peckham, McKenna)–4 (Harlan I, E. White, Holmes, Day)

Opinion of the Court: Peckham; Dissenting opinions: Harlan I (E. White, Day), Holmes

In this case, the Court ruled that a New York law that regulated the working conditions of bakery employees violated the right of contract.

Loving v. Virginia, 388 U.S. 1 (1967): Unanimous vote (Warren, Black, Douglas, Clark, Harlan II, Brennan, Stewart, B. White, Fortas)

Opinion of the Court: Warren; Opinion concurring in judgment: Stewart

The court ruled that a Virginia law that prohibited interracial marriage was a violation of the Fourteenth Amendment's equal protection clause.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992): Vote 6 (Rehnquist, B. White, O'Connor, Scalia, Thomas, Kennedy)–3 (Blackmun, Stevens, Souter)

Opinion of the Court: Scalia; Concurring opinion: Kennedy; Dissenting opinions: Blackmun, Stevens, Souter

In this case, the Court ruled that a South Carolina law limiting the development of private property as a part of a coastal land preservation program was a violation of the takings clause of the Fifth Amendment.

Lynch v. Donnelly, 465 U.S. 668 (1984): Vote: 5 (Burger, B. White, Powell, Rehnquist, O'Connor)–4 (Brennan, T. Marshall, Blackmun, Stevens)

Opinion of the Court: Burger; Concurring opinion: O'Connor; Dissenting opinions: Brennan (T. Marshall, Blackmun, Stevens), Blackmun (Stevens)

The Court decided that a municipal display of holiday decorations that included a crèche and some non-religious objects did not violate the First Amendment.

Marbury v. Madison, 5 U.S. 137 (1803)*: Vote 5 (J. Marshall, Paterson, S. Chase, Washington, Moore)–0

Opinion of the Court: J. Marshall; Did not participate: Cushing

In this case, John Marshall concluded that the Court possesses the power of judicial review.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976): Vote 7 (Burger, Brennan, Stewart, B. White, Blackmun, Powell, Rehnquist)–1 (T. Marshall)

Opinion of the Court: *Per curiam*; Dissenting opinion: T. Marshall; Did not participate: Stevens

The Court decided that the equal protection clause does not require strict scrutiny for a claim of discrimination based on age.

McCleskey v. Kemp, 481 U.S. 279 (1987): Vote 5 (Rehnquist, B. White, Powell, O'Connor, Scalia)–4 (Brennan, T. Marshall, Blackmun, Stevens)

Opinion of the Court: Powell; Dissenting opinions: Brennan (T. Marshall, Blackmun, Stevens), Blackmun (Brennan, T. Marshall, Stevens), Stevens (Blackmun)

The Court rejected a claim that Georgia's system of capital punishment was unconstitutional because it discriminated on the basis of race.

McCullum v. Illinois, 333 U.S. 203 (1948): Vote 5 (Black, Frankfurter, R. Jackson, Rutledge, Burton)–1 (Reed)

Opinion of the Court: Black; Concurring opinions: Frankfurter, Jackson; Dissenting opinion: Reed

The Court ruled that religious instruction in public schools violates the establishment clause.

McCreary County v. ACLU, 545 U.S. ___ (2005): Vote 5 (Souter, Stevens, O'Connor, Ginsberg, Breyer)–4 (Scalia, Rehnquist, Thomas, Kennedy)

Opinion of the Court: Souter; Concurring opinion: O'Connor; Dissenting opinion: Scalia (Rehnquist, Thomas)

The Court ruled that the public display of the Ten Commandments in a Kentucky courtroom was unconstitutional.

Meyer v. Nebraska, 262 U.S. 390 (1923): Vote 7 (Taft, McKenna, Van Devanter, McReynolds, Brandeis, Butler, Sanford)–2 (Holmes, Sutherland)

Opinion of the Court: McReynolds; Dissenting opinion: Holmes, Sutherland

The Court ruled that a Nebraska statute that prohibited the teaching of languages other than English to children violated the Fourteenth Amendment.

Michael H. v. Gerald D., 491 U.S. 110 (1989): Vote 5 (Scalia, O'Connor, Kennedy, Rehnquist, Stevens)–4 (Brennan, White, Blackmun, J. Marshall)

Opinion of the Court: Scalia; Concurring opinions: O'Connor, Stevens; Dissenting opinions: Brennan (Blackmun, J. Marshall), White

The Court upheld a California law under which a child born to a married woman living with her husband was presumed to be a child of the marriage.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981): Vote 5 (Burger, Stewart, Blackmun, Powell, Rehnquist)–4 (Brennan, B. White, T. Marshall, Stevens)

Judgment of the Court: Rehnquist; Concurring opinion: Stewart; Opinion concurring in judgment: Blackmun; Dissenting opinions: Brennan (B. White, T. Marshall), Stevens

The Court sustained a California statutory rape law that punished males for sexual relations with a female under the age of 18 years but not females engaged in the same behavior with underage males.

Miller v. California, 413 U.S. 15 (1973)*: Vote 5 (Burger, B. White, Blackmun, Powell, Rehnquist)—4 (Douglas, Brennan, Stewart, T. Marshall)

Opinion of the Court: Burger; Dissenting opinions: Douglas, Brennan (Stewart, T. Marshall)

In this case, the Court developed a three-part test for defining obscenity, which is not protected under the First Amendment. Justice Burger concluded, “At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”

Minersville v. Gobitis, 310 U.S. 586 (1940) (Flag Salute Case I): Vote 8 (Hughes, McReynolds, Roberts, Black, Reed, Frankfurter, Douglas, Murphy)—1 (Stone)

Opinion of the Court: Frankfurter; Concurring without opinion: McReynolds; Dissenting opinion: Stone

The Court upheld a Pennsylvania law that required all public school children to begin each day with a salute to the American flag. The Court decided that the law was not a violation of freedom of speech or religion.

Minor v. Happersett, 88 U.S. 162 (21 Wall. 162) (1874): Unanimous vote (Waite, Clifford, Swayne, Miller, Davis, Field, Strong, Bradley, Hunt)

Opinion of the Court: Waite

The Court ruled unanimously that a woman’s right of suffrage was not protected by the Constitution.

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982): Vote 5 (Brennan, B. White, T. Marshall, Stevens, O’Connor)—4 (Burger, Blackmun, Powell, Rehnquist)

Opinion of the Court: O’Connor; Dissenting opinions: Burger, Blackmun, Powell (Rehnquist)

The Court ruled that the Mississippi University’s nursing school for women violated the equal protection clause of the Fourteenth Amendment by not allowing men to attend.

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938): Vote 6 (Hughes, Brandeis, Stone, Roberts, Black, Reed)—2 (McReynolds, Butler)

Opinion of the Court: Hughes; Dissenting opinion: McReynolds (Butler)

The Court ruled that the racially discriminatory admissions policy of the all-white University of Missouri law school violated the equal protection clause.

Moore v. City of East Cleveland, 431 U.S. 494 (1977): Vote 5 (Brennan, T. Marshall, Blackmun, Powell, Stevens)—4 (Burger, Stewart, B. White, Rehnquist)

Judgment of the Court: Powell; Concurring opinion: Brennan (T. Marshall); Opinion concurring in judgment: Stevens;

Dissenting opinions: Burger, Stewart (Rehnquist), B. White

The Court decided an East Cleveland housing ordinance that allowed only immediate family members to live together violated the due process clause of the Fourteenth Amendment.

Munn v. Illinois, 94 U.S. 113 (1877) (Granger Cases): Vote 7 (Waite, Clifford, Swayne, Miller, Davis, Bradley, Hunt)—2 (Field, Strong)

Opinion of the Court: Waite; Dissenting opinion: Field (Strong)

In this case, the Court decided that state laws regulating how much railroads could charge to move goods and people was not a violation of the right to property.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987): Vote 5 (Rehnquist, B. White, Powell, O’Connor, Scalia)—4 (Brennan, T. Marshall, Blackmun, Stevens)

Opinion of the Court: Scalia; Dissenting opinions: Brennan (T. Marshall), Blackmun, Stevens (Blackmun)

The Court ruled that a coastal development permit issued by the California Coastal Commission violated the takings clause of the Fifth Amendment because it deprived the plaintiffs of the reasonable use of their property.

Noto v. United States, 367 U.S. 290 (1961): Vote 7 (Harlan II, Frankfurter, Whittaker, Clark, Stewart, Black, Douglas)—2 (Brennan, Warren)

Opinion of the Court: Harlan; Concurring opinions: Black, Douglas; Remand to lower court with request to dismiss: Brennan (Warren)

In this case, the Court distinguished sharply between the advocacy of illegal action, which may be prohibited under the First Amendment, and the advocacy of ideas, which may not be prohibited.

Olmstead v. United States, 277 U.S. 438 (1928): Vote 5 (Taft, Van Devanter, McReynolds, Sutherland, Sanford)—4 (Holmes, Brandeis, Butler, Stone)

Opinion of the Court: Taft; Dissenting opinions: Holmes (Stone), Brandeis (Stone), Butler (Stone), Stone

The Court ruled that the Fourth Amendment did not prohibit the use of wiretaps to monitor private telephone conversations without an actual trespass onto private property.

Palko v. Connecticut, 302 U.S. 319 (1937): Vote 8 (Hughes, McReynolds, Brandeis, Sutherland, Stone, Roberts, Cardozo, Black)—1 (Butler)

Opinion of the Court: Cardozo; Dissenting without opinion: Butler

The Court ruled that the Fourteenth Amendment did not incorporate the guarantee against double jeopardy in the Fifth Amendment. Palko was executed.

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973): Vote 5 (Burger, B. White, Blackmun, Powell, Rehnquist)—4 (Douglas, Brennan, Stewart, T. Marshall)

Opinion of the Court: Burger; Dissenting opinions: Douglas, Brennan (Stewart, T. Marshall)

The Court upheld a Georgia statute that outlawed “hard-core” pornography.

Pierce v. Society of Sisters, 268 U.S. 510 (1925): Unanimous vote (Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone)

Opinion of the Court: McReynolds

The Court concluded that an Oregon law requiring a public school education for children ages 8 to 16 was a violation of parents’ right to direct the upbringing and education of their children.

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976): Multiple votes

Opinion of the Court: Blackmun; Concurring opinion: Stewart (Powell); Dissenting opinions: B. White (Burger, Rehnquist), Stevens

In this case, the Court responded to several provisions of a 1974 Missouri act passed in response to *Roe v. Wade*, including a provision that required a married woman to obtain the consent of her husband for an abortion.

Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983): Multiple votes

Judgment of the Court: Powell; Opinion concurring in judgment: O’Connor (B. White, Rehnquist); Dissenting opinion: Blackmun (Brennan, T. Marshall, Stevens)

The Court upheld a Missouri regulation requiring parental consent for “unemancipated minors” to obtain an abortion, coupled with a provision that provided, in some cases, for an alternative process for judicial approval.

Planned Parenthood v. Casey, 505 U.S. 833 (1992)*: Vote 5 (Blackmun, Stevens, O’Connor, Kennedy, Souter)—4 (Rehnquist, B. White, Scalia, Thomas)

Judgment of the Court: O’Connor, Kennedy, Souter; Concurring opinion: Stevens; Opinion concurring in judgment: Blackmun; Dissenting opinions: Rehnquist (B. White, Scalia, Thomas), Scalia (Rehnquist, B. White, Thomas)

A plurality of the Court refused to overrule *Roe* but in the process worked several substantial changes in the Court’s abortion jurisprudence, including eliminating the trimester and viability framework and replacing the compelling state interest test with the undue burden test.

Plessy v. Ferguson, 163 U.S. 537 (1896): Vote 7 (Fuller, Field, Gray, Brown, Shiras, E. White, Peckham)—1 (Harlan I)

Opinion of the Court: Brown; Dissenting opinion: Harlan I; Did not participate: Brewer

In announcing the separate but equal doctrine, the Court ruled that Louisiana’s separate car law did not violate the equal protection clause of the Fourteenth Amendment.

RAV v. City of St. Paul, 505 U.S. 377 (1992): Unanimous vote (Rehnquist, B. White, Blackmun, Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas)

Opinion of the Court: Scalia; Opinions concurring in judgment: B. White (Blackmun, Stevens, O’Connor), Blackmun, Stevens (B. White, Blackmun)

In this case, the Court struck down a St. Paul ordinance that forbade placing “on public or private property a symbol or object,” such as a burning cross or a Nazi swastika, “which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender.”

Reed v. Reed, 404 U.S. 71 (1971): Unanimous vote (Burger, Douglas, Brennan, Stewart, B. White, T. Marshall, Blackmun, Powell, Rehnquist)

Opinion of the Court: Burger

The Court found that an Idaho statute giving preference to males in the administration of a decedent’s estate violated the equal protection clause of the Fourteenth Amendment.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)*: Multiple votes

Judgment of the Court: Powell; Opinions concurring in part and dissenting in part: Brennan, B. White, T. Marshall, Blackmun, Stevens (Burger, Stewart, Rehnquist), B. White, T. Marshall, Blackmun

A plurality of the Court held that public universities may not constitutionally use numerical quotas in their admissions programs but may use race as a criterion in admissions.

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997): Vote 7 (Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer)—2 (Rehnquist, O'Connor)

Opinion of the Court: Stevens; Opinion concurring in part and dissenting in part: O'Connor (Rehnquist)

The Court ruled that a federal law prohibiting the transmission of obscene or indecent messages on the Internet to recipients younger than 18 years of age was unconstitutional because it was overbroad.

Reynolds v. United States, 98 U.S. 145 (1878): Unanimous vote (Waite, Clifford, Swayne, Miller, Strong, Bradley, Hunt, Harlan I; Field)

Opinion of the Court: Day; Opinion concurring in part and dissenting in part: Field

In this case, the Court sustained the constitutionality of a congressional statute that forbade polygamy as applied to the territory of Utah.

Roe v. Wade, 410 U.S. 116 (1973) (Abortion Case): Vote 7 (Burger, Douglas, Brennan, Stewart, T. Marshall, Blackmun, Powell)—2 (B. White, Rehnquist)

Opinion of the Court: Blackmun; Concurring opinions: Burger, Douglas, Stewart; Dissenting opinions: B. White (Rehnquist), Rehnquist

The Court ruled that a right to an abortion was part of the Fourteenth Amendment's concept of personal liberty and privacy. The Court also devised an elaborate scheme, based on the state's interests in protecting the fetus at the point of viability and the mother's health, that permits the state to regulate the abortion decision at certain points in the pregnancy, provided that the state's interest is "compelling."

Romer v. Evans, 517 U.S. 620 (1996): Vote 6 (Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer)—3 (Rehnquist, Scalia, Thomas)

Opinion of the Court: Kennedy; Dissenting opinion: Scalia (Rehnquist, Thomas)

The Court invalidated a Colorado constitutional amendment that barred local governments from enforcing any regulation or conferring any entitlement that granted homosexuals protected minority status.

Roper v. Simmons, 543 U.S. 551 (2005): Vote 5 (Kennedy, Stevens, Breyer, Ginsburg, Souter)—4 (Rehnquist, Scalia, O'Connor, Thomas)

Opinion of the Court: Kennedy; Concurring opinion: Stevens (Ginsburg); Dissenting opinions: O'Connor, Scalia (Rehnquist, Thomas)

The Court ruled that the Eighth Amendment forbids the execution of offenders who were under the age of 18 when their crimes were committed.

Roth v. United States, 354 U.S. 476 (1957): Vote 6 (Warren, Frankfurter, Burton, Clark, Brennan, Whittaker)—3 (Black, Douglas, Harlan II)

Opinion of the Court: Brennan; Opinion concurring in judgment: Warren; Opinion concurring in part and dissenting in part: Harlan II; Dissenting opinion: Douglas (Black)

In this case, the Court established that the test for obscenity is "whether to an average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973): Vote 5 (Burger, Stewart, Blackmun, Powell, Rehnquist)—4 (Douglas, Brennan, B. White, T. Marshall)

Opinion of the Court: Powell; Concurring opinion: Stewart; Dissenting opinions: Brennan, B. White (Douglas, Brennan), T. Marshall (Douglas)

The Court found that a public school education is not a fundamental right under the due process clause and that economic classifications are not entitled to strict scrutiny under the equal protection clause.

Schenck v. United States, 249 U.S. 47 (1919): Unanimous vote (E. White, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke)

Opinion of the Court: Holmes

In upholding the Espionage Act of 1917, the Court, speaking through Justice Holmes, established the clear and present danger test.

Sherbert v. Verner, 374 U.S. 398 (1963): Vote 7 (Warren, Black, Douglas, Clark, Brennan, Stewart, Goldberg)—2 (Harlan II, B. White)

Opinion of the Court: Brennan; Concurring opinion: Douglas; Opinion concurring in judgment: Stewart; Dissenting opinion: Harlan II (B. White)

In this case, the Court ruled that a secular regulation that "substantially burdens" a religious practice must be justified by a compelling state interest. Parts of this case were later overruled by *Employment Division v. Smith* (1989).

Stenberg v. Carhart, 530 U.S. 914 (2000): Vote 5 (Stevens, O'Connor, Souter, Ginsburg, Breyer)—4 (Rehnquist, Scalia, Kennedy, Thomas)

Opinion of the Court: Breyer; Concurring opinions: Stevens (Ginsburg), O'Connor, Ginsburg (Stevens); Dissenting opinions: Rehnquist, Scalia, Kennedy (Rehnquist), Thomas (Rehnquist, Scalia)

The Court concluded that a Nebraska law that banned dilation and evacuation procedures during abortion procedures (or so-called partial-birth abortions) was unconstitutional because it was too broad and did not include a health exception.

Sweatt v. Painter, 339 U.S. 629 (1950): Unanimous vote (Vinson, Black, Reed, Frankfurter, Douglas, R. Jackson, Burton, Clark, Minton)

Opinion of the Court: Vinson

The Court ordered the state of Texas to admit an African-American student to its all-white law school, even though the state did have a separate law school for African-Americans.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002): Vote 6 (Stevens, O'Connor, Kennedy, Souter, Ginsberg, Breyer)—3 (Rehnquist, Scalia, Thomas)

Opinion of the Court: Stevens; Dissenting opinions: Rehnquist (Scalia, Thomas), Thomas (Scalia)

The Court refused to rule that a series of local statutes that placed moratoria on land development in advance of a comprehensive land-use plan necessarily constituted a “temporary taking” under the Fifth Amendment.

Talley v. California, 362 U.S. 60 (1960): Vote 6 (Black, Warren, Douglas, Brennan, Stewart; Harlan II)—3 (Clark, Frankfurter, Whittaker)

Opinion of the Court: Black; Concurring opinion: Harlan; Dissenting opinion: Clark

The Court found that a California ordinance restricting the distribution of anonymous handbills violates the First Amendment.

Texas v. Johnson, 491 U.S. 397 (1989): Vote 5 (Brennan, T. Marshall, Blackmun, Scalia, Kennedy)—4 (Rehnquist, B. White, Stevens, O'Connor)

Opinion of the Court: Brennan; Concurring opinion: Kennedy; Dissenting opinions: Rehnquist (B. White, O'Connor), Stevens

In overturning a criminal conviction for burning a U.S. flag, the Court ruled that the defendant's actions were constitutionally protected under the First Amendment because he was expressing a political viewpoint and because his actions qualified as symbolic speech.

Thomas v. Review Board, 450 U.S. 707 (1981): Vote: 8 (Burger, Brennan, Stewart, B. White, T. Marshall, Blackmun, Powell, Stevens)—1 (Rehnquist)

Opinion of the Court: Burger; Opinion concurring in judgment: Blackmun; Dissenting opinion: Rehnquist

The Court decided that a state decision denying unemployment benefits to the plaintiff impermissibly interfered with his free exercise of religion.

Tinker v. Des Moines School District, 393 U.S. 503 (24 Feb. 1969): Vote 7 (Warren, Douglas, Brennan, Stewart, B. White, Fortas, T. Marshall)—2 (Black, Harlan II)

Opinion of the Court: Fortas; Concurring opinions: Stewart, B. White; Dissenting opinions: Black, Harlan II

In this case, the Court held that the decision of school administrators to prohibit students from wearing armbands to protest the war in Vietnam was an unconstitutional infringement of symbolic speech.

Trimble v. Gordon, 430 U.S. 762 (1977): Vote 5 (Stevens, T. Marshall, Powell, Brennan, White)—4 (Rehnquist, Blackmun, Stewart, Burger)

Opinion of the Court: Powell; Dissenting opinions: Rehnquist, Blackmun, Stewart, Burger

The Court struck down an Illinois inheritance statute that disadvantaged nonmarital children as a violation of the equal protection clause.

Troxel v. Granville, 530 U.S. 57 (2000): Vote 6 (Rehnquist, O'Connor, Souter, Thomas, Ginsburg, Breyer)—3 (Stevens, Scalia, Kennedy)

Judgment of the Court: O'Connor; Opinions concurring in judgment: Souter, Thomas; Dissenting opinions: Stevens, Scalia, Kennedy

In this case, the Court struck down Washington's third-party visitation statute, noting that it interfered with parents' due process right “to make decisions concerning the care, custody, and control” of their children.

United States v. O'Brien, 391 U.S. 367 (1968) (Draft Card Case): Vote 7 (Fortas, Stewart, White, Harlan II, Black, Warren, Brennan)—1 (Douglas)

Opinion of the Court: Warren; Concurring opinion: Harlan II; Dissenting opinion: Douglas; Did not participate: T. Marshall

In upholding a conviction based on the burning of a draft card, the Court developed a three-part test to determine when the First Amendment protects symbolic speech or expressive conduct.

United States v. Virginia, 518 U.S. 515 (1996): Vote 7 (Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer)—1 (Scalia)

Opinion of the Court: Ginsburg; Opinion concurring in judgment: Rehnquist; Dissenting opinion: Scalia; Did not participate: Thomas

In this case, the Court struck down the males-only admissions policy of the Virginia Military Institute as a violation of the equal protection clause. The Court ruled that for sex discrimination to be constitutional, the government must present an “exceedingly persuasive justification” to treat men and women differently.

Vacco, Attorney General of New York v. Quill, 521 U.S. 793 (1997): Unanimous vote (Ginsberg, Souter, Thomas, Breyer, Scalia, Stevens, Rehnquist, O’Connor, Kennedy)

Opinion of the Court: Rehnquist; Concurring opinions: O’Connor, Ginsburg, Souter, Stevens, Breyer

The Court found that New York’s ban on physician-assisted suicide did not violate the equal protection clause because the ban was rationally related to the state’s interest in protecting medical ethics.

Van Orden v. Perry, 545 U.S. ___ (2005): Vote 5 (Rehnquist, Scalia, Kennedy, Thomas, Breyer)—4 (Ginsberg, O’Connor, Souter, Stevens)

Opinion of the Court: Rehnquist; Concurring opinion: Breyer (Scalia, Thomas); Dissenting opinion: Stevens (Ginsberg)

The Court ruled that a monument of the Ten Commandments on the Texas state capitol building grounds did not violate the First Amendment’s establishment clause.

Virginia v. Black, 538 U.S. 343 (2003)*: Vote 7 (Ginsberg, Breyer, Scalia, Rehnquist, Kennedy, O’Connor, Stevens)—2 (Thomas, Scalia)

Opinion of the Court: O’Connor; Concurring opinions: Scalia (Rehnquist), Souter (Kennedy, Ginsburg); Dissenting opinion: Thomas

The Court ruled that Virginia’s cross-burning statute prohibiting the burning of a cross to intimidate any person or group did not violate the First Amendment.

Wallace v. Jaffree, 472 U.S. 38 (1985): Vote 6 (Brennan, T. Marshall, Blackmun, Powell, Stevens, O’Connor)—3 (Burger, B. White, Rehnquist)

Opinion of the Court: Stevens; Concurring opinion: Powell; Opinion concurring in judgment: O’Connor; Dissenting opinions: Burger, B. White, Rehnquist

The Court struck down an Alabama statute that required a one-minute “moment of silence” at the beginning of the school day as a violation of the establishment clause.

Washington v. Glucksberg, 521 U.S. 702 (1997): Unanimous vote (Rehnquist, Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer)

Opinion of the Court: Rehnquist; Concurring opinions: Ginsburg, Breyer, Stevens, Souter, O’Connor (Ginsburg, Breyer)

The Court decided that Washington’s prohibition against physician-assisted suicide does not violate the due process clause of the Fourteenth Amendment.

West Coast Hotel v. Parrish, 300 U.S. 379 (1937): Vote 5 (Hughes, Brandeis, Stone, Roberts, Cardozo)—4 (Van Devanter, McReynolds, Sutherland, Butler)

Opinion of the Court: Hughes; Dissenting opinion: Sutherland (Van Devanter, McReynolds, Butler)

The Court upheld a wages and hours statute and, thus, overruled *Lochner v. New York*.

West Virginia v. Barnette, 319 U.S. 624 (1943): Vote 6 (Stone, Black, Douglas, Murphy, R. Jackson, W. Rutledge)—3 (Roberts, Reed, Frankfurter)

Opinion of the Court: R. Jackson; Concurring opinions: Black (Douglas), Murphy; Dissenting opinion: Frankfurter;

Dissenting without opinion: Roberts, Reed

The Court ruled that a state law requiring students in public elementary schools to salute the flag violated the First Amendment. This case overruled *Minersville v. Gobitis* (1940).

Whitney v. California, 274 U.S. 357 (1927): Unanimous vote (Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone)

Opinion of the Court: Sanford; Concurring opinion: Brandeis (Holmes)

The Court upheld the California Criminal Syndicalism Act of 1919, which made it a crime to organize or knowingly become a member of an organization that aims to bring about revolutionary change through the use of violence.

Wisconsin v. Mitchell, 508 U.S. 476 (1993): Unanimous vote (Rehnquist, B. White, Blackmun, Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas)

Opinion of the Court: Rehnquist

The Court unanimously upheld a state hate crime law that provided for up to five years’ additional imprisonment for an offender who intentionally selected his or her victim because of the person’s race, religion, color, disability, sexual orientation, national origin, or ancestry.

Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish School Case): Vote 6 (Burger, Brennan, Stewart, B. White, T. Marshall, Blackmun)—1 (Douglas)

Opinion of the Court: Burger; Concurring opinions: Stewart (Brennan), B. White (Brennan, Stewart); Dissenting opinion: Douglas; Did not participate: Powell, Rehnquist

The Court held that the First Amendment protected the religious rights of the Amish to withdraw their children from public schools at the age of 14.

Wooley v. Maynard, 430 U.S. 705 (1977): Vote 6 (Burger, Brennan, Stewart, T. Marshall, Powell, Stevens)—3 (B. White, Blackmun, Rehnquist)

Opinion of the Court: Burger; Dissenting opinions: B. White (Rehnquist, Blackmun), Rehnquist (Blackmun)

The Court ruled that under the First Amendment, New Hampshire could not force a citizen to display the words “Live Free or Die” on a license plate.

Yates v. United States, 354 U.S. 298 (1957): Vote 6 (Warren, Black, Frankfurter, Douglas, Burton, Harlan II)—1 (Clark)

Opinion of the Court: Harlan II; Opinion concurring in judgment: Burton; Opinion concurring in part and dissenting in part:

Black (Douglas); Dissenting opinion: Clark; Did not participate: Brennan, Whittaker

The Court overturned the convictions of 14 communist leaders on the grounds that the Smith Act undermined free speech.

Zelman v. Simmons-Harris, 536 U.S. 639 (2002): Vote: 5 (Rehnquist, O’Connor, Scalia, Kennedy, Thomas)—4 (Stevens, Souter, Ginsburg, Breyer)

Opinion of the Court: Rehnquist; Concurring opinions: O’Connor, Thomas; Dissenting opinions: Stevens, Souter (Stevens, Ginsburg, Breyer), Breyer (Stevens, Souter)

The Court upheld an Ohio school voucher plan against a claim that the plan violated the establishment clause of the First Amendment.

**Civil Liberties
and the
Bill of Rights
Part II
Professor John E. Finn**



THE TEACHING COMPANY ®

John E. Finn, J.D., Ph.D.

Professor of Government, Wesleyan University

John E. Finn is Professor of Government at Wesleyan University. He received his B.A. in political science from Nasson College, a J.D. from Georgetown University, a Ph.D. in political science from Princeton University, and a degree in culinary arts from the French Culinary Institute. He has taught at Wesleyan since 1986, where his research focuses on constitutional theory, comparative constitutional law, the First Amendment, the legal regulation of terrorism and political violence, and cuisine and popular culture. He is the recipient of four distinguished teaching awards at Wesleyan: the Carol A. Baker '81 Memorial Prize for Excellence in Teaching & Scholarship, awarded in 1989; the Binswanger Prize for Excellence in Teaching in 1994; and on two occasions the Caleb T. Winchester Award for Teaching Excellence, first in 1997, and again in 2004. He was also the recipient of the Association of Princeton Graduate Alumni Teaching Award for distinguished teaching while a graduate student at Princeton. The American Political Science Association described his syllabus for American Constitutional Interpretation as “an ideal model.”

Professor Finn is an internationally recognized expert on constitutional law and political violence. His public lectures include testimony in front of the U.S. House Judiciary Committee, as well as lectures in Chile, Bolivia, Spain, Italy, Canada, England, and France.

Professor Finn has published widely in the fields of constitutional theory and interpretation. Among his publications are *American Constitutional Law: Essays, Cases, and Comparative Notes*, 2nd edition (Rowman & Littlefield, 2004), with Donald P. Kommers of Notre Dame University and Gary Jacobsohn of Williams College, once described as “the Cadillac of constitutional law casebooks,” and the highly regarded *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1991).

Professor Finn lives in Hartford, Connecticut, with his wife, Linda, and their two children.

Table of Contents

Civil Liberties and the Bill of Rights

Part II

Professor Biography	i
Course Scope	1
Lecture Thirteen Other Privacy Interests—Family	3
Lecture Fourteen Other Privacy Interests—Sexuality	5
Lecture Fifteen Same-Sex Marriages and the Constitution.....	7
Lecture Sixteen The Right to Die and the Constitution	10
Lecture Seventeen Cruel and Unusual? The Death Penalty	13
Lecture Eighteen The First Amendment—An Overview	16
Lecture Nineteen Internal Security and the First Amendment	19
Lecture Twenty Symbolic Speech and Expressive Conduct.....	22
Lecture Twenty-One Indecency and Obscenity	25
Lecture Twenty-Two Hate Speech and Fighting Words	29
Lecture Twenty-Three The Right to Silence	32
Lecture Twenty-Four Why Is Freedom of Religion so Complex?	35
Timeline of Cases Discussed in the Course	Part I
Annotated List of Cases (Alphabetical Order)	Part I
Glossary	38
Biographical Notes	42
Bibliography	Part III
The Bill of Rights	Part III

Civil Liberties and the Bill of Rights

Scope:

This course is designed to introduce students to a uniquely American invention and, to some ways of thinking, a wonderfully naïve contribution to politics: The written specification of individual liberties and rights that citizens possess and can, through courts, enforce against the state. *Civil Liberties* is not, however, a course on law. It is, instead, a course that has as its subject the relationship of law to the most fundamental sorts of questions about politics, morality, and human nature.

In this course of 36 lectures, we shall see that most of the serious difficulties (and there are many) in the politics of civil liberties arise from conflicts between our commitments to two or more positive values. There are, for example, inevitable and recurrent conflicts (despite our attempts to ignore them) between the values of liberty and equality. As Felix Frankfurter once wrote, these and other such conflicts are “what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs.” We examine these clashes in light of the broader philosophical and institutional problems of the constitutional order. I hope to show that constitutional “answers” to problems like those of abortion, freedom of speech, and affirmative action require a coherent understanding of the U.S. Constitution and of the assumptions it makes about human nature and the proper ends of government and civil society.

We will, therefore, examine the doctrinal development of specific liberties and rights, such as due process and privacy, the ultimate denial of liberty entailed by the death penalty, freedom of speech and religion, and equal protection, but we shall consider them in a broader theoretical context. We shall want to know what overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the Constitution and the polity it both constitutes and envisions.

The course is divided into three sections. We begin with the institutional and interpretive foundations of the American constitutional order. Our purpose here is to provide students with background on the U.S. Supreme Court and its role in the constitutional order, as well as an overview of the process of constitutional interpretation. In our first lecture, for example, we focus on the organization, composition, and decision-making authority of the Court. In our second lecture, we take up the “why” and the “what” of constitutional interpretation. We shall see that interpretation is both a choice and a necessity: a choice because we must choose among many diverse methods and strategies, and a burden because such choices are often difficult to justify or even to explain. In Lectures Three and Four, we take up the intersection of Lectures One and Two by considering how and why the power of constitutional interpretation—and, hence, the power to decide the most pressing issues of civil liberties—came to rest with the Supreme Court through the mechanism of judicial review.

In the second section of the course, we begin our inquiry into the Bill of Rights. In every case that arises under the Bill of Rights, we must reconcile our desire for individual liberty with the need for public order, personal autonomy with the needs of the community. Considered in its totality, and not simply provision by provision, a bill of rights sketches the broad outlines of the relationship between individual liberty and the needs of the community. In this larger sense, a bill of rights indicates how conflicts between liberty and community should be conceived and, to some extent, resolved. In our fifth lecture, we consider the history and theory of the Bill of Rights. Was a bill of rights really necessary? And why, initially, did its protections run only against the federal government, not the states? In the sixth lecture, we take up the fascinating doctrine of *incorporation*, or the torturous and winding road the Court followed to make the Bill of Rights applicable to state and local governments—arguably a constitutional revolution no less significant than the Founding in Philadelphia.

In the third and, by far, the largest section of the course, comprising 30 lectures, we consider the individual provisions of the Bill of Rights and the development of several other specific liberties. In deference to the Founders, we begin with the constitutional right to property. The protection of private property, broadly defined, was a central purpose of the constitutional order, and the rise, fall, and possible resurgence of property as a constitutional right of magnitude has had important implications for civil liberties more generally. After property, we take up the fundamental rights of privacy and personhood, rights that cover a broad spectrum of liberty issues, including procreation and abortion, the definition of family, sexual orientation and preference, capital punishment, and the right to die.

We then devote a series of lectures to the speech and religion clauses of the First Amendment. We start with speech. Among the issues we will consider will be the definition of speech, hate speech and fighting words, indecency and pornography, and freedom of association. Our examination of the religion clauses likewise includes questions concerning the definition of religion, as well as consideration of the meaning of the establishment and free exercise clauses and how they interact.

In the final part of the course, we explore the many intricacies of the equal protection clause of the Fourteenth Amendment. When, if ever, does the equal protection clause allow the state to discriminate on the basis of race? Is there a constitutional difference between malignant discrimination, such as Jim Crow laws, and affirmative action, or so-called “reverse discrimination”? Should the Constitution be colorblind? The equal protection clause also applies to other forms of discrimination; thus, we will want to consider how the Supreme Court has addressed discrimination based on gender, sexual orientation, and national origin.

In addressing these issues, whether under the equal protection clause, the First Amendment, or the Eighth Amendment, we will confront a welter of difficult and controversial questions. It is unlikely that we will succeed in our attempts to answer them fully or finally. What we can hope to achieve, however, is an improved and more sophisticated appreciation of the importance of our commitment to civil liberties and of the sacrifices we must make if we choose to honor that commitment.

Lecture Thirteen

Other Privacy Interests—Family

Scope: As we saw in Lecture Eleven, the right to liberty is less a single right than a collection of diverse interests. The same is true of the right to privacy: Privacy is an umbrella that covers a wide collection of more specific interests, including, among other things, procreation, abortion, marriage, and sexuality. In *Moore v. City of East Cleveland* (1977), for example, the Court struck down an ordinance that prohibited, under its definition of “immediate family,” a grandmother from living in the same house with her son and two grandchildren (who were first cousins). The Court wrote, “when the government intrudes on choices concerning family living arrangements, [we] must examine carefully the importance of the governmental interests advanced....” The Court has since considered a fair number of other family cases. Hence, in *Michael H. v. Gerald D.* (1989), the Court refused to find a fundamental right on the part of a biological father (not married to the mother) to be guaranteed visits with his child. And in *Troxel v. Granville* (2000), although the Court noted its recognition of “the changing realities of the American family,” it nonetheless struck down a statute that gave grandparents increased visitation rights with their deceased son’s children as an unconstitutional infringement of the parents’ fundamental right to rear their children.

Outline

- I. The Court has long recognized that the right to privacy encompasses more than reproductive freedom and sexuality.
 - A. The right to privacy, like the rights to liberty and property, is an umbrella term for a wide range of more specific liberty interests, such as rights concerning the family unit.
 - B. As with the other rights we have seen, judicial determination of what those other protected interests include, and what is not included, raises important issues about the nature of constitutional interpretation and the proper limits of judicial power.
- II. In *Moore v. City of East Cleveland* (1977), for example, the Court struck down an ordinance that prohibited, under its definition of “immediate family,” a grandmother from living in the same house with her son and two grandchildren who were first cousins.
 - A. In its plurality decision, the Court wrote that a government action that “intrudes on choices concerning family living arrangements” must be subject to careful scrutiny.
 - B. The plurality decision suggests that these kinds of choices are protected as fundamental rights, because “unless we close our eyes to the basic reasons why certain rights associated with the family have been” protected, “we cannot avoid applying the force and rationale” of prior cases to this case.
 - C. The Court also directly addressed the difficult issues of judicial power and legitimacy raised by privacy cases, noting: “Substantive due process has at times been a treacherous field for this Court.”
 - D. In dissent, Justice Stewart noted that “although the appellant’s desire to share a single-dwelling unit also involves ‘private family life,’ that desire can hardly be equated with any of the interests protected” in previous privacy cases.
- III. In *Michael H. v. Gerald D.* (1989), the Court considered a somewhat different set of family-related issues.
 - A. In this case, the Court refused to find a fundamental right on the part of a biological father (not married to the mother) to be guaranteed visits with his child.
 - B. Noting the importance to the state of promoting and protecting the nuclear family, the Court upheld a California statute that created a legal presumption that a child born to a married woman is a product of the marriage.
 - C. In refusing to find a fundamental right on the part of the biological father, Justice Scalia wrote that to be so protected, the interest must “be so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

- D. In dissent, Justice Brennan argued: “The plurality’s interpretive method is more than novel; it is misguided.... In a community such as ours, ‘liberty’ must include the freedom not to conform.”
- IV. Family and parental rights were also the issue in the case of *Troxel v. Granville* (2000). Noting its recognition of “the changing realities of the American family,” the Court nonetheless struck down a statute that gave grandparents increased visitation rights with their deceased son’s children as an unconstitutional infringement of the parents’ fundamental right to rear their children.
- A. Justice O’Connor’s plurality decision relied on a series of precedents to sketch a parental due process right to “make decisions concerning the care, custody, and control” of children.
- B. In individual dissents, Justices Stevens, Scalia, and Kennedy each expressed discomfort with the Court’s apparent willingness to displace the judgments of popularly elected state legislatures.

Essential Reading:

Moore v. City of East Cleveland (1977).

Michael H. v. Gerald D. (1989).

Troxel v. Granville (2000).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 252–253.

Robert A. Burt, “The Constitution of the Family,” 1979 *Supreme Court Review* 329.

Supplementary Reading:

James S. Fishkin, *Justice, Equal Opportunity, and the Family*.

Susan Moller Okin, *Justice, Gender, and the Family*.

Questions to Consider:

1. Unlike some other late-20th-century constitutions, the American constitutional text has little if anything to say about the family proper. How has this relative silence influenced the Court? Does it make judicial decisions about family or parental rights more troublesome as exercises of judicial authority in a democracy?
2. According to Justice Powell in *Moore*, why does the Constitution protect “the sanctity of the family”? Does he respond persuasively to Justice White’s complaints about the Court’s use of substantive due process?
3. According to Justice Scalia, “a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ mentioned in the Declaration of Independence.” However, he went on to say that the Declaration “is not a legal prescription conferring powers upon the Courts.” Why not?

Lecture Fourteen

Other Privacy Interests—Sexuality

Scope: Does the Constitution protect the choices we make about sexuality? Few areas of life, it might seem, are as “private,” but most societies also recognize that society sometimes does have a collective interest in regulating certain kinds of sexual conduct. Incest, for example, is clearly an area in which the state has an interest in protecting the individual members of society, as well as a larger collective interest. In this lecture, we consider the Court’s work in this controversial area. We begin with a review of *Griswold v. Connecticut* (1963) and *Eisenstadt v. Baird* (1972), in which the Court found a privacy right that did extend to certain kinds of sexual behavior but not to all. The Court’s sense that privacy does not extend to every kind of sexual practice was underscored in the important case of *Bowers v. Hardwick* (1986), in which the Court refused to find in privacy what it called a “right to homosexual sodomy.” The Court reversed its position in *Texas v. Lawrence* (2003), this time holding that “Liberty presumes an autonomy of self that includes . . . certain intimate conduct.” The Court’s decision in *Lawrence*, like its earlier decision in *Bowers*, provoked controversy both on and off the Court, controversy that once again revolves around great questions of morality and judicial power.

Outline

- I. In this lecture, we continue our examination of the constitutional right to privacy. Our cases involve an area of profound importance and complexity: human sexuality.
 - A. Does the Constitution, perhaps through a right of privacy, protect certain kinds of sexual behavior? If so, which ones and why?
 - B. It is important to remember here, as with the other kinds of privacy cases we have considered, that there is always some tension between the individual right and the community’s interests in regulating those rights.
- II. It is important to remember, too, that the issues in these cases are made even more complicated because they also involve important issues about the limits of judicial power.
 - A. Such concerns arise in part because, again, the constitutional text has little if anything to say directly about such matters. Consequently, constitutional interpretation has to struggle with familiar questions—about how broadly or narrowly to read the text and about when, if ever, it is appropriate for judges to go beyond the text itself.
 - B. As we shall see, the Court’s work in this area has been especially sensitive to issues about judicial power and the use of substantive due process.
- III. All these issues came into play in the important case of *Bowers v. Hardwick* (1986), in which the Court first addressed so-called “unconventional sexual practices.” In *Bowers*, the Court ruled that the right to privacy does not prohibit states from making consensual sodomy between same-sex partners a criminal offense.
 - A. Writing for the Court, Justice White concluded, “There is no fundamental right [of] homosexuals to engage in sodomy.”
 1. Justice White reasoned that the Court’s earlier privacy cases did not reach so far and that protection for homosexual activity is “not deeply rooted in this nation’s history and traditions.”
 2. In addition, Justice White voiced concerns about the limited role of courts in a democracy. The Court should be reluctant “to expand the substantive reach of the Due Process Clause,” he wrote, because in doing so, “the Judiciary necessarily takes to itself further authority to govern the country.”
 - B. In an impassioned dissent, Justice Blackmun described the privacy interest in very different terms, arguing that this case was less about sodomy than the right to be let alone and self-determination.
 - C. *Bowers* is important in part because it demonstrated again that the Court has been unable to develop a method or procedure for determining what “privacy” includes or excludes.

- D. *Bowers* is important, too, because it demonstrated that cases involving privacy rights are profoundly influenced by how one characterizes the interests involved in any specific case. These, in turn, may be influenced by the Court's understanding about the nature and limits of its own power, as well as by larger visions about the relationship of the individual to society.

IV. The same issues were still very much alive 17 years later, in *Lawrence v. Texas* (2003).

- A. In this case, the Court struck down a Texas law that prohibited sodomy between same-sex partners. Unlike the Georgia law, however, the Texas statute did not criminalize the same acts when performed by heterosexuals.
- B. Writing for a 6–3 majority, Justice Kennedy said, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”
1. The majority thus concluded that the description in *Bowers* of the right of privacy as a right to sodomy had profoundly mischaracterized the liberty interest in this case and that *Bowers* must, therefore, be overruled.
 2. The majority opinion discussed at some length when precedent should control a decision and when it may be overruled.
- C. In a strongly worded dissent, Justice Scalia accused the majority of taking sides in a “culture war” that was better left to the democratic process and that threatened a “massive disruption of the current social order.”
1. As he had in *Casey*, Justice Scalia again reminded the Court that it had little constitutional warrant for displacing the choices of democratic majorities absent a clear constitutional basis for doing so.
 2. Responding to the majority's discussion of precedent, Justice Scalia wrote: “I do not myself believe in rigid adherence [to precedent], but I do believe that we should be consistent rather than manipulative in invoking [precedent].”

- V. Like so many of the Court's privacy cases, the decisions in *Bowers* and *Lawrence* provoked a storm of both support and criticism in society at large. In that sense, Justice Scalia may well have been correct when he predicted “massive social disruption.” Following *Lawrence*, for example, some members of Congress have spoken openly about ways to discipline the Court. Other critics have explored the possibility of amendments to the Constitution, one of which, for example, would define marriage as between a man and a woman.

Essential Reading:

Griswold v. Connecticut (1963).

Eisenstadt v. Baird (1972).

Bowers v. Hardwick (1986).

Texas v. Lawrence (2003).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 249–253.

Supplementary Reading:

Richard Posner, *Sex and Reason*.

Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*.

Questions to Consider:

1. *Lawrence* invites comparisons to *Planned Parenthood v. Casey* (1992), in part because in both cases the Court seemed to adopt fairly expansive definitions of *liberty*. Are there implications in these cases for “morals” legislation more generally? Does either case give conscientious legislators any clear guidance about to what extent or when the community may regulate sexual practices?
2. Do you agree with Justice Scalia's claim that in *Lawrence*, the majority of the Court chose to take sides in a larger “culture war” concerning the criminalization of homosexual conduct?

Lecture Fifteen

Same-Sex Marriages and the Constitution

Scope: Does the Constitution protect same-sex marriages? No decision by the Supreme Court has addressed this question directly, but there are several cases that might be relevant to the issue, including *Loving v. Virginia* (1967), *Romer v. Evans* (1996), and *Lawrence v. Texas* (2003). The issue has received a bit more attention in the state courts. In *Baehr v. Lewin* (1993), for example, the Supreme Court of Hawaii held that a law limiting marriage to opposite-sex couples violated the state constitution. An amendment to the Hawaiian Constitution overturned the decision. Similarly, in *Baker v. Vermont* (1999), the Supreme Court of Vermont held that a state law denying the statutory benefits of marriage to same-sex couples violates that state's constitution. And in *Goodridge v. Mass. Department of Public Health* (2003), the Massachusetts Supreme Court ruled that the Massachusetts Constitution prohibits the state from discriminating against same-sex marriages. On the other hand, at least 39 states have laws similar to the federal Defense of Marriage Act (1996), which prohibits same-sex marriages. And President George W. Bush has called for a constitutional amendment barring same-sex marriages. The controversy surrounding same-sex marriages should remind us that civil liberties are matters of importance, not just for lawyers and judges, but also for every citizen.

Outline

- I. As you know by now, there is a great deal of material we must cover in this course, and in every lecture are several cases and issues that demand our attention. Every once in awhile, however, I think we would do well to narrow our focus by examining just one issue and just a few cases in greater detail.
 - A. In this lecture, then, I would like to take up a particular privacy issue and consider it at length: Does the right to privacy offer some degree of constitutional protection for same-sex marriages?
 - B. We shall see that the U.S. Supreme Court has yet to address this question directly, but there are several opinions, both federal and state, that are relevant to the question.
- II. Again, no decision by the U.S. Supreme Court directly addresses this question, but there are a few cases that might bear on it.
 - A. For example, in *Loving v. Virginia* (1967), the Court ruled that a Virginia statute that prohibited interracial marriages was a violation of the fundamental right to marriage and of the equal protection clause of the Fourteenth Amendment.
 1. It is interesting that the Court identified two distinct constitutional grounds upon which the law could be invalidated—the fundamental right to marry and equal protection.
 2. As we shall see in Lectures Thirty-Two through Thirty-Five, the equal protection argument can be made entirely independently of the fundamental rights argument.
 - B. In *Romer v. Evans* (1996), the Court invalidated an amendment to the Colorado Constitution that barred local governments from adopting ordinances that prohibited discrimination against homosexuals.
 1. The majority concluded that the amendment could not survive the rationality test that we explored in earlier lectures.
 2. Although *Romer* was decided on equal protection grounds, there are aspects of the Court's majority opinion that might be of relevance to the fundamental rights question as well.
 - C. As we saw in Lecture Fourteen, in *Lawrence v. Texas* (2003), the Court struck down a Texas law that prohibited sodomy between same-sex partners. Unlike the Georgia law, however, the Texas statute did not criminalize the same acts when performed by heterosexuals.
 1. Writing for a 6–3 majority, Justice Kennedy said, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”
 2. One must wonder if that same liberty includes the right to marry the partner of one's choice.
 3. *Lawrence* is also relevant because, at least in the opinion of many observers, the Court seemed to use a heightened form of rationality, a somewhat more aggressive version of the rationality test.

4. There was also an important dissent in *Romer* from Justice Scalia. He wrote:

The Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment before us here [he means the Colorado amendment] is not the manifestation of a “bare ... desire to harm” homosexuals, but is rather a modest attempt by seemingly tolerant Coloradoans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.

- D. In addition to the foregoing cases, several states have adopted statutes, sometimes called Defense of Marriage Acts, that typically define marriage as an institution reserved to heterosexual couples. There is also a federal version, the Defense of Marriage Act, or DOMA.

III. Although the Court has yet to say, this issue has been a matter of exceptional controversy since at least the early 1990s, when the Supreme Court of Hawaii ruled that the state’s ban on such marriages violated the Hawaiian state constitution.

- A. In the controversial case of *Baehr v. Lewin* (1993), the state Supreme Court ruled that such prohibitions were a violation of the equal protection clause. The court in part relied on a U.S. Supreme Court decision, *Loving v. Virginia* (1967), which had ruled that state prohibitions of interracial marriages violated the equal protection clause and the fundamental right to marriage, protected under the due process clause. In 1997, however, voters in Hawaii passed an amendment to the state constitution giving the legislature the right to limit marriage to male-female partners.
- B. Six years later, in *Baker v. Vermont* (1999), the Vermont Supreme Court ruled that the Vermont Constitution requires equality of treatment between heterosexual and same-sex marriages. The Vermont legislature responded by passing a law offering such couples “civil unions” with all the benefits that attach to marriage, including the right to adopt children, to own real estate, and to dispose of one’s estate.
- C. In 2003, the Massachusetts Supreme Court, in the controversial case of *Goodridge v. Mass. Department of Public Health* (2003), ruled that a prohibition against same-sex marriages violated both the fundamental right to marriage and the right to equal protection under the state constitution.

IV. The federal government has also taken up the issue of same-sex marriages, notably with the passage of the Defense of Marriage Act (1996), which prohibits federal recognition of same-sex marriages and allows states to refuse to recognize such marriages performed in other states.

- A. Thirty-nine states have enacted similar laws, but many have been challenged on constitutional grounds. In particular, litigants have claimed that such laws violate the “full faith and credit” provision of Article IV, Section 1, which generally requires state courts to honor judicial rulings and decisions in other states.
- B. Doubts about the constitutionality of DOMA and its counterparts in the states have led some, including President George W. Bush, to call for a constitutional amendment barring same-sex marriages.

V. Now, having reviewed the relevant case law, let’s turn to a constitutional analysis of same-sex marriage.

- A. Imagine that the Supreme Court takes up such a case, and for purposes of analysis, imagine that the Court restricts its analysis to the privacy and substantive due process issues.
1. Our first inquiry, probably, should concern whether such a right exists and whether it is fundamental.
 2. We might use the *Palko* test to address this question: Is the right to same-sex marriage “implicit in the concept of ordered liberty”?
 3. Or we might use the test advanced by Justice Scalia: Is such a right one that is traditionally protected as a part of American history, or is it rooted in the nation’s history and tradition?
 4. The answer, under either test, is not as obvious at it might first seem.
 5. What is obvious, though, is that many if not all of the justices will introduce another factor into the analysis—that issue, of course, is whether, in the absence of any clear constitutional guidance, the Court should even undertake to resolve the issue or, instead, should leave it to the democratic process to resolve.

- B. Assume, for purposes of analysis, that a majority of the Court overcame the previous difficulties and held that there is a fundamental right to same-sex marriage. There is more that we must do to complete the analysis.
 - 1. We must next address: What state interests are advanced to regulate the right, and are those interests compelling?
 - 2. We have yet, in this course, to come up with a clear or concise definition of *compelling*.
 - C. Alternatively, suppose the Court finds that such a right does not exist, or at least, it is not a fundamental right.
 - 1. The Court must still assess whether the state's interests would pass the rationality test.
 - 2. As we have seen, historically, this has not proved to be much of a hurdle. But *Romer*'s use of the rationality test to strike the Colorado amendment might suggest a more subtle analysis.
- VI. Finally, let's consider another hypothetical situation. Imagine this time that the requisite number of states passes a constitutional amendment that carefully defines marriage as a heterosexual institution.
- A. Could the Supreme Court declare an amendment—passed in cheerful and complete compliance with every other constitutional requirement—"unconstitutional"?
 - B. Suppose the amendment—this one or some other—seems to be at odds with some other basic constitutional commitment?
 - 1. What if we passed an amendment, for example, that repealed the First Amendment?
 - 2. Or if we passed an amendment repealing the antislavery provisions of the Thirteenth Amendment?
 - C. Behind these questions is another, perhaps more basic question: Does our commitment to democratic self-governance trump every other constitutional value?

Essential Reading:

Loving v. Virginia (1967).

Romer v. Evans (1996).

Baker v. Vermont (1999).

Lawrence v. Texas (2003).

Goodridge v. Mass. Department of Public Health (2003).

Supplementary Reading:

Anita Bernstein, "For and Against Marriage: A Revision," 102 *Michigan Law Review* 129 (2003).

Evan Gerstmann, *Same-Sex Marriage and the Constitution*.

Mark Strasser, *On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads*.

Cass Sunstein, "The Right to Marry," 26 *Cardozo Law Review* 2081 (2005).

Questions to Consider:

- 1. Does it matter, either politically or constitutionally, if we consider the same-sex marriage issue a fundamental rights/due process issue or an issue of equal protection?
- 2. At bottom, same-sex marriages raise an old and familiar problem about the relationship between our commitment to democratic self-governance and the protection of civil liberties: When, if ever, should the interests of the community trump individual liberty? Or is this a false conflict?

Lecture Sixteen

The Right to Die and the Constitution

Scope: Does the Constitution include a right to die? Few issues in civil liberties are as controversial as this question. In 1994, for example, Oregon voters adopted the Death with Dignity Act, which legalized physician-assisted suicide in certain instances. The federal government has since sought to have the statute declared unconstitutional. On the other hand, dozens of states have passed laws making physician-assisted suicide illegal. The Court has yet to issue a definitive ruling concerning the right to die in general, but there are several cases in which the Court has addressed the issue, and they have all sparked controversy, both inside the Court and in society more generally. Following the Court's decision in *Cruzan v. Director, Missouri Dept. of Health* (1990), for example, protesters occupied Cruzan's hospital room to prevent her removal from life-support systems. The Court had ruled that there is a limited "fundamental liberty interest" in terminating life-support systems. Even so, the Court upheld a Missouri statute that required "clear and convincing" evidence of a person's desire to refuse life-prolonging treatment. Seven years later, in *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997), the Court refused to extend that liberty interest to include a right on the part of terminally patients to "physician-assisted suicide." Together, these cases nicely illustrate how the most fundamental questions in civil liberties are not so much legal as they are moral.

Outline

- I. Does the Constitution include a right to die? Privacy issues often include questions that concern the quality of life, and cases involving an individual's right to refuse certain types of medical treatment have appeared with increasing frequency in the past two decades.
 - A. Perhaps the first case to command public attention was that of Karen Ann Quinlan. In 1976, the New Jersey Supreme Court decided that the right to privacy included a right to be removed from a respirator and for her family to decline other life-maintaining procedures.
 - B. This is an issue, like so many others in civil liberties, that is not confined to the courts. In 1994, for example, Oregon voters adopted the Death with Dignity Act, which legalized physician-assisted suicide in certain instances. The federal government has since sought to have the statute declared unconstitutional. On the other hand, dozens of states have passed laws making physician-assisted suicide illegal.
 - C. The Supreme Court was scheduled to take up the Oregon case in the fall of 2005. [Update: In *Gonzales v. Oregon* (decided 2006), the Court ruled, in a 6–3 to decision, that the federal government had exceeded its authority by threatening to prosecute doctors who prescribed lethal drugs. Writing for the Court, Justice Kennedy noted that the government had failed to recognize "the background principles of our federal system."]
- II. The issue has come to the Court before, and each time, the Court has avoided coming to a definitive decision about whether there is a constitutionally protected right to die or how far it might extend.
 - A. In *Cruzan v. Director, Missouri Dept. of Health* (1990), the Court considered the case of Nancy Cruzan.
 1. In this case, Nancy Cruzan suffered a severe brain injury in a car crash in January 1983. Although she survived the crash, her brain was deprived of oxygen for at least 12 minutes, and the doctors advised Cruzan's parents that she would never regain consciousness. Her parents approved the insertion of a feeding tube to keep her alive.
 2. In 1988, a state court granted Cruzan's parents permission to remove the feeding tube. The state appealed to the Missouri Supreme Court, which reversed the lower court. The Cruzans appealed to the U.S. Supreme Court.
 - B. In his opinion for the majority, Chief Justice Rehnquist assumed but did not decide "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."
 1. Please note that the Chief had not decided anything about the particulars of this case just yet.

2. Instead, he had postulated, for purposes of argument, that a competent individual might have a constitutionally protected right to refuse certain kinds of lifesaving treatments.
 - C. In this case, however, Nancy Cruzan was in a vegetative state and, therefore, not competent. Hence, the question was whether the state of Missouri may require “clear and convincing evidence” of Nancy’s wishes before permitting her surrogates—her parents—to make a decision for her.
 - D. The majority upheld the evidentiary requirement, noting that Missouri had two distinct interests it sought to protect.
 1. First, Missouri had an interest in “the protection and preservation of human life, and there can be no gainsaying this interest.”
 2. Second, Missouri had a “more particular interest” in protecting “the personal element” of the profound choice between life and death, and “Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers.”
 - E. In a sharply worded concurrence, Justice Scalia sounded a familiar theme about the role of courts in such matters: “While I agree with the Court’s analysis today ... I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field....”
 - F. In dissent, Justices Brennan, Marshall, and Blackmun argued: “Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration,” and the state’s interests were not sufficiently strong to overcome that right.
 - G. As you read the various opinions in the *Cruzan* case, I’d like you to consider the following question: What, precisely, is the point of disagreement between the majority and dissenting opinions?
 1. Both sets of opinions, I might suggest, are willing to at least consider the possibility of a fundamental right.
 2. And, to a certain extent, there is agreement about the sorts of interests the state seeks to address.
 3. The disagreement, then, might be in how the various opinions try to “balance” these diverse sets of interests.
- III. In 1996, just six years after *Cruzan*, two lower federal courts extended the logic of the case to prohibit states from enacting laws that prohibited doctors from prescribing lethal doses of medication to terminally ill patients who had requested the prescription.
- A. In one case, arising from Washington State, the court struck down the law on the ground that it violated a fundamental right of privacy protected by the due process clause. In the other, a federal court struck down a New York State law on equal protection grounds, finding that the state could not distinguish between a terminally ill patient’s right to refuse treatment and a right to physician-assisted suicide.
 - B. In *Vacco v. Quill* (1997), the U.S. Supreme Court overruled the equal protection case, finding instead: “On their faces, neither New York’s ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently than anyone else or draw distinctions between persons.”
 - C. In *Washington v. Glucksberg* (1997), the Court weighed a liberty of “personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide” against “our Nation’s history, legal traditions, and practices.”
 1. The Court concluded that bans against suicide and assisted suicide are “longstanding expressions of the States’ commitment to the protection and preservation of human life.” Unwilling to find a fundamental right, the Court then weighed the liberty against the state’s interest using the rationality test. The Court had little difficulty in identifying a number of rational state interests that would support the ban.
 2. On the other hand, the majority opinion by Chief Justice Rehnquist did suggest that the strength of the liberty interest might be different in other cases. As a consequence, the issue is not finally settled.
 3. It is important, too, to consider some aspects of Justice O’Connor’s concurring opinion, in part because she raises a familiar concern about the role of courts in addressing these kinds of issues. She wrote: “There is no reason to think that the democratic process will not strike the proper balance between the interests of terminally-ill, competent individuals and the state’s interest in protecting those who might seek to end life mistakenly or under pressure.”

4. Surely, that is about as blunt a way of putting the issue as one can imagine. She says that there is, indeed, a potential conflict between these two interests, but “there is no reason to think,” she writes, “that the state or the political process, more generally, cannot fairly, justly, sensibly resolve the tensions between those two interests.”
 5. It is worth giving some thought to Justice O’Connor’s claims. What if we suspect, or know, that the political process is “defective” or compromised?
- IV. As a final issue, consider this: Up to this point, we have spoken often about the nature and importance of constitutional rights. Are there also constitutional duties?
- A. Hence, in the *Cruzan* case, should we ask if the state of Missouri has a constitutional duty to protect life or “to safeguard the element of personal choice”?
 - B. Or should the Court generally defer to other decision makers, recognizing, as did Justice Scalia in a famous dissent, that the materials necessary to decide such cases “are neither set forth in the Constitution nor known to the nine justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory”?

Essential Reading:

Cruzan v. Director, Missouri Dept. of Health (1990).

Washington v. Glucksberg (1997).

Vacco v. Quill (1997).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 6, pp. 253–254.

Supplementary Reading:

Ronald Dworkin, *Life’s Dominion*, chapter 7.

Alan Meisel, *The Right to Die*, 2nd ed. (1995).

Michael W. McConnell, “The Right to Die and the Jurisprudence of Tradition,” *Utah Law Review* 665 (1997).

Questions to Consider:

1. If there is a constitutional right to die, what is its source in the Constitution? Is it a necessary part of a constitutional right to liberty? Is it grounded in a right to privacy?
2. The majority opinion in *Glucksberg* suggested that the state’s interest in protecting the disabled includes protecting against more than coercion: “It extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference.’” How does a law prohibiting physician-assisted suicide advance that broader interest?

Lecture Seventeen

Cruel and Unusual? The Death Penalty

Scope: In the past few lectures, we have explored issues that go to the very heart of what it means to be a human being. In so doing, we have opened up questions that consider the relationship between self and society, between rights and responsibilities, and, indeed, about the meaning and definition of life itself. In this lecture, we take up those issues in their most profound form: the death penalty. In the case of *Furman v. Georgia* (1972), Justice Potter Stewart wrote, “The penalty of death differs from all other forms of criminal punishment.” A majority of the Court has never come to the conclusion that the death penalty is by definition cruel and unusual and, hence, a violation of the Eighth Amendment. But if there is one distinguishing aspect of the Court’s death penalty jurisprudence, it is the persistence and intensity of disagreement over its constitutionality. Among the issues we address in this lecture are the mechanics of the death penalty—what procedures must a judge or a jury follow in imposing the ultimate sanction?—as well as questions that consider its actual application. Consider, for example: Who gets the death penalty? In the important case of *McCleskey v. Kemp* (1987), the Court rejected a challenge premised on academic studies showing that African-Americans who murdered white victims were substantially more likely to receive the death penalty than whites who murdered blacks. We close with two important cases. In *Atkins v. Virginia* (2002), the Court concluded that states may not execute individuals found to be mentally retarded. And in *Roper v. Simmons* (2005), the Court ruled that the death penalty may not be applied to minors under the age of 18.

Outline

- I. In the past few lectures, we have explored issues under the rubric of a constitutional right to privacy or substantive due process that go to the heart of what it means to be a human being and to live in community with others.
 - A. In so doing, we have opened up questions about the relationship between self and society.
 - B. In this lecture, we consider perhaps the most profound version of those questions: the death penalty.
 - C. Among the issues we must consider are, first, the mechanics of the death penalty and, second, the question of who actually gets the death penalty, why, and how often.
- II. Is the death penalty a violation of the Eighth Amendment’s prohibition of cruel and unusual punishments? In this lecture, we will see that a majority of the Court has never ruled that it does violate the Eighth Amendment. On the other hand, most of the justices have agreed with an observation by Justice Stewart, who once wrote, “death is different.”
 - A. We take up the death penalty here because these cases, like the privacy cases we have just explored, raise troubling and awe-inspiring questions about the meaning of life, about the relationship between the individual and society, and about the proper limits of judicial power.
 - B. And like the privacy cases, the only enduring and stable feature of the Court’s work in this area has been the persistence and intensity of disagreement, both within the Court and in society more generally.
- III. The current jurisprudence begins with the Court’s decision in *Furman v. Georgia* in 1972.
 - A. A sharply divided Court concluded that Georgia’s death penalty system did violate the Eighth Amendment but could not agree why. Every member of the Court issued an opinion.
 - B. Two justices—Brennan and Marshall—concluded that the death penalty is by definition unconstitutional.
 - C. Three other justices—Douglas, White, and Stewart—concluded that the Georgia scheme was unconstitutional because it gave the sentencing authority (in this case, the jury) too much discretion.
 - D. Justice Stewart wrote: “The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its absolute renunciation of all that is embodied in our concept of humanity.”

- E. In a separate opinion, Chief Justice Burger sounded a theme that should be familiar: “Since there is no majority of the Court, the future of capital punishment in this country is in limbo. If today’s opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than Courts.”
 - F. The other four justices dissented.
 - G. Following *Furman*, well over 30 states adopted new death penalty laws. The inability of the Court to find a majority voice for its majority judgment in *Furman* meant that, as a practical matter, the lower federal and state courts were left without any clear guidance about when the death penalty might pass constitutional muster.
- IV. In *Gregg v. Georgia* (1976), the Court again considered the death penalty, and again it could not find a majority voice. Writing for a plurality, Justice Stewart concluded that mandatory death schemes would be unconstitutional. He went on to limit a state’s ability to impose death by imposing a number of conditions on the process, including a suggestion that the Court’s concerns might be alleviated if states adopted “a bifurcated proceeding.”
- A. Justice Stewart also noted that opponents of the death penalty must bear “a heavy burden” in attacking the “judgment of the representatives of the people.”
 - B. Nevertheless, the Court did attach a number of conditions to the death penalty. The best known of these is the requirement of *bifurcated proceedings*, which means only that there must be separate hearings to determine guilt and sentencing.
 - C. In an impassioned dissent, Justice Brennan challenged the majority’s deference to the people, noting, “This Court inescapably has the duty, as the ultimate arbiter of the meaning of the Constitution, to say whether ‘moral concepts’ require us to hold that the death penalty is cruel and unusual.”
 - D. *Gregg*, like *Furman* before it, initiated another round of state experimentation with death penalty procedures.
- V. Who gets the death penalty? As far back as *Furman*, some justices had argued that the death penalty is racially biased.
- A. In 2002, there were just over 300 persons on death row in the United States. More than 98% were male, 56% were white, 35% were black, 7% were Hispanic, and 2% were of other racial backgrounds. What, if anything, do these numbers tell us about race and the death penalty?
 - B. In *McCleskey v. Kemp* (1987), the Court considered an academic study that had concluded that African-Americans who murdered white victims were substantially more likely to receive the death penalty than whites who murdered blacks.
 - 1. The Court concluded that “at most ... the evidence presented indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.”
 - 2. Moreover, Justice Powell sounded familiar themes about the reach of judicial power, noting that such “arguments are best presented to the legislative bodies.”
- VI. What is the state of death penalty jurisprudence? *McCleskey* suggests a Court that stresses deference to the democratic process.
- A. On the other hand, in two other cases, the Court appeared more willing to open the substantive issues involved in some kinds of death penalty cases.
 - 1. In *Atkins v. Virginia* (2002), the Court concluded that states may not execute individuals found to be mentally retarded.
 - 2. In *Roper v. Simmons* (2005), the Court ruled that the death penalty may not be applied to minors under the age of 18.
 - 3. In *Herrera v. Collins* (1993), the Court considered a claim of “actual innocence,” or a claim by a prisoner, in other words, that he could proffer real evidence of his actual innocence.

4. In rejecting the claim, the Court concluded, “A prisoner’s claim of actual innocence standing alone is not sufficient grounds for relief, because federal courts do not sit to correct factual errors. They sit to correct constitutional violations.”
- B. What are we to make of the death penalty if, as seems likely, we sometimes execute individuals who are, in fact, innocent? Consider two additional quotes:
1. The first is an opinion by Justice Blackmun in *Callins v. Collins* (1994):

From this day forward, I no longer shall tinker with the machinery of death. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. The path the Court has chosen lessens us all. I dissent.
 2. The second is a response, in the same case, from Justice Scalia: “Blackmun’s opinion,” he wrote, “often refers to intellectual, moral, and personal perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control.”
- C. Finally, we should note that in many of the Court’s most recent death penalty cases, the justices have begun to argue about when, if ever, our Court should draw on the constitutional jurisprudence of other countries.
1. Justice Breyer, for example, has seemed open to such inquiries.
 2. On the other hand, Justices Scalia, Rehnquist, and Thomas have objected to the use of these kinds of interpretive materials.

Essential Reading:

Furman v. Georgia (1972).

Gregg v. Georgia (1976).

McCleskey v. Kemp (1987).

Atkins v. Virginia (2002).

Roper v. Simmons (2005).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 4, pp. 123–127.

Stuart Banner, *The Death Penalty: An American History*.

Supplementary Reading:

Hugo Adam Bedau, *The Death Penalty in America: Current Controversies*.

Walter Berns, *For Capital Punishment: Crime and the Morality of the Death Penalty*.

Charles L. Black, *Capital Punishment: The Inevitability of Caprice and Mistake*.

Austin Sarat, *When the State Kills: Capital Punishment and the American Condition*.

Questions to Consider:

1. In *Gregg*, Justice Brennan challenged the majority’s deference to the people, noting, “This Court inescapably has the duty, as the ultimate arbiter of the meaning of the Constitution, to say whether ‘moral concepts’ require us to hold that the death penalty is cruel and unusual.” Whose morals should prevail in such an inquiry, and why?
2. Is the Court the “ultimate arbiter” of the Constitution?

Lecture Eighteen

The First Amendment—An Overview

Scope: “Congress shall make no law ... abridging the freedom of speech, or of the press.” From these sparse words, the Supreme Court has created a huge and complicated jurisprudence. In this lecture, we consider what the Founders may have meant when they sought to protect speech and the equally important question of *why* they sought to protect speech. As we shall see, the answers to these questions are complex. And even if the historical record could show us precisely what the Founders meant by free speech and press, it is not so clear in the 21st century that attempts to restrict the interpretation of these terms to the meaning of the 18th century is possible or desirable.

Outline

- I. “Congress shall make no law ... abridging the freedom of speech, or of the press.” From these sparse words, the Supreme Court has created a huge and complicated jurisprudence. In this lecture, we consider what the Founders may have meant when they sought to protect speech and the equally important question of *why* they sought to protect speech.
 - A. Few areas in civil liberties cover as much ground, or are as complicated, as is the Court’s First Amendment jurisprudence. Indeed, one aspect or another of the First Amendment will be the focus of our attention for the next 11 lectures, and even then, we can only hope to scratch the surface.
 - B. What if the historical record could show us what the Founders meant by freedom of speech? Is it so clear in the 21st century that we should restrict the meaning of the First Amendment to an 18th-century understanding?
 - C. As we have seen in nearly every lecture, the Constitution’s meaning has changed over time, and with each change, the amendment—or, rather, its jurisprudence—seems to have become ever more complicated.
 1. There are many reasons for this complexity, including the centrality of freedom of speech and religion to constitutional democracy, as well as the Constitution’s relative silence on matters pertaining to speech.
 2. As we have seen in earlier lectures, too, cases and conflicts concerning freedom of speech raise important and intractable issues about the nature of constitutional interpretation and the limits of judicial authority.
- II. Why did the Founders single out speech and religion for special protection? There is no single answer to this question.
 - A. Some of the justifications advanced, both by the Founders and by courts charged with making sense of the First Amendment, include:
 1. The close relationship between the free exchange of ideas and democratic self-governance.
 2. The importance of free speech and thought to the self-realization and intellectual growth of free persons and citizens.
 3. The importance of such freedoms to the pursuit and, perhaps, to the attainment of “truth.”
 - B. The argument from self-government is premised on the claim that representative democracy would not be possible without the consent and participation of citizens.
 - C. The argument from self-realization regards freedom of speech as critical to the self-realization and intellectual growth of free persons, and perhaps, also, to notions of citizenship itself.
 - D. The argument from truth, derived in part from J. S. Mill’s *On Liberty* (1859), rests on the assumption that truth is most likely to emerge in a free and open marketplace of ideas.
 - E. There are other, less grand justifications for expressive freedom, including the so-called *checking theory* and the *safety valve theory*.

III. We should take up each of the foregoing justifications for freedom of speech in more detail.

- A.** The first argument is premised on the demands of self-government.
 - 1. The claim, which might seem obvious, is that representative democracy would not be possible without the free exchange of ideas. This free exchange is partly about the ability of citizens to debate the merits of various public policies and matters of public import.
 - 2. But it is also critical to the free exchange of information between citizens and their representatives.
 - 3. It is important to note that this defense of speech—like all of the others we shall consider—does not extend, necessarily, to all forms of speech and expression. We might say, on this defense, that it is only “political” speech (however we define it) that must be protected.
 - 4. Consider a brief example—the case of *Moore v. City of East Cleveland* (1977) that we took up in the privacy lectures. It was clear that the case raised family/privacy issues, but it also raised issues that might fall under the rubric of freedom of association.
 - 5. One justice, Justice Stewart, argued precisely this and went on to note that freedom of association should extend only to associations that are political in nature.
 - 6. Of course, the obvious response to this line of argument is to open the question of definition. Is it clear that the family is not political?
- B.** The second argument for freedom of expression rests on its centrality to human personality and self-development.
 - 1. The idea here is that the development and flourishing of the human personality must mean that we are free to hold a wide array of ideas and beliefs, that we must be able to try them on, even if they are noxious to others.
 - 2. If there are ideas we may not hold or express, then there may be some avenues for self-development that are closed.
- C.** A third argument for freedom of expression is the argument from truth.
 - 1. Many forms of this defense trace their origin to John Stuart Mill’s *On Liberty* (1859). It rests on the assumption that truth is most likely to emerge from a free marketplace of ideas. The antidote for bad speech, it is thus said, is more speech.
 - 2. There are, of course, a number of interesting questions that follow from this approach, such as: What do we do if we find truth?
- D.** There are a number of other defenses of freedom of expression that we shall see in the following lectures.
 - 1. One is sometimes called the *checking theory*, or the idea that speech is a check against governmental power or bad speech.
 - 2. A second is the so-called *safety valve theory*, which rests on the claim that freedom of speech acts as a safety valve for what might otherwise be violent action against the state or other persons.

IV. Of all these different justifications for freedom of expression, which did the Founders embrace?

- A.** The answer is that they embraced all of them, in various degrees and in various combinations.
 - B.** It is important to remember, when we take up specific issues and cases, that, for the most part, we have very little evidence of what the Founders intended.
- V.** It is worth noting, too, that the First Amendment prohibits only laws curtailing freedom of speech, not speech itself.
- A.** The interpretive problems with the First Amendment, therefore, begin with an effort to determine the meaning of *freedom*.
 - B.** For the sake of what values or interests would government be justified in limiting speech? The Constitution fails to answer these questions, at least directly; thus, we and the Court are left to the tricky business of interpretation.
 - C.** Consider, for example, the familiar problem of shouting “Fire!” in a crowded theater.
 - D.** Imagine another situation, such as threatening to kill the president.

- E. And here is another problem: Should we tolerate speech that offends others, as opposed, in the earlier two examples, to putting them directly in harm's way?
 - F. A similar question is raised by prohibitions on hate speech or racially bigoted speech.
 - G. Consider, too, speech that makes derogatory remarks about public officials.
 - H. In each of the foregoing, we must balance our commitment to freedom of speech against our commitment to other principles, such as public safety, or equality, or the public welfare.
- VI. The next 11 lectures will begin with 5 lectures concerning freedom of expression and be followed by 6 lectures concerning freedom of religion. .

Essential Reading:

Zechariah Chafee, Jr., *Free Speech in the United States*.

Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*.

Cass Sunstein, *Democracy and the Problem of Free Speech*.

Supplementary Reading:

Walter Berns, *The First Amendment and the Future of American Democracy*.

Lee C. Bollinger, *The Tolerant Society*.

Thomas Emerson, *The System of Freedom of Expression*.

Leonard Levy, *The Emergence of a Free Press*.

John Stuart Mill, *On Liberty*.

David Rabban, *Free Speech in Its Forgotten Years*.

Questions to Consider:

1. Is freedom of speech really necessary for self-governance? If it is, does this tell us anything about what kinds of speech the First Amendment protects or what kinds of expression might not warrant protection?
2. Assume we can know precisely what the Founders meant by such terms as *speech* and *religion*. Should the meaning of the First Amendment be restricted to those 18th-century meanings? Is there a way to give these terms contemporary content while remaining faithful to the Founders' intent?

Lecture Nineteen

Internal Security and the First Amendment

Scope: As we saw in the last lecture, the reasons we protect speech are complex. Are there times when we might not want to protect it? When is the nation entitled to protect itself against speech that advocates illegal action or, arguably, endangers the security of the United States? As we shall see in this lecture, the United States has wrestled with this question from its inception, beginning with the Alien and Sedition Act of 1798, through the Espionage Act of 1917, and most recently, in the USA Patriot Act. We begin with the well-known case of *Schenck v. United States* (1919), in which the Court penned the famous “clear and present danger” test. Over the years, the test has undergone various formulations, from the “bad tendency” test in *Gitlow v. New York* (1925) to the “incitement” test elaborated in *Brandenburg v. Ohio* (1969), but in all of them, the underlying issues have been the same: How deep does our commitment to freedom of speech run, and who should balance the competing demands of the First Amendment and national security?

Outline

- I. As we saw in the last lecture, the reasons we protect speech are complex. Are there times when we might not want to protect it? When is the nation entitled to protect itself against speech that advocates illegal action or, arguably, endangers the security of the United States? Are there times when, the First Amendment notwithstanding, we should not protect any and all forms of speech? This question has plagued the nation since the Founding.
 - A. Some scholars, for example, have argued that the Founders intended to prohibit the prior censorship of the press but perhaps not seditious libel or a written communication critical of the government or the state.
 - B. The Alien and Sedition Acts of 1798 illustrate the longstanding tendency of the state to seek to stifle criticism, as well as the intense controversy and backlash that such efforts typically generate.
- II. The Court’s consideration of such issues starts with the important decision in *Schenck v. United States* (1919).
 - A. In *Schenck*, the Court upheld the Espionage Act of 1917, which made it illegal for individuals, in this case, to distribute pamphlets that encouraged resistance to military proscription.
 - B. Sometimes the Court insists that there are different kinds of speech, and some kinds are of greater constitutional weight.
 1. The Court has often suggested, for example, that political speech goes to very core of the First Amendment and, thus, warrants great protection.
 2. If that is true, then consider the kind of speech at issue in this case: Schenck is protesting perhaps the most political of actions—war—and making an argument based upon the Constitution itself.
 - C. *Schenck* is critical to the development of First Amendment doctrine because it introduced the well-known “clear and present danger” test. Holmes wrote:

The character of every act depends upon the circumstances in which it is done. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.
 - D. It is worth noting that the clear and present danger test is not necessarily a standard that protects speech; instead, the test is largely contentless.
 1. In *Schenck*, for example, the defendants were convicted simply for distributing pamphlets—it is difficult to imagine that there was much of a substantial threat to proscription in particular or to the war effort in general.
 2. The critical question, then, is less the test than who gets to apply it.

- III. In later cases, the Court continued to reformulate the clear and present danger test, sometimes in ways that were more protective of speech and, at other times, more sympathetic to governmental regulation.
 - A. In *Gitlow v. New York* (1925), the Court relaxed the test, transforming it into the so-called “bad tendency” test. The Court sustained the application of a New York criminal anarchy law to political strikes.
 1. In so doing, the Court simply accepted the judgment of the New York legislature that certain words, in and of themselves, tended to present a danger. The Court wrote: “A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration.”
 2. In an important dissent, Justices Holmes and Brandeis argued that the clear and present danger test required an actual and immediate threat.
 - B. In *Whitney v. California* (1927), Justice Brandeis, writing for the Court, argued in contrast to *Gitlow*: “The fact that speech is likely to result in some violence is not enough to justify its suppression. There must be the probability of serious injury to the State.”

[**Supplementary note:** On the other hand, in the midst of the Cold War, the Court seemed to reassume the deferential posture it had adopted in *Gitlow*. In *Dennis v. United States* (1951), for example, the Court ruled that the First Amendment does not make the government helpless “in the face of preparation for revolution,” no matter how far off it might be.]
 - C. Finally, in *Brandenburg v. Ohio* (1969), the Court, following suggestions in *Yates v. United States* (1957) and *Noto v. United States* (1961), reformulated the clear and present danger test once again. In its current formula, the test prohibits the suppression of speech “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”
- IV. Although the decision seems more protective of speech than some of the Court’s earlier efforts, *Brandenburg* is not without its own difficulties.
 - A. Such terms as *advocacy*, *incitement*, and *likely to incite* are sufficiently vague to require interpretation, and judges may vary on how much emphasis they give to one part of the test or another.
 - B. The illegal advocacy cases, therefore, raise the perennial issues of when the state may act to protect itself and how far it may go in restricting civil liberty in the pursuit of security.
 - C. These issues did not die with the end of the Cold War. Instead, they are the heart of current conflicts surrounding parts of the USA Patriot Act and the war on terrorism.
- V. The illegal advocacy cases raise familiar issues about how to weigh competing interests in constitutional cases and about when judges should defer to majoritarian judgments. These issues extend well beyond the illegal advocacy cases.
 - A. Consider a hypothetical set of issues: What if a political party challenged the very legitimacy of the government of the United States?
 - B. In other words, imagine a political party committed to the destruction of representative democracy in the United States but one that denounces violence.
 - C. Can we prohibit such speech—unquestionably political in content—without running afoul of the First Amendment?
 - D. The Supreme Court has yet to decide such a case, but we might have the doctrinal tools necessary to resolve the issue. Should we apply the clear and present danger test? If we do, what should be the result?
 - E. In addition to the doctrinal issues, there are larger issues of constitutional theory involved. Does a constitutional democracy have the right to defend itself?
 1. Some constitutional states, such as the Federal Republic of Germany, have adopted a concept called the *fighting or militant democracy*, or the concept that a democracy—even one committed to freedom of expression—need not tolerate speech committed to the destruction of democracy.
 2. Something like the logic of the fighting democracy is partly behind several of the provisions in U.S. antiterrorism legislation, such as the USA Patriot Act.

Essential Reading:

Schenck v. United States (1919).

Gitlow v. New York (1925).

Whitney v. California (1927).

Dennis v. United States (1951).

Yates v. United States (1957).

Brandenburg v. Ohio (1969).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 7, pp. 366–367.

Supplementary Reading:

Pnina Lahav, “Holmes and Brandeis: Libertarian and Republican Justifications of Free Speech,” 4 *Journal of Law & Politics* 451 (1987).

J. C. Miller, *Crisis in Freedom: The Alien and Sedition Acts*.

James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties*.

Questions to Consider:

1. These cases raise important issues about the relationship between security and freedom. Does the Constitution say anything about which branch of government should have primary responsibility for weighing the balance? In *Dennis*, the Court seemed to defer to legislative assessments, but *Brandenburg* seems to envision a Court more inclined to decide for itself. Is there a constitutional reason to prefer one approach to the other?
2. Does a decision by the state to restrict speech and expression betray a lack of faith in the idea that truth will always win out in the marketplace of ideas?
3. Consider this quote by Justice Holmes, writing in *Gitlow*: “If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” Do you agree?

Lecture Twenty

Symbolic Speech and Expressive Conduct

Scope: The last two lectures concentrated on the rationale for protecting speech. Should those reasons also influence how we define *speech*? In the next four lectures, we take up thorny questions about the meaning of speech and expression, about what we might include in the ambit of the First Amendment, and what we might choose to leave unprotected because it is not “really” speech. The Court has long recognized that the distinction between conduct and content can be elusive, particularly when “speech” and “nonspeech” elements unite in a single course of action. Any action, such as burning a draft card or a flag, or hanging an effigy, or wearing an armband, might be motivated by an expressive purpose. In this lecture, we consider how the Court has handled symbolic speech and expressive conduct. In *United States v. O’Brien* (1968), the Court developed a four-part test for determining the validity of governmental actions that regulate expressive conduct. As we shall see, however, the test is not always easy to apply and does little to help us understand the most vexing of issues: What is *speech*, what is *conduct*, and what is the difference?

Outline

- I. In our last lecture, we saw that the *Schenck/Brandenburg* line of cases is very complicated doctrinally. But at no point did anyone argue that the cases did not involve speech at all. In other words, in *Schenck*, *Brandenburg*, *Gitlow*, *Dennis*, *Yates*, and that entire line of internal or illegal advocacy cases, we all agreed, without even really having to ask, that there was actually speech involved in those cases.
 - A. In the next four lectures, however, we take up thorny and difficult questions about the very definitions of *speech* and *expression*, or about what we might want to include in the ambit of the First Amendment and what we might choose to leave unprotected because it is not “really” speech, whatever *speech* means.
 - B. The Court has long recognized, as we shall see in this lecture, that there is a distinction between conduct and content, and that that distinction can be elusive, particularly when there are “speech” and “nonspeech” elements that unite in a single course of action.
- II. Many definitional issues haunt the First Amendment. Perhaps the most intractable of these definitional issues is misleadingly straightforward: What is *speech*? This is a topic that will occupy us for several lectures.
 - A. In this lecture, we consider the question in its most basic sense: Is there a difference, constitutionally, between speech and conduct?
 - B. The Court has long held that some things that seem plainly to be speech, such as obscenity, are sometimes not protected. On the other hand, some things that might seem to be conduct, such as sleeping in a park, might be expressive and, thus, protected.
 - C. And there are the cases in which the distinction is blurred—such as wearing an armband to protest a war or carrying a placard in a union strike. In these cases, the conduct, or activity, seems motivated by an expressive purpose.
- III. The Court has created a complicated set of tests to govern the area of *symbolic speech* or *expressive conduct*. In the leading case of *United States v. O’Brien* (1968), the Court developed a four-part test for reviewing the constitutionality of legislation regulating expressive conduct.
 - A. *O’Brien* involved a person who had burned his draft registration card in a public protest against the Vietnam War. A federal statute made it a crime to destroy a draft card.
 - B. According to the Court, the statute at issue was content neutral. Its primary purpose, in other words, was to protect the integrity of the registration system, not to suppress speech. The Court tries to distinguish between *content-based* and *content-neutral* restrictions on conduct.
 - C. Because the legislation was content neutral, the Court did not subject it to strict scrutiny. Instead, the Court offered a multi-pronged test. A content-neutral law is constitutional:
 1. If it is otherwise justifiable as within the legitimate powers of the state.
 2. If it furthers an important governmental interest.

3. If that interest is unrelated to the suppression of speech and if the incidental restriction on speech is no greater than necessary to further that interest.
 - D. The basic test, then, is this: If a governmental action regulating conduct is intended to suppress the message, the restriction must be subjected to strict scrutiny.
 1. There are difficulties with this test. The most obvious is that it is often difficult to determine legislative intent or purpose.
 2. Another difficulty is definitional: How can we know whether the activity or behavior is expressive?
 3. The Court addressed this question at least in part, noting: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."
 - E. There is another difficulty with *O'Brien*. The Court ruled that the government's stated purpose in maintaining the integrity of the draft system was sufficiently important to overcome the speech interest. The Court also hints that a part of its conclusion rests on the idea that there were other methods of communication open to the plaintiff. The Court will begin to build on that suggestion in later cases.
 - F. Finally, the *O'Brien* Court should remind us of the doctrine of comity. *Comity* is the principle that one branch of government owes the other branches a great deal of respect. How is it involved in *O'Brien*?
 1. The government stated that it had no hostility to *O'Brien* or his message. *Comity* holds that the Court must respect this claim, absent any direct evidence that would contravene it.
 2. Why is comity important? The principle is grounded in larger considerations of separation of powers.
- IV. The *O'Brien* test is not always easy to apply. More troublesome, however, is that it does little to help us understand the most vexing of issues: What is *speech*, what is *conduct*, and what is the difference? The Court's consideration of subsequent cases may help us to get a handle on the distinction.
- A. In *Tinker v. Des Moines* (1969), the Court considered a case in which several students at a public school were suspended for wearing black armbands to oppose the war in Vietnam.
 - B. In his opinion for the Court, Justice Fortas described this conduct as "akin to pure speech."
 - C. Consequently, "In order for the State to justify the prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."
 - D. Fortas concluded by noting, "In our system, state-operated schools may not be enclaves of totalitarianism."
 - E. The case generated an impassioned dissent by Justice Black, who wrote: "Assuming the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim, as a platform for the exercise of free speech."
 - F. *Tinker* suggests a wide range of First Amendment freedoms for students in public schools, but, in recent years, the Court has been more sympathetic to the claims of school officials who argue that limits on expression are necessary to maintain school discipline and the integrity of the curriculum.
- V. Two years later, in *Cohen v. California* (1971), the Court considered the case of young man who entered a courthouse wearing a jacket with the slogan "F--- the Draft" imprinted on the back.
- A. Writing for the Court, Justice Harlan ruled that the conviction violated Cohen's freedom of speech, noting, "It is, nevertheless, often true that one man's vulgarity is another's lyric. In fact, words are often chosen as much for their emotive as their cognitive force."
 1. Recall our discussion of *O'Brien*. Should we ask if Cohen had available another means, nonvulgar, of expressing his idea?
 2. Do we want judges to decide whether "Damn the Draft" is equivalent to "F--- the Draft"?
 - B. In dissent, Justice Blackmun argued, "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech."

VI. Finally, consider the interesting case of *Clark v. Community for Creative Nonviolence* (1984).

- A. In this case, protesters wanted to camp overnight in Lafayette Park to bring attention to the plight of the homeless. The Park Service refused to issue permits for overnight stays. The protesters sued, claiming that their desire to sleep in tents was a form of symbolic expression protected by the First Amendment.
- B. Following *O'Brien*, we should ask: What is the governmental policy or interest at play, and is it content neutral? If so, we apply the *O'Brien* test, as did the Court. The Court had little difficulty concluding that the restriction passed the constitutional analysis.
- C. Unfortunately, the *Clark* case fails, as have all others, to do much to address the underlying question about whether and when there is a constitutionally relevant distinction between speech and conduct.

Essential Reading:

United States v. O'Brien (1968).

Tinker v. Des Moines (1969).

Clark v. Community for Creative Nonviolence (1984).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 7, pp. 364–365.

Supplementary Reading:

Mark R. Arbuckle, “Vanishing First Amendment Protection for Symbolic Expression 35 Years after *United States v. O'Brien*,” 25 *Communications and the Law* 1 (2003)

Joshua Waldman, “Symbolic Speech and Social Meaning,” 97 *Columbia Law Review* 1844 (1997).

Questions to Consider:

- 1. Why did the Founders fail to define *speech* in the First Amendment? Is the search for a definition a necessary part of the Court’s effort to interpret the First Amendment? Is such a search destined to failure?
- 2. Should a person’s intent matter in trying to determine if conduct is sufficiently expressive to warrant First Amendment protections? What if a person intends to communicate, but the audience fails to comprehend the message or even to understand that there is a message?
- 3. The Court typically distinguishes between content-based and content-neutral restrictions on symbolic speech and conduct. Why? In either case, isn’t the effect to chill speech?

Lecture Twenty-One

Indecency and Obscenity

Scope: In the past few lectures, we have struggled with a series of classic First Amendment problems. For example, in Lecture Nineteen, we explored the so-called internal security or subversive speech cases, and in Lecture Twenty, we took up the problems of symbolic speech and expressive conduct. In both areas, as we saw, the Court has constructed a complicated jurisprudence, a jurisprudence that centers on a variety of doctrinal tests, such as the clear and present danger doctrine or the four-part *O'Brien* test for regulating symbolic speech. And implicit in both areas of inquiry was also a problem of definition: What is *speech*? What isn't?

We will follow the same course in this lecture, where we ask: Is pornography speech? This is, in many ways, also a question of definition. And the Court's efforts to provide such a definition have similarly resulted in a set of doctrinal tests that we will need to consider. In *Miller v. California* (1973), the Court provided some support for the efforts of state and local governments "to maintain a decent society," developing a three-part test designed to distinguish between protected speech and the "crass commercial exploitation of sex." Since *Miller*, the Court has continued to struggle, however, with the problem of definition. As we shall see, too, the Court's recent efforts to define pornography and indecency have been further complicated by the rapid advance of technology. Thus, in *Reno v. American Civil Liberties Union* (1997), the Court found unconstitutional two key provisions of the Communications Decency Act of 1996 designed to prevent minors from indecent and patently offensive communications on the Internet. In *Ashcroft v. Free Speech Coalition* (2002), the Court struck down a part of the Child Pornography Protection Act that regulated "virtual child pornography." Finally, we will conclude by returning to the question that undergirds every First Amendment case: What do we do if the values that inform the First Amendment conflict with other values, such as equality or human dignity?

Outline

- I. The Court's modern obscenity jurisprudence begins with *Roth v. United States* (1957), in which the Court reaffirmed the rule that obscenity is unprotected by the First Amendment.
 - A. The justices on the *Roth* Court, however, could not agree on a definition of *obscenity*.
 1. In his majority opinion, Justice Brennan wrote: "All ideas having even the slightest redeeming social importance ... have the full protection [of the First Amendment].... But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."
 2. Critics object: Who is the Court to determine which kinds of speech have "redeeming social importance"? Where does the Constitution give the Court any guidance about which kinds of speech merit protection and which do not?
 - B. In a separate opinion, Justice Harlan accused the majority of begging the question. What question was that? The definition of pornography itself, we might say.
 1. Justice Harlan wrote: "We deal with highly emotional, not rational, questions. To many, the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment...."
 2. Note here how Justice Harlan has combined the question of definition with another of the themes that runs throughout our course—the power of judges to decide constitutional questions and the issue of what should be left to the political process or to the people themselves.
 - C. Consider what might happen if we followed the course suggested by Justice Harlan; that is, consider a constitutional amendment that prohibits pornography and obscenity.
 1. Is it clear that the Court would be out of the business of considering whether and when certain kinds of pornography or obscenity violate the First Amendment?
 2. What about a pornographic work that is simultaneously political?

3. Feminist legal theory has argued that all forms of pornography are deeply political because they embrace the subordination of women.
 4. A new constitutional amendment prohibiting pornography and obscenity would come in conflict with the First Amendment freedom of speech, and a court would eventually have to rule whether (and, if so, how) to reconcile the new amendment with the First Amendment or whether some constitutional values are even more important than freedom of expression.
- D. Finally, in *Roth*, Justice Douglas, dissenting, likewise rejected the majority's formulation, arguing, "I reject too the implication that the problems of freedom of speech ... are to be resolved by weighing against the values of free expression the judgment of the Court that a particular form of that expression has 'no redeeming social importance.'"
- E. In this and other cases, we can fairly ask: How does the test work in practice?
1. Following *Roth*, the Court found almost all forms of obscenity, except for hard-core pornography, protected by the Constitution.
 2. The *Roth* definition simply failed to give lower courts the kind of guidance that would be necessary to provide for a workable test.
- II. In *Miller v. California* (1973), the Court again picked up the issue of definition.
- A. As in *Roth*, some kinds of pornography are not protected by the First Amendment. The Court began by acknowledging that state and local governments may take steps to "maintain a decent society."
- B. The majority in *Miller* rejected the *Roth* test in favor of a new three-part standard for determining obscenity.
- C. Under the new test, a work is obscene if:
1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
 2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
 3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
- D. Let's look at each part of this three-prong test.
1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
 - a. Who is the average person? It is the job of the jury to speak for the average person.
 - b. What is the relevant community?
 - c. What is prurient interest? Courts have defined this as "shameful" or "sinful" interest in sexuality.
 2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
 - a. The state law must define such conduct with a certain level of detail; otherwise, citizens can't know what is prohibited.
 - b. "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or alternatively, patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
 3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
 - a. What if the work in question violates prongs one and two but satisfies prong three?
 - b. And who decides? Remember, it is the same jury, representing the community, that took up prongs one and two.
 4. This suggests that *Miller* sets out a process for resolving pornography cases but doesn't really get to the underlying, fundamental question, just as Justice Harlan suggested in *Roth*: When, if ever, should some kinds of pornography merit protection as speech, and when and why, if ever, should other kinds of social interests and concerns outweigh freedom of expression?

- E. Notwithstanding the seeming precision of the new test, since *Miller*, the courts have continued to struggle with basic definitional issues, even as they have seemed to warm to suggestions that obscenity and pornography sometimes debase “family life, community welfare, and the development of the human personality,” as the Court noted in *Paris Adult Theatre I v. Slaton* (1973).
 - F. In some recent cases, for example, the Court has begun to consider the doctrine of the secondary effects of pornography in the community, suggesting, for example, that in areas where there are pornographic bookstores and theaters, there may be secondary effects, such as increased crime rates and an increase in prostitution.
 - G. One of the best examples of this new approach is in the case of *Barnes v. Glen Theater*, decided in 1991.
 - 1. In this case, the Court sustained an Indiana public decency statute as applied to nude dancing as a form of entertainment.
 - 2. Three justices—Rehnquist, Kennedy, and O’Connor—were willing to admit that nude dancing might well have an expressive dimension, though they did not inquire directly into the nature of the message that might be communicated.
- III. The Court’s efforts to construct obscenity jurisprudence have also been hampered by the rapid advance of technology, especially as evidenced by the Court’s cases involving the Internet.
- A. Thus, in *Reno v. American Civil Liberties Union* (1997), the Court found unconstitutional two key provisions of the Communications Decency Act of 1996 designed to prevent minors from exposure to indecent and patently offensive communications on the Internet.
 - B. In his majority opinion, Justice Stevens ruled that a federal law prohibiting intentional transmission of obscene or indecent messages to minors is unconstitutional. In distinguishing the case from others involving indecent material on television and radio, the Court observed that the Internet is “a unique and wholly new medium of worldwide communication.”
 - 1. The first key question would seem to be: In what ways is the Internet unique? Is it unique because, unlike some other broadcast media, the resource is “unlimited”?
 - 2. Is it unique because it transcends state or national boundaries?
 - C. More recently, in *Ashcroft v. Free Speech Coalition* (2002), the Court struck down a part of the Child Pornography Protection Act that regulated “virtual child pornography.”
 - 1. Of course, a central problem here was the inherent ambiguity in such a prohibition.
 - 2. However, the state’s efforts to protect children on the Internet might survive in other contexts if the government can overcome that ambiguity.
 - D. One similarity in these two cases is that the government sought to restrict expression in order to advance another interest—in both of the cases, obviously, the asserted interest was to protect children in society.
- IV. Another important area in the fight against obscenity involves the effort to define pornography as a violation of the civil rights of women.
- A. Catherine A. MacKinnon and Andrea Dworkin, who drafted an anti-pornography statute adopted by the city of Indianapolis, spearheaded much of the early impetus for these efforts.
 - B. The statute prohibited “trafficking” in pornography and provided that anyone injured by someone who had seen or read pornographic materials could sue the maker or seller of the materials.
 - C. In *American Booksellers Association, Inc. v. Hudnut* (U.S. Court of Appeals, 7th Circuit, 1985), a circuit court ruled the statute unconstitutional.
 - 1. Judge Easterbrook wrote, “Indianapolis justifies the ordinance on the ground that pornography affects thoughts. . . . [W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination.”
 - 2. The judge also noted, though, that “this simply demonstrates the power of pornography as speech.”
 - 3. Precisely because pornography can influence some people (in this case, men) to harm others (in this case, women and children), it is speech—and not just speech but consequential speech—and, therefore, must be protected by the First Amendment.

- V. Judge Easterbrook's quote is a nice place to end, because it reminds us that a robust commitment to freedom of expression means that we may sometimes have to see, hear, and read things that are deeply offensive or that assault our good sense.
- A. When, if ever, is that assault not only on our sensibilities but also on basic constitutional values, such as dignity and equality?
 - B. That was the logic of the Indianapolis statute, and that is the topic raised by the decision in *Hudnut*: When, if ever, must we regulate or moderate our commitment to freedom of speech simultaneous with our commitment to protecting human dignity?
 - C. We will take that question up in our next lecture, when we consider the problems involved with hate speech and fighting words.

Essential Reading:

Roth v. United States (1957).

Miller v. California (1973).

Reno v. American Civil Liberties Union (1997).

Ashcroft v. Free Speech Coalition (2002).

American Booksellers Association, Inc. v. Hudnut (U.S. Court of Appeals, 7th Circuit, 1985).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 7, pp. 372–375.

Supplementary Reading:

Donald A. Downs, *The New Politics of Pornography*.

Lawrence Lessig, "Reading the Constitution in Cyberspace," 45 *Emory Law Journal* 869 (1996).

Catherine A. MacKinnon, *Only Words*.

Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*.

Questions to Consider:

1. Why should the First Amendment protect only those works that have redeeming social value, or serious artistic, literary, political, or scientific value? What theory or understanding of the purposes of the speech clauses would support such a rule?
2. The tension between liberty and community looms large in the obscenity cases. But exactly what do these terms mean? What, precisely, is the liberty interest in producing or having access to pornographic materials? And precisely what interests does the state advance when it prohibits them? Having identified these competing interests, is there a clear constitutional rule for balancing them?
3. Consider another aspect of this problem: In *Miller*, the Court does try to identify the sorts of interests a state or community might have in prohibiting certain kinds of pornography and obscenity. What reasons does the Court offer for entrusting such decisions to smaller local communities instead of the nation as a whole?

Lecture Twenty-Two

Hate Speech and Fighting Words

Scope: Consider the following: Should a liberal society suppress racist propaganda or hate speech directed at particular groups? Should it regulate the use of epithets or words that offend, hurt, or simply shock those who hear the message? These questions are important because they highlight the tension between our commitment to freedom of expression and our collective interest in protecting such values as civility, social morality, and public order. We begin with *Chaplinsky v. New Hampshire* (1942), in which the Court ruled that fighting words “contribute nothing to the expression of ideas or truth.” We conclude with *Texas v. Johnson* (1989), the infamous flag-burning case, and *R.A.V. v. City of St. Paul* (1992), in which the Court struck down a Minneapolis ordinance banning certain kinds of hate speech.

Outline

- I. When, if ever, may society limit speech because the expression in question is racist, bigoted, or hateful? May society limit speech because it offends or tarnishes cherished national symbols, such as the flag? The Supreme Court has struggled with each of these issues in the last few decades, and like its work in other First Amendment issues, the decisions highlight the tension between liberty and community.
- II. Although such concepts as *hate speech* may seem of recent vintage, the Court has a long history in such areas. In two early cases, for example, the Court tried to balance speech rights against a community’s interest in prohibiting offensive speech. One of these was *Chaplinsky v. New Hampshire*, decided in 1942. However, I begin with a later case, *Beauharnais v. Illinois* (1952), because it dealt with racially offensive speech. As it turns out, the Court’s most recent hate speech cases also often involve race, so I think it best to begin and end on that topic.
 - A. In *Beauharnais v. Illinois* (1952), the Court considered the constitutionality of a statute that made it a crime to defame any class of persons based on race or creed as “criminal, unchaste, or lacking in virtue....”
 1. In upholding the statute, the majority noted that it would be “arrant dogmatism” for the Court to deny a state legislature the authority to protect society against such attacks.
 2. It is important to note that we might describe the conflict here as between our commitments to freedom of speech and to equality, as well as between individual and community.
 3. In this case, then, the Court weighed the balance in favor of community, but it recognized that in other cases, the balance might be struck differently.
 4. In an important dissent, Justice Douglas wrote: “Intemperate speech is the distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. So it has been from the beginning, so it will be throughout time. The Framers of the Constitution knew human nature as well as we do.” This seems to recall the safety valve defense of freedom of expression that we considered in an earlier lecture.
 - B. I mentioned an earlier case that laid some of the groundwork for *Beauharnais*. In the important case of *Chaplinsky v. New Hampshire* (1942), the Court considered a New Hampshire statute that forbade the use of “any offensive, derisive, or annoying word to any other person ... with an intent to deride, offend, or annoy him.”
 1. The facts involved a Jehovah’s Witness, Chaplinsky, who made a series of inflammatory remarks in public in Rochester, New Hampshire.
 2. A local police officer arrested Chaplinsky, who had called the officer a “God-damned racketeer” and a “fascist.”
 - C. In his opinion for the Court, Justice Murphy noted that the First Amendment does not protect “fighting words,” or words that tend “by their very utterance” to injure or to “incite to an immediate breach of the peace.”
 1. What would it mean to say that a word “by its very utterance” tends to injure or incite a breach of peace?

2. Justice Murphy elaborated: “There are certain well-defined and narrowly limited classes of speech, the prevention and prohibition of which have never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or ‘fighting’ words....”
3. The Court noted that fighting words “contribute nothing to the expression of ideas or truth” and that their value is outweighed by society’s interest in “order and morality.”
4. In this case, then, the Court explicitly measured the speech against a particular theory about why speech is valuable in a democracy. It measured it, too, against our collective interests in other values, such as “order and morality,” the prevention of harm to others, or perhaps, the promotion of human dignity.
5. Finally, we should ask if there is some standard that allows us to distinguish fighting from nonfighting words. The Court suggested that context would be a critical part of such a test.

III. Context was also important in our next case. In *Texas v. Johnson* (1989), the Court considered another kind of offensive expression—the burning of an American flag.

- A. In a 5–4 opinion, a divided Court struck down a Texas statute that prohibited the “desecration of venerated objects,” such as a U.S. flag. In this case, a man had burned the flag in protest at the Republican National Convention in Dallas.
- B. In his opinion for the Court, Justice Brennan overturned the conviction because, in seeking to preserve the integrity of the flag as a symbol of national unity, Texas had tread directly on the content of the intended message: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable.”
- C. In dissent, Chief Justice Rehnquist denied that the flag burning was an “essential part of any exposition of ideas” and, indeed, compared it instead to “an inarticulate grunt.” In addition, the Chief argued that the act conveyed nothing that “could not have been conveyed and was not conveyed just as forcefully in a dozen different ways.”
- D. In a separate dissent, Justice Stevens noted, “the value of the flag as a symbol cannot be measured.”
- E. It is important, too, to consider a part of Justice Kennedy’s extraordinary concurring opinion. What is important is not so much what it has to say about the First Amendment, but rather what it says about one of the great themes—or, if you prefer, one of the great unanswered questions—of this course: Do the justices just make it up? Justice Kennedy wrote: “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right—right in the sense that the law and the Constitution as we see them compel the result.”

IV. The Court revisited *Chaplinsky*’s fighting words doctrine in the important case of *R.A.V. v. City of St. Paul* (1992), a case that recalls, in some ways, *Beauharnais*.

- A. In this case, the Court addressed the constitutionality of a St. Paul ordinance that forbade placing “on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”
- B. The Court was unanimous in striking down the law, but the Court could muster only a bare majority of 5–4 in favor of an opinion by Justice Scalia that found the statute unconstitutional as *viewpoint discrimination*. In Justice Scalia’s opinion, the statute was unconstitutional because it prohibited only certain kinds of fighting words but not all fighting words.
 1. This amounted to a kind of censorship, Justice Scalia wrote. Again, we sometimes refer to this as *viewpoint discrimination*.
 2. There is, also, a principle of equality implied by a prohibition on viewpoint discrimination.
 3. Finally, Justice Scalia also argued, “An ordinance not limited to the favored topics ... would have precisely the same beneficial effect.”
- C. In a subsequent case, *Virginia v. Black* (2003), the Court upheld a Virginia statute that provided for enhanced criminal penalties in cases involving racial “hate crimes.” The difference between that case and *R.A.V.*, wrote Justice O’Connor, was that the statute in *Virginia* was directed to conduct, not speech.

1. Justice O'Connor wrote: "The First Amendment permits Virginia to outlaw cross burning, because burning a cross is a particularly virulent form of intimidation."
 2. One might respond that this does not squarely face up to Justice Scalia's opinion in *R.A.V.* or to the question of whether such actions should be considered speech, no matter how offensive.
- V. These cases remind us that speech may not be shut down simply because it offends or shocks. But they may also show that the traditional rationales for protecting speech may be less persuasive when the point is not so much about the communication of ideas and is instead more about the vilification and intimidation of others.

Essential Reading:

Chaplinsky v. New Hampshire (1942).

Texas v. Johnson (1989).

R.A.V. v. City of St. Paul (1992).

Wisconsin v. Mitchell (1993).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 7, pp. 370–372.

Kent Greenawalt, *Fighting Words*.

Supplementary Reading:

Richard Abel, *Speech and Respect*.

Donald A. Downs, *Nazis in Skokie: Freedom, Community, and the First Amendment*.

Questions to Consider:

1. Assume that some speech is deeply offensive, perhaps because it is racist or bigoted. What understanding of the purposes of the First Amendment requires the community to tolerate such speech? Does the argument that freedom of speech is a necessary mechanism for the discovery of truth require such tolerance, for example? Do the speech rights of individuals necessarily outweigh another's interest in human dignity or society's interest in civilized discourse?
2. Is the integrity of the community at issue in the flag-burning case? One might argue that the flag is a visible symbol of social integrity or that it shelters the memory and character of our shared community. Doesn't the protection of the flag ensure, or help to ensure, that the community will exist over time, beyond the lives of the individuals that comprise it? Alternatively, is the meaning of America, which the flag also symbolizes, our freedom to disagree on or about any institution, idea, convention, or symbol, no matter how sacred or cherished?
3. What constitutional value or values, if any, trump freedom of expression?

Lecture Twenty-Three

The Right to Silence

Scope: Does freedom of speech include the right not to speak? In *Talley v. California* (1960), the Court considered a variant of this question in finding unconstitutional a Los Angeles ordinance that restricted the distribution of anonymous handbills and flyers. In this lecture, we also take up two important cases in which the Court addressed the constitutionality of state laws that required schoolchildren to recite the pledge of allegiance. In *Minersville v. Gobitis* (1940), the Court upheld such a requirement. But just three years later, in *West Virginia v. Barnette* (1943), the Court changed its mind, concluding that a compulsory pledge “invades the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control.” More recently, in *Wooley v. Maynard* (1977), the Court ruled that the state of New Hampshire could not prosecute an individual who had masked over the phrase “Live Free or Die” on the license plate of his car.

Outline

- I. We typically think of freedom of speech as involving the right to speak our minds, to say or express what we believe. But should it also include the right to be silent—not in the criminal sense, but in the sense that the state may not compel us to say what we might not believe?
 - A. Such cases arise more frequently than one might imagine. Every day, thousands of students recite pledges as school begins. Many of us take certain kinds of oaths—such as loyalty oaths or oaths to testify truthfully in a court of law—as a matter of routine.
 - B. Sometimes such oaths implicate freedom of religion issues, as we shall see in Lectures Twenty-Five through Twenty-Seven, but they also raise freedom of speech claims, as well.
- II. Before we take up these issues, this is an appropriate point to reflect on fundamentals.
 - A. We began our study of the First Amendment by considering the different justifications we can advance for protecting freedom of expression.
 - B. We then moved to a discussion of some specific First Amendment issues, such as illegal advocacy, pornography, and hate speech.
 - C. We can say, I think, that no matter what the specific issue, some basic themes or principles are always present.
 1. First, there is the problem of definition.
 2. Second, we confront a wide variety of doctrinal tools and formulas, though we may wonder how much they assist in reaching decisions.
 3. Third, specific issues and doctrines notwithstanding, there are always present larger questions about how we reconcile tensions between our commitment to expression and other social values.
 - D. There is, too, yet another difficulty, especially prominent in this lecture. This is what we might call the problem of decisional authority, and we have seen it before. The problem is: Which branch of government should be entrusted with such weighty matters?
- III. In *Talley v. California* (1960), the Court considered a variant of this question in finding unconstitutional a Los Angeles ordinance that restricted the distribution of anonymous handbills and flyers.
 - A. The plaintiffs in *Talley* challenged the prohibition on anonymous flyers. In this case, they had distributed flyers and handbills urging a boycott of merchants who allegedly discriminated against their employees on the basis of race.
 - B. The Court ruled for the plaintiffs, noting that a requirement of identification would tend to restrict speech.
 - C. Justice Black wrote that “persecuted groups and sects from time to time throughout history have been able to criticize ... either anonymously or not at all.”

- D. We need to understand the rationale behind this opinion. Justice Black stressed the point that without anonymity, some speech might never be voiced or heard. But we should consider, too, what kinds of interests might lie behind a governmental regulation prohibiting anonymous speech.
- IV. The Court's most famous cases involving compelled speech, however, have not addressed the question of anonymous speech but, instead, have considered the constitutionality of state laws requiring schoolchildren to salute the flag and recite the Pledge of Allegiance.
- A. In the first of these cases, *Minersville v. Gobitis* (1940), the Court upheld the constitutionality of the flag salute as an exercise of the state's use of the police power to promote patriotism among the students. The Gobitis children, Jehovah's Witnesses, were expelled after they refused to say the pledge.
- B. Writing for the Court, Justice Frankfurter agreed that "every possible leeway should be given to the claims of religious faith" but nevertheless upheld the school's requirements.
1. Frankfurter noted, "The state's interest is inferior to none.... National unity is the basis of national security."
 2. Frankfurter also struck a familiar chord about the necessity for judicial deference to legislative authority as a central feature of democratic self-governance.
- C. *Gobitis* unleashed a wave of persecution against the Witnesses; the Justice Department, for example, recorded several cases of lynching and castrations.
- D. The Court reopened the issue three years later in the case of *West Virginia v. Barnette* (1943). This time, the Court changed its mind, concluding that a compulsory pledge "invades the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control."
- E. In his opinion for the Court, Justice Jackson began by noting, "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote. They depend on the outcome of no election."
1. This claim is fundamentally at odds with the claim made by Felix Frankfurter, writing for a majority in *Minersville*.
 2. Jackson continued: "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual."
- F. Justice Jackson has described the conflict in a particular way. But we might remember that the community does have an interest in this case—the promotion of patriotism, for example—and we might wonder if the First Amendment gives us any real guidance about how to weigh the balance.
- G. It is here that we see the importance of Jackson's insistence that: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities...."
- H. Jackson continued: "Freedom to differ is not limited to things that do not matter much.... The test of [freedom] is the right to differ as to things that touch the heart of the existing order." The case, he wrote, "is made difficult not because the principles of its decision are obscure, but because the flag involved is our own."
- I. In a strongly worded and emotional dissent, Justice Frankfurter (who had written the majority opinion in *Minersville*) began, "One who belongs to the most vilified and persecuted minority in history is not likely to be insensitive to the freedoms guaranteed by our Constitution."
1. Frankfurter also noted, in the same vein, "Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court's opinion."
 2. Why tell us that? Why does it matter what his personal opinion would be? Justice Frankfurter reminds us that there is a difference between a judge's appeal to his or her own personal identity or personal set of beliefs and the obligation to interpret the Constitution.
- J. Coming to the merits, Frankfurter argued, "The state is not shut out from a domain because the individual conscience may deny the state's claim...."

- K. In *Wooley v. Maynard* (1977), the Court ruled that the state of New Hampshire could not prosecute an individual who had masked over the phrase “Live Free or Die” on the license plate of his car.
1. *Wooley* involved a Jehovah’s Witness who objected to the phrase “Live Free or Die” on his New Hampshire license plate. In his majority opinion, Chief Justice Burger compared the case to *Barnette*, noting, “Here, as in *Barnette*, we are faced with a state measure which forces an individual as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”
 2. Chief Justice Burger argued also that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all” as equal parts of a comprehensive “individual freedom of mind.”

Essential Reading:

Talley v. California (1960).

Minersville v. Gobitis (1940).

West Virginia v. Barnette (1943).

Wooley v. Maynard (1977).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, pp. 467–468.

Supplementary Reading:

Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, pp. 13–36.

Questions to Consider:

1. As we saw earlier, there are several different justifications for freedom of speech. Do all of them support a conclusion that freedom of speech must also include a right not to speak or not to be compelled to speak?
2. What explains the different opinions in the two flag-salute cases? Do they turn on different claims about the purposes of the First Amendment? Do they turn, instead, on different definitions of speech? Do they rest on different estimations about the importance of the state’s interests? Do they embody different understandings about the limits of judicial power?
3. Does the First Amendment point, as Chief Justice Burger suggested in *Wooley*, to “an individual freedom of mind”? What would be the limits on such a right, if any?

Lecture Twenty-Four

Why Is Freedom of Religion so Complex?

Scope: The relationship between matters of the soul and matters of state is a subject of intense controversy in the United States. In this lecture, we begin an extended inquiry into freedom of religion. As we shall see, the Court's work in this area is complicated and often confusing. In part, this is because the First Amendment includes not one but two guarantees designed to protect religious freedom—the establishment clause and the free exercise clause. Although they overlap, the two clauses also point in different directions and seek to achieve different things. Moreover, the Founders either decided not to or neglected to give us a definition of *establishment* and *free exercise* and even of *religion* itself. Finally, in recent years a sharply divided Court has hinted at sweeping changes in the long-settled doctrines that make up freedom of religion jurisprudence.

Outline

- I. Every polity must reconcile the demands of religious faith (and denial) with the beliefs of others, as well as with the collective welfare of the community.
 - A. In the United States, the parameters of this conflict are sketched out by the religion clauses of the First Amendment. This amendment, as most folks know, has two critical components:
 1. The first is the establishment clause, which provides that “Congress shall make no law respecting an establishment of religion.”
 2. The second provides that Congress shall not prohibit the “free exercise” of religion.
 3. We shall see that these two provisions have occasioned an astonishingly complex and often confusing jurisprudence.
 4. Sometimes, that confusion is directly traceable to the existence of the two clauses—they do not always work in tandem, and indeed, they sometimes seem to pull in different directions.
 - B. There are other provisions as well, most notably Article VI, which provides that there shall be no religious test as a qualification for public office.
 - C. We should note, however, that these prohibitions applied only to the federal government until well into the 20th century, when the religion clauses were incorporated through the Fourteenth Amendment. At the time of the Founding, for example, many states had established religions and required religious oaths for public office.
 1. As a consequence, almost all of the Court's work in this area is from the 20th century.
 2. It may be that some of the confusion and complexity we will encounter stems from just that fact—perhaps the Court needs more time, and perhaps there is something especially difficult about making 18th-century guarantees of religious freedom have meaning and coherence more than two centuries later.
 3. For example, how are we to reconcile the two clauses?
 4. One justice once pointed to the problem by asking us to imagine a lonely soldier stationed at a far outpost. He might plausibly claim that his right of free exercise is impinged if the military does not provide access to a chaplain or minister of his faith.
 5. But if the military obliges his demand, it runs the risk of favoring one religion over another or religion over nonreligion and, thus, might run afoul of the establishment clause.
 6. This conflict between the two clauses is not a necessary consequence—it follows from our specific interpretations of the clauses. Those interpretations might be the wrong ones, and the conflict may be artificial. But they point to difficulties in giving the clauses meaning.
- II. The religion clauses, then, are among the most controversial and ambiguous of the Constitution's provisions, and the Court's efforts to give them meaning have produced a long and complex set of rulings and doctrines.
 - A. Consider two kinds of immediate problems:

- B. First, under what conditions, if any, may a majority of the community express its belief in public spaces, such as the nation's elementary schools or at the opening of legislative sessions? For example, should students be allowed to pray at the beginning of a school day or at a school-sponsored event, such as a graduation?
 - 1. How are we to decide such cases? Neither the establishment clause nor the free exercise clause clearly settles the matter.
 - 2. In other words, we need some interpretive method to determine the answer.
 - C. Second, under what conditions, if any, should the community be permitted to regulate or prohibit the religious beliefs of individual citizens or religious groups? Should parents, for example, be permitted to withhold from their children certain types of medical treatments, such as blood transfusions, if such treatments violate their faith?
 - 1. These, too, are not mere abstractions. There are hundreds of such cases, and in most, if not all, of our choices they have profound consequences.
 - 2. Justice Felix Frankfurter once referred to such clashes as "great tragedies," as conflicts not between right and wrong but between competing conceptions of what is good and what is right.
- III. Before we take up specific cases and issues, we should consider, at a higher level of abstraction, what the religion clauses were intended to accomplish.
- A. I don't mean so much that we should engage in a search for the Framers' intent. Instead, I think we should consider what the clauses are meant to accomplish to determine what ends they mean to achieve.
 - B. One possible purpose is to remove religion as a source of civil conflict. The clauses do this, we might argue, insofar as they immunize religion from state control.
 - C. They may also do it by encouraging and promoting religious pluralism.
 - 1. By one survey, there are more than 200 major religious denominations in the United States and scores of so-called "minor" faiths.
 - 2. The existence of so many religions may help to keep any one of them from establishing a foothold in the government, but it also increases the opportunity for conflict among them.
- IV. Some of the difficulties in the Court's jurisprudence are not specific to the clauses but, instead, result from a familiar tension—the conflict between our commitment to individual liberty and the interests of the community.
- A. As we shall see, these conflicts are especially pronounced in the religion cases.
 - B. It might be, however, that if we characterize the religion cases as just another example of this larger tension, we might miss something unique about religion as a constitutional liberty.
 - C. Consider this question, for example: Given that speech and expression are already protected, what was the need to include two guarantees for freedom of religion in the First Amendment?
 - 1. One might argue that most, if not all, expressions of religious faith would be protected under the speech clauses.
 - 2. Indeed, some cases about religious freedom seem as though they were decided on other grounds, such as *Minersville* and *Barnette*.
 - D. Some scholars and judges have argued that our inability or unwillingness to articulate a clear distinction between speech and religion reflects a failure to understand how or why the Founders took special care to protect religion.
- V. Of course, another difficulty we will encounter will also seem familiar and is suggested by the foregoing issue. What is the definition of *religion*?
- A. As we shall see, the Court's definition has changed dramatically over the years, but at no time has the Court been able to come up with a comprehensive, universal definition.
 - 1. Some of the Court's earliest cases are directly relevant to the question of definition, and many, interestingly, involve religious minorities.
 - 2. For example, the Mormon migration west raised a number of freedom of religion questions—often occasioned by the practice of polygamy.

3. In *Reynolds v. United States* (1878), the Court upheld a federal statute that prohibited polygamy in the territories. Later, in *Davis v. Beason* (1890), the Court upheld a federal statute that not only prohibited polygamy but also made it a crime to belong to a religion that practiced it. Upon conviction, one could lose the right to vote.
 4. Writing for the Court, and taking care to define *religion*, Justice Field said, “The term ‘religion’ has reference to one’s view of his relations to his Creator and to the obligations they impose in reverence for his being and character, and of obedience to his will.”
 5. How does Justice Field know that this is the correct constitutional definition of *religion*?
 6. In a case decided almost a century later, this time involving the Amish, the Court again struggled with questions about definition. In *Wisconsin v. Yoder* (1972), the Court wrote, “To have the protection of the religion clauses, the claims must be rooted in religious belief.”
 7. What is a religious, as opposed to a nonreligious, belief? The Court is not as clear here but did note: “Thoreau’s choice was philosophical and personal, rather than religious.”
 8. Finally, there is the case of *Thomas v. Review Board* (1981). In this case, the Court wrote, “Courts are not arbiters of scriptural interpretation.”
 9. One consequence of the failure to define religion is that it is equally difficult to determine what is included as what is excluded. More generally, it points to the problem of judicial power in a democracy.
- B.** In addition, there is an underlying issue that harkens back to familiar problems of judicial power: Who should decide whether any particular set of beliefs is “really” a religion?
1. One possibility is that the courts should decide, but there are profound dangers here.
 2. A second possibility is to let individuals decide for themselves, but this, too, has several dangers, including the obvious one of abuse.
- VI.** Finally, we shall see over the next few lectures that few areas in civil liberties are in as much turmoil as religion. In recent years, the Court has hinted at substantial and far-reaching changes in long-settled rules and doctrines.
- A.** Part of the reason for this volatility may reflect deep-seated divisions in American society about what role matters of faith ought to play in the public square.
- B.** Again, this is part of the reason why our approach in this course is less focused on doctrine than overarching principles.

Essential Reading:

Phillip Hamburger, *Separation of Church and State*.

James H. Hutson, *Religion and the New Republic: Faith in the Founding of America*.

Mark De Wolfe Howe, *The Garden and the Wilderness*.

Supplementary Reading:

Lief Carter, *Constitutional Interpretation: Cases in Law and Religion*.

Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*.

Louis Fisher, *Religious Liberty in America: Political Safeguards*.

John T. Noonan, Jr., *The Luster of Our Country: The American Experience of Religious Freedom*.

Questions to Consider:

1. Are the religion clauses really necessary? Wouldn’t matters of faith and belief be protected under the speech and association protections of the First Amendment? Why would the Founders include special guarantees for religious freedom?
2. Do we need a definition of religion? Why? Suppose we could determine, with reasonable certainty, how the Founders defined religion. Should we be bound by an 18th-century understanding of what religion is or means?
3. Why are two clauses necessary? Do the establishment and free exercise clauses point to different religious freedoms? Where, if at all, do they overlap?

Glossary

advisory opinion: A formal opinion issued by a court about a hypothetical or nonadversarial state of affairs or when no concrete case or controversy is to be decided.

affidavit: A written and signed declaration of facts made before a notary public or a similar officer.

affirm: A decision by a higher or superior court to uphold or confirm a decision by a lower or inferior court.

amicus curiae: “Friend of the court”; a person or group, not a litigant in the case, that submits a brief on an issue before the court.

appeal: A request asking a higher court to review a trial or lower-court decision to decide whether it was correct.

appellant: A person or group who appeals a judicial decision from a lower court. This is the party listed first in the title of a decision.

appellate jurisdiction: When a higher or superior court has the authority to review the judgment and proceedings of an inferior or lower court.

appellee: The person or group who won the suit in a lower court and against whom an appeal is taken. This is the party listed second in the title of a decision.

balancing: A method of constitutional interpretation in which judges weigh one set of interests or rights against another set of interests or rights. This method is often found in First Amendment cases or in cases where two or more rights are in apparent tension.

bench trial: A trial, in a lower court, by a judge and without a jury.

Brandeis brief: A lawyer’s brief that utilizes not only case law and other legal materials but also a wide variety of non-legal materials, such as legislative findings, public policy documents, and data from social science. Named after Justice Louis Brandeis, who as a lawyer was among the first to use such materials.

brief: A written argument of law submitted by lawyers explaining why a case should be decided in favor of their client.

case and controversy (also “case or controversy”): A matter before a court in which the parties suffer real and direct harm and seek judicial resolution. The phrase often refers to Article III, Section 2 of the Constitution. Contrast with **advisory opinion**.

certification, writ of: Similar to an appeal, this is a process in which a lower court forwards a case to, and requests guidance from, an appellate court regarding unresolved legal questions.

certiorari, writ of: This is a method of appeal to the Supreme Court and the primary means by which the Court sets its docket. Technically, it is an order issued by the Supreme Court directing the lower court to transmit records for a case the Court has accepted on appeal.

circuit court: An appellate court; in the federal judicial system, each circuit covers several states; in most states, the court’s jurisdiction is by county.

comity: Courtesy, or the respect a court owes to other branches and levels of government.

common law: A type of legal system that is based primarily on judicial decisions rather than legislative action and statutory law.

complaint: A written statement by the plaintiff indicating legally and factually how he or she has been harmed by the defendant.

concurring opinion: An opinion by a judge who agrees with the result reached by the majority or plurality but disagrees with part of the reasoning.

constitutional court: A court with the authority to review whether governmental action conforms with the national constitution; in the United States, such courts are created under Article III.

counsel: The lawyers of record in a case.

de facto: In fact or practice.

defendant: The person named as the offender in a civil complaint or, in a criminal case, the person accused of the crime.

de jure: In law or official policy.

deposition: An oral statement, whether by a defendant or a witness, usually taken by an attorney, that may later be used at trial. See also **discovery**.

dicta (obiter dicta): Statements by a court that are not strictly necessary to reach the result in the case or that are not necessarily relevant to the result of the case. *Dicta* do not have the binding force of precedent.

discovery: The process before trial in which attorneys investigate what happened, often by using written interrogatories and taking oral depositions.

dissenting opinion: An opinion filed by a judge or judges who do not agree with the result reached by the majority of the court.

distinguish: To show why a case differs from another case and, thus, does not legally control the result.

diversity jurisdiction: The authority of federal courts to hear cases in which the litigants are citizens of different (or diverse) states.

docket: A full record of a court's proceedings.

doctrinalism: A method of constitutional interpretation that decides cases by appealing to specific doctrines, such as the "clear and present danger" test, and a way of organizing constitutional law more generally. This method is often found in First Amendment and equal protection cases.

doctrinal test: A set of guidelines, usually established through precedent, that the Court uses to adjudicate specific cases in specific areas of constitutional law. For example, the Court uses a three-part doctrinal test called the Miller test, first formulated in *Miller v. California* (1973), to determine whether materials are obscene. Other examples include the *Lemon v. Kurtzman* (1971) test for cases determining when a law has the effect of establishing religion, and the clear and present danger test in cases of subversive speech. Closer to terms of art than definitions, doctrinal tests typically have meanings that are much more fluid and dynamic than those of many other legal concepts: They may change from judge to judge and case to case.

due process: A requirement of fair and regular procedures; in the United States, there are two due process clauses, one in the Fifth Amendment, which applies to the federal government, and one in the Fourteenth Amendment, which applies to the states.

en banc: "In the bench" or "full bench." Refers to cases in which all the judges of the court participate. For example, in federal circuit courts, cases are usually decided, not *en banc*, but by a smaller panel of three judges. See also **panel**.

error, writ of: A writ—or an order—sent by a higher court to a lower court instructing it to send the case to the higher court for review for possible error.

ex parte: "From one side; on one side." A hearing at which only one of the sides to a case is present.

ex post facto: "After the fact"; a law that makes something illegal that was not illegal when it was done or that increases the penalty for the act after it has occurred. In the United States, *ex post facto* applies only to the criminal law.

ex rel.: "On behalf of" (Latin: *ex relatione*); typically, when the government brings a case on behalf of a private party that has an underlying interest in the case, as in *Missouri ex rel. Gaines v. Canada* (1938).

federal question jurisdiction: A case based on, or that involves, the application of the U.S. Constitution, acts of Congress, and treaties of the United States.

habeas corpus, writ of: "You have the body"; a writ from a judge or a court sent to an officer or official asking him or her to explain why he has authority to detain or imprison a certain individual.

impeachment: The constitutional process in which the House of Representatives may accuse high officers of the federal government of misconduct. The trial of an impeached officer takes place in the Senate.

incorporation: In constitutional doctrine, the process by which the Supreme Court made the Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment.

injunction: A judicial order, usually temporary in duration, that prohibits or compels the performance of a specific act to prevent irreparable damage or injury.

interrogatories: Written questions, prepared by an attorney, that must be completed under oath by the other party, usually with the assistance of counsel, during the process of discovery. See also **deposition**.

issue presented: The legal issue or constitutional controversy raised by the facts of the case.

judgment: A final decision by a court. It usually determines the respective rights and claims of the parties but is subject to **appeal**.

judicial review: The authority of a court to review legislation, executive orders, and other forms of state action for their conformity with constitutional provisions.

jurisdiction: The authority of a court to entertain, or hear, a case.

jurisprudence: The study of law and legal philosophy.

justiciability: Whether a case may be heard by a court or is suitable for a judicial resolution. See also **jurisdiction**.

legislative court: A court created by Congress under its Article I powers; in contrast to Article III courts, judges on such courts generally do not receive lifetime tenure.

litigant: A party to a lawsuit, whether plaintiff, defendant, petitioner, or respondent.

majority opinion: An opinion by a majority of sitting judges or justices. Majority opinions typically have the force of law. See also **precedent**.

mandamus, writ of: “We command”; an order by a court to a governmental official directing that official to take a particular course of action or to comply with a judicial order.

martial law: A condition under which rule by military authorities replaces that of civilian authorities and courts martial replace civilian courts. See also **habeas corpus**.

moot: “Unsettled; undecided.” A situation in which the underlying legal or constitutional controversy has been resolved or changed so that a judicial resolution is not possible or must be hypothetical.

natural law, natural rights: A system of law or rights based on “nature” or a higher law that transcends human authority.

opinion: A written explanation by a judge that sets forth the legal basis and rationale for his or her decision.

opinion of the court: An opinion by a majority of the judges or justices hearing a case. Compare with **plurality opinion**.

oral argument: Proceeding where attorneys explain their positions to a court and answer questions from the judges.

original jurisdiction: The authority of a court to hear a case in the first instance or as a trial court. Contrast with **appellate jurisdiction**.

originalism: A method of constitutional interpretation that seeks the “original” meaning of a constitutional provision or the intent of its drafters.

overrule: Where a decision by a court specifically repudiates or supersedes a statement of law made in an earlier case. Contrast with **distinguish**.

panel: A group of appellate judges, usually three, that decides cases. Also, a group of potential jurors for a trial court.

parties: The litigants in a case, including the plaintiff and the defendant, or on appeal, the appellants and appellees. The parties are typically named in the title of a case.

per curiam: “By the bench”; a collective decision issued by a court for which no individual judge or justice claims authorship or is identified by name.

per se: “In or by itself”; intrinsic, in the nature of the thing.

petitioner: The party who seeks a writ from a judge or the assistance of the court.

plaintiff: A person in a civil lawsuit who files the complaint against one or more defendants.

plurality opinion: The opinion in a case by a group of judges or justices that commands the most votes, but not an absolute majority of the court.

police powers: The powers reserved to state or local government to protect the “health, safety, welfare, and morals of the community.”

political question doctrine: A rule of judicial power which holds that cases primarily involving political instead of legal issues should not be decided by courts but, instead, should be left to the other branches of government.

precedent: A court decision in an earlier case that is similar to the case at hand. Precedents are typically binding, in the sense that other courts must follow the rule established in the precedent, or explain why the rule does not apply (see **distinguish**) or why the precedent should be **overruled**.

prima facie: “At first sight”; the evidence needed to establish a case until it is contested by opposing evidence.

procedure: The code or rules that govern how a lawsuit proceeds. Different areas of law and different courts have different rules of procedure.

prudentialism: A method of constitutional interpretation that advises judges to avoid setting broad rules for future cases, as well as a particular understanding of the limited role courts should play in a constitutional democracy.

record: A full and written account of the proceedings in a lawsuit.

recuse: The process by which a judge decides not to participate in a case, usually because he or she has or appears to have a conflict of interest. A judge normally will not set forth the reasons for his or her recusal.

remand: The process by which an appellate court sends a case back to a lower court for further proceedings, often with specific instructions of law.

reserved powers: Powers, or areas of governance, that remain with the states, as confirmed by the Tenth Amendment.

respondent: The party against whom legal action is sought or taken.

reverse: When a higher court sets aside, or overrules, an erroneous decision by a lower court.

ripeness: A requirement that a case must be sufficiently developed factually before it may be heard by a court. Contrast with **moot**.

seriatim opinion: “In series”; usually a reference to a judicial decision where each judge issues a separate opinion instead of a majority opinion announced by the court.

sovereign immunity: A doctrine that holds that the government may not be sued without its consent.

standing: A doctrine requiring a plaintiff to demonstrate that he or she has a real, direct, and personal concern in a case before the court will hear the case.

stare decisis: “Let the decision stand.” The practice of adhering to settled law and prior decisions. See **precedent**.

state action: Actions for which the state bears responsibility, either directly or indirectly; a requirement for a judicial remedy under the Constitution. In other words, the Constitution does not apply to private action.

statute: A law passed by a legislature. Compare with **common law**.

stay: A suspension of court proceedings.

structuralism: This method of constitutional interpretation suggests that the meaning of any particular or specific constitutional provision should be found by understanding how it relates to the constitutional text as a whole. This method is often found in separation of powers and federalism cases.

subpoena: A command to a witness to appear in a court or before a judge and give testimony.

textualism: A method of constitutional interpretation that stresses the actual wording of the constitutional provision in question, and which argues that we should read the words first for their ordinary meaning.

tort: A private civil wrong or breach of a legal duty owed to another person.

vacate: To set aside.

venue: The location or jurisdiction where a case in a lower court is tried.

verdict: A decision by a jury or a judge.

vested rights: A doctrine which holds that longstanding property rights must be respected by the government absent an urgent claim of public need.

writ: A written order by a court ordering an individual or a party to comply with its terms.

Biographical Notes

Note: Names of current justices are printed in capital letters.

ALITO, SAMUEL ANTHONY, JR. (b. 1950). Associate Justice; after an undergraduate degree from Princeton University and a J.D. from Yale Law School, he served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976 to 1977. Thereafter he worked in several different capacities for the Department of Justice and was U.S. Attorney, District of New Jersey, from 1987 to 1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. Nominated by President George W. Bush, he joined the Supreme Court on January 31, 2006.

Black, Hugo (1886–1971). Associate Justice; nominated by President Roosevelt. He served from 1937 until his retirement in 1971. Black had been an Alabama state judge and U.S. senator (1926–1937). He was a firm supporter of Roosevelt's New Deal programs in the Senate; his youthful membership in the Ku Klux Klan did not block his confirmation. Black was a First Amendment absolutist on the Court, strongly supporting free speech, separation of church and state, and strict textual analysis of the Constitution. His most important opinions include *Everson v. Ewing Township* (1947), *McCullum v. Board of Education* (1948), *Engel v. Vitale* (1962), and dissents in *Chambers v. Florida* (1940), *Betts v. Brady* (1942), *Adamson v. California* (1947), *Griswold v. Connecticut* (1965), and *Tinker v. Des Moines* (1969).

Blackmun, Harry (1908–1999). Associate Justice; nominated by President Nixon in 1970, he served until 1994. Blackmun attended Harvard University, where he earned his bachelor's degree in mathematics and studied law under the guidance of Felix Frankfurter. In 1959, President Eisenhower appointed Blackmun to the United States Court of Appeals for the Eighth Circuit, where his opinion in *Jackson v. Bishop* (1968) determined that physical abuse of prisoners was in violation of the Eighth Amendment. He voted to strike down laws interfering with reproductive rights and filed emotional separate opinions in *Webster v. Reproductive Health Services* (1989) and *Planned Parenthood v. Casey* (1992). His opinion in *Roe* was joined by six other justices, while in *Casey*, no other justice joined his opinion. Blackmun also wrote strong dissents in *Bowers v. Hardwick* (1986) and *DeShaney v. Winnebago County* (1989).

Brandeis, Louis D. (1856–1941). Associate Justice; nominated by President Wilson. He served from 1916 until his retirement in 1939 as the first Jewish justice. He argued the case of *Muller v. Oregon* in 1908, introducing the famous "Brandeis brief" and the use of social science in law. Brandeis also advocated the right to privacy in an influential law review article in 1890 and was opposed to the "bigness" in business and government. He wrote important opinions in *Whitney v. California* (1927), *Erie v. Tompkins* (1938), *Olmstead v. United States* (1928), and *New State Ice Co. v. Liebmann* (1932).

Brennan, William J., Jr. (1906–1997). Associate Justice; nominated by President Eisenhower in 1956, he served until 1990. He completed his law degree at Harvard and entered private practice in New Jersey. He authored important opinions in the areas of free expression, criminal procedure, and reapportionment. Brennan wrote the Court decision in *Cooper v. Aaron* (1958) that forced school officials to accelerate classroom integration and in *Baker v. Carr* (1962). In *United Steelworkers of America v. Weber* (1979), he wrote for the Court that federal anti-discrimination law does not bar employers from adopting race-based affirmative action programs to boost the number of blacks in the work force and management. Also, Brennan's opinion in *New York Times v. Sullivan* (1964) required public figures who sue for libel to prove "actual malice." He delivered the majority opinion in *Edwards v. Aguillard* (1987) that invalidated the required teaching of "creation science."

BREYER, STEPHEN G. (b. 1938). Associate Justice; nominated by President Clinton in 1994. Breyer graduated from Stanford University, and also received a B.A. from Magdalen College, Oxford, and a law degree from Harvard Law School, where he then taught, as well as at the Kennedy School of Government. He served as a law clerk to Justice Goldberg during the 1964 term. During 1980–1990, he served as a judge of the United States Court of Appeals for the First Circuit, and as Chief Judge during 1990–1994. Breyer wrote the plurality opinion declaring that the government may not require cable TV operators to segregate and block leased access channels that feature offensive or indecent programming in *Denver Area Consortium v. Federal Communications Commission* (1996). He dissented in the *Bush v. Gore* (2003) decision.

Burger, Warren Earl (1907–1995). Fifteenth Chief Justice; nominated by President Nixon. He served from 1969 until his retirement in 1986. Burger attended St. Paul's College of Law, now known as The William Mitchell College of Law. He went on to become a federal appeals judge. His most important opinions include *Swann v. Charlotte-Mecklenburg School District* (1971), *Milliken v. Bradley* (1974), and *Nixon v. United States* (1974), which upheld a subpoena for the Watergate tapes and resulted in Nixon's resignation. Burger's other benchmark decisions include *Miller v. California* (1973), defining obscenity, and *Lemon v. Kurtzman* (1971), concerning state establishment of religion.

Douglas, William O. (1898–1980). Associate Justice; nominated by President Cleveland in 1939, he left office in 1975, having served the Court for thirty-six years—the longest of any justice. Douglas graduated from Columbia Law School in 1925, began teaching at Yale Law School in 1927, and became a member of the Securities and Exchange Commission in 1936 (and chair in 1937). He expressed strong opinions in First Amendment rights cases, including *Terminiello v. City of Chicago* (1949) and

Dennis v. United States (1952), and wrote the lead opinion in *Griswold v. Connecticut* (1965). Some of his other important opinions include *Skinner v. Oklahoma* (1942) and a dissent in *Roth v. United States* (1957).

Frankfurter, Felix (1882–1965). Associate Justice; nominated by President Roosevelt in 1939, he served until 1962. Frankfurter was born in Vienna; emigrated with his parents to New York, where he attended City College; and then went on to Harvard Law School, where he earned a reputation as an expert in Constitutional and federal law. He advised Woodrow Wilson during the Paris Peace Conference of 1919, maintained an active interest in Zionist causes, and helped to found the American Civil Liberties Union in 1920. In *Minersville School District v. Gobitis* (1940) flag salute case, Frankfurter's opinion for the Court concluded that a public school was permitted to expel a student who refused, for religious reasons, to salute the American flag. His last opinion before retiring was a long dissent to *Baker v. Carr* (1962), in which he argued that legislative apportionment was a political rather than judicial matter.

GINSBURG, RUTH BADER (b. 1933). Associate Justice; nominated by President Clinton in 1993 as the first Jewish woman Justice. Ginsburg received her undergraduate degree from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School. She served as a law clerk to Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, from 1959–1961. She was a professor of law at Rutgers University School of Law (1963–1972) and Columbia Law School (1972–1980). Ginsburg also served as the ACLU's General Counsel and was on the National Board of Directors during 1974–1980. She was appointed a judge of the United States Court of Appeals for the District of Columbia Circuit in 1980. Majority opinions authored by Ginsburg include *United States v. Virginia* (1996). In *Bush v. Gore* (2000), Ginsburg dissented. She also voted against the execution of minors in *Roper v. Simmons* (2005).

Harlan, John M., II (1899–1971). Associate Justice; nominated by President Eisenhower, he served from 1955 until his death in 1971. Harlan was educated at Princeton and was a Rhodes Scholar at Oxford where he read law. He took an American law degree at New York Law School in 1925. President Eisenhower appointed Harlan to the United States Court of Appeals for the Second Circuit, where he served for ten months. Eisenhower promoted him to the High Court. He argued for a broad interpretation of the Fourteenth Amendment's due process clause, evidenced in his dissenting opinion to *Poe v. Ullman* (1961). Harlan dissented in *Mapp v. Ohio* (1961) and *Miranda v. Arizona* (1966), which expanded the protections of defendants in criminal cases, and again in *Reynolds v. Sims* (1964).

Holmes, Oliver Wendell, Jr. (1841–1933). Associate Justice; nominated by President Taft in 1902, he served until his retirement in 1932 at age 90. He was a Harvard law professor, edited the *American Law Review*, and was Chief Justice of the Massachusetts Supreme Court. Holmes played an important role in shaping Legal Realism. His benchmark opinions include *Schenck v. United States* (1919) and the opinion for the Court in *Buck v. Bell* (1927). His dissents in *Northern Securities Co. v. U. S.* (1904), *Lochner v. New York* (1905), *Dr. Miles Medical v. J. D. Park & Sons* (1911), *American Column & Lumber v. U. S.* (1921), and *Abrams v. United States* (1919) earned him the reputation "The Great Dissenter."

Hughes, Charles Evan (1862–1948). Eleventh Chief Justice; nominated by President Hoover in 1930, Hughes served until his retirement in 1941. Hughes was governor of New York (1907–1910), appointed to the Supreme Court as an associate justice in 1910 by President Taft, resigned in 1916 to run a losing race against Democratic candidate Woodrow Wilson in 1918, and later became Secretary of State (1921–1925). Hughes's *West Coast Hotel* (1937) decision abandoned a line of cases that had read the due process clauses of the Fifth and Fourteenth amendments as providing expansive protection for freedom of contract and the right of property.

Jackson, Robert (1892–1954). Associate Justice; nominated by Franklin Roosevelt, he served from 1941 until 1954, taking a leave of absence during 1945–46 to serve as the chief prosecutor of the Nuremberg Trials. Jackson formulated a three-tier test for evaluating claims of presidential power in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), which remains one of the most widely-cited opinions in Supreme Court history. He also wrote the majority opinion in *West Virginia State Board of Education v. Barnette* (1943), which overturned mandatory saluting of the American flag. He dissented in *Korematsu v. United States* (1944).

KENNEDY, ANTHONY (b. 1936). Associate Justice; nominated by President Reagan in 1988. Kennedy received his B.A. in Political Science from Stanford University, and an LL.B. from Harvard Law School. He was Professor of Constitutional Law at McGeorge School of Law, University of the Pacific. In 1975, he was appointed to the United States Court of Appeals for the Ninth Circuit by President Ford. Kennedy joined the opinion of *Atkins v. Virginia* (2002), declaring execution of the mentally ill unconstitutional. He also wrote the opinion of the court in *Roper v. Simmons* (2005), invalidating the execution of felons. Kennedy joined the opinion of O'Connor and Souter in *Planned Parenthood v. Casey* (1993) but dissented in *Stenberg v. Carhart* (2002), which supported partial-birth abortions. He authored the Court's opinion in *Lawrence v. Texas* (2003).

Marshall, John (1755–1835). Fourth Chief Justice; nominated by President Adams. He served from 1801 until his death in 1835. Marshall had been a Virginia state legislator, U.S. envoy to France, a U.S. representative from Virginia, and U.S. Secretary of State under Adams. Marshall established that the courts were entitled to exercise judicial review, or the power to strike down laws that violated the Constitution. Thus, Marshall has been credited with cementing the position of the judiciary as an independent and influential branch of government. His most important opinions include *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1819), *Dartmouth College v. Woodward* (1819), and *Gibbons v. Ogden* (1824).

Marshall, Thurgood (1908–1993). Associate Justice; nominated by President Johnson. He served from 1967 until his retirement in 1991 and was the first black justice on the Court. He headed the NAACP legal staff from 1938 until 1961 and argued many benchmark civil rights cases before the Court. Of the thirty-two cases he argued before the Supreme Court, Marshall won twenty-nine. These cases include *Dong v. Florida* (1940), *Smith v. Allwright* (1944), *Shelley v. Kraemer* (1948), *Sweatt v. Painter* (1950), and *McLaurin v. Oklahoma State Regents* (1950). His most famous case as a lawyer was *Brown v. Board of Education of Topeka* (1954). His most important opinions include *Stanley v. Georgia* (1969), *Furman v. Georgia* (concurrency, 1972), and *San Antonio School District v. Rodriguez* (1973).

Murphy, Frank (1890–1949). Associate Justice; nominated by President Roosevelt in 1939, he served from 1940 through 1949. Murphy was elected Governor of Michigan in 1936; his settlement of the automobile strike (1937) in Flint, Michigan, made him a national figure. While serving the Court, his decisions protected citizens against discrimination in *Falbo v. United States* (1944), *West Virginia State Board of Education v. Barnette* (1943), and *Korematsu v. United States* (1944). He sought to protect labor workers picketing in *Thornhill v. Alabama*, (1940). He worked to uphold the Fourth Amendment, dissenting in *Wolf v. Colorado* (1949).

O'Connor, Sandra Day (b. 1930). The Supreme Court's 102nd Justice and first female Justice; nominated by President Reagan in 1985, she retired in 2006. O'Connor received her B.A. and LL.B. from Stanford University. She was appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms. In 1975, she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. In *Grutter v. Bollinger* (2003), she maintained that the state's legitimate interest in using race as a factor for admission had gradually declined over the past 25 years as minority test scores improved, and that the Court should continue to monitor the strength of that interest until it decided that it was no longer sufficient to merit racial distinctions. O'Connor was instrumental in the Court's refashioning of its position on the right to abortion in 1992. In *Planned Parenthood v. Casey* (1992), O'Connor wrote the decision with Justices Kennedy and Souter that reaffirmed the constitutionally protected right to abortion established in *Roe v. Wade* (1973) but also lowered the standard that legal restrictions on abortion must meet in order to pass constitutional muster.

Powell, Lewis (1907–1998). Associate Justice; nominated by President Nixon in 1971, after turning down a nomination two years before. Often the swing vote, Powell's opinion in *Regents of the University of California v. Bakke* (1978) and *Bowers v. Hardwick* (1986); concerning the latter, he stated he had never met a homosexual person. After his retirement from the Court in 1987, he expressed remorse for his majority opinion in *McCleskey v. Kemp* (1987), where he voted to uphold the death penalty despite a study purporting to confirm that the penalty was applied disproportionately to African-Americans. Powell dissented in *Furman v. Georgia* (1972) but also helped rewrite the opinion in the compromise four years later in *Gregg v. Georgia* (1976).

Rehnquist, William H. (1924–2005). Sixteenth Chief Justice; nominated by President Nixon in 1972, he served for fourteen years until President Reagan appointed him Chief Justice in 1986, replacing Chief Justice Burger. Rehnquist served on the Supreme Court until his death in 2005. He received a B.A., M.A., and LL.B. from Stanford University and an M.A. from Harvard University. He served as a law clerk for Justice Robert H. Jackson during the 1951 and 1952 terms, practiced law in Phoenix, Arizona (1953–1969), and served as Assistant Attorney General, Office of Legal Counsel (1969–1971). Rehnquist wrote many important opinions, including dissents in *Roe v. Wade* (1972) and *Wallace v. Jaffree* (1985). He joined the majority in *Bowers v. Hardwick* (1986). Rehnquist presided over the Clinton impeachment hearings.

ROBERTS, JOHN G., JR. (b. 1955). Seventeenth Chief Justice; nominated by President George W. Bush in 2005. Roberts graduated from Harvard where he earned his undergraduate and law degrees. He then clerked for Henry Friendly of the United States Court of Appeals for the Second Circuit (1979–1980), and then Associate Justice Rehnquist. He served as Associate Counsel to President Reagan, White House Counsel's Office (1982–1986), and Principal Deputy Solicitor General, U.S. Department of Justice (1989–1993). He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. Roberts joined Justice Scalia's dissent in *Gonzales v. Oregon* (2006), where the Court decided that an Oregon state law permitting physician-assisted suicide did not conflict with the Controlled Substances Act. Roberts also wrote the unanimous decision in *Rumsfeld v. Forum for Academic and Institutional Rights* (2006).

SCALIA, ANTONIN (b. 1936). Associate Justice; nominated by President Reagan in 1986. He received his B.A. from Georgetown University and the University of Fribourg, Switzerland, and his law degree from Harvard Law School. He was in private practice in Cleveland, Ohio (1961–1967), and then served as a professor of law at the University of Virginia and the University of Chicago. In 1982, President Reagan appointed him to the United States Court of Appeals for the District of Columbia Circuit. His most notable decisions include preventing personal property from being searched without a warrant in *Kyllo v. United States* (2001). Scalia also wrote strongly worded dissents in *Lawrence v. Texas* (2003), *Webster v. Reproductive Health Services* (1999), and *Planned Parenthood v. Casey* (1992).

SOUTER, DAVID H. (b. 1939). Associate Justice; nominated by President George W. Bush in 1990. Souter graduated from Harvard College, earned a B.A. in jurisprudence from Oxford University, and received his law degree from Harvard in 1966. In 1983, he was appointed an Associate Justice to the Supreme Court of New Hampshire. He became a judge of the United States Court of Appeals for the First Circuit in 1990. Souter joined the plurality opinion of *Planned Parenthood v. Casey* (1992), along with Kennedy and O'Connor. He dissented in *Bush v. Gore* (2000). Souter voted to affirm a state ban on nude dancing in *Barnes v. Glen Theatre* (1991) and concurred in *Lee v. Weisman* (1992).

STEVENS, JOHN PAUL (b. 1920). Associate Justice; nominated by President Ford in 1975. Previously, Stevens served as a judge of the United States Court of Appeals for the Seventh Circuit, nominated by President Nixon. He voted to reinstate capital punishment in the United States, opposed the affirmative action program at issue in *Regents of the University of California v. Bakke* (1978), and refused to recognize a right to burn the flag as a speech act in *Texas v. Johnson* (1994). Later, Stevens supported a different affirmative program at the University of Michigan Law School, challenged in *Grutter v. Bollinger* (2003). In *Cleburne v. Cleburne Living Center* (1985), Stevens argued against the Supreme Court's famous "strict scrutiny" doctrine for laws involving "suspect classifications."

Stewart, Potter (1915–1985). Associate Justice; nominated by President Eisenhower in 1958, he served until his retirement in 1981. In 1954, Stewart was appointed to the United States Court of Appeals for the Sixth Circuit. Stewart dissented from the Court's decision in *Griswold v. Connecticut* (1965), but he changed his views and joined the Court's decision in *Roe v. Wade* (1973). Stewart is known for his views in the obscenity case of *Jacobellis v. Ohio* (1964), where he wrote in his short concurrence that "hard-core pornography" was hard to define, but that "I know it when I see it."

Story, Joseph (1779–1845). Associate Justice; nominated in 1811 by President Madison, he served until his death. In 1829, Story also accepted a newly-created position as Dane Professor of Law at Harvard University. Story devoted his efforts to equity jurisprudence and contributed significantly to patent law. In 1819, he attracted attention by his vigorous denunciation of the slave trade, and in 1820, he called on his fellow members of the Massachusetts Convention to revise the state constitution. He is also remembered for his ruling in *Amistad* (1841) in favor of kidnapped Africans.

Taney, Roger (1777–1864). Fifth Chief Justice; nominated by President Jackson in 1836, he served until 1864 as the first Roman Catholic to hold this position. Educated at Dickinson College before a law degree was required, Taney practiced law in Maryland and was elected to the Maryland State Senate, and served as Attorney General of the United States. The Taney Court overturned the Marshall Court's decision in the *Dartmouth College v. Woodward* (1819) that had limited the power of the states to regulate corporations and reversed the Marshall Court's previous holding that states could not charter banks. In the *Charles River Bridge v. Warren Bridge* (1837) Taney declared that a state charter of a private business conferred only privileges expressly granted and that any ambiguity must be decided in favor of the state. He is also known for the benchmark decision of *Dred Scott v. Stanford* (1857).

THOMAS, CLARENCE (b. 1948). Associate Justice; nominated by President George W. Bush in 1991. Thomas attended Conception Seminary, graduated from Holy Cross College, and received his law degree from Yale University. He served as Assistant Secretary for Civil Rights in the U.S. Department of Education (1981–1982) and as Chairman of the U.S. Equal Employment Opportunity Commission (1982–1990). He became a judge of the United States Court of Appeals for the District of Columbia Circuit in 1990. In *McIntyre v. Ohio Elections Commission* (1995), Thomas wrote a concurring opinion agreeing with a majority of the Court that a law banning anonymous campaign literature violated the First Amendment. He concurred with the Court's decision in *United States v. Lopez* (1995) invalidating a federal law prohibiting possession of a firearm in a school zone, and he voted to expand personal gun rights under the Second Amendment in *Printz v. United States* (1997). Thomas also voted to uphold the school voucher program in *Zelman v. Simmons-Harris* (2002). He was the only Justice to side with the government in *United States v. Hubbell* (2000) and dissented with a divided court in *Lawrence v. Texas* (2003).

Vinson, Frederick (1890–1953). Thirteenth Chief Justice; nominated by President Truman. He served from 1946 until his death in 1953. Vinson served in the U.S. House of Representatives, became an associate justice of the U.S. Court of Appeals for the District of Columbia, and later became chief justice of the U.S. Emergency Court of Appeals. He made several significant decisions concerning internal security legislation. In *American Communications v. Douds* (1950), he found the requirement that members of labor unions swear to their non-membership in the Communist party unconstitutional; in *Dennis v. United States* (1951), he upheld the conviction of eleven leaders of the Communist party for violations of the Smith Act. His important opinions include *Sweatt v. Painter* (1948) and *Shelley v. Kraemer* (1948).

Warren, Earl (1891–1974). Fourteenth Chief Justice; nominated by President Eisenhower in 1953, and served until his retirement in 1969. Warren attended the University of California at Berkeley, where he earned his undergraduate and law degrees. In 1942, Warren was elected Governor of California, and he was twice re-elected. In 1948, he was the Republican nominee for Vice President of the United States, and in 1952, he sought the Republican Party's nomination for President. Among his most important opinions is his unanimous decision for the Court in *Brown v. Board of Education* (1954).

**Civil Liberties
and the
Bill of Rights
Part III
Professor John E. Finn**



THE TEACHING COMPANY ®

John E. Finn, J.D., Ph.D.

Professor of Government, Wesleyan University

John E. Finn is Professor of Government at Wesleyan University. He received his B.A. in political science from Nasson College, a J.D. from Georgetown University, a Ph.D. in political science from Princeton University, and a degree in culinary arts from the French Culinary Institute. He has taught at Wesleyan since 1986, where his research focuses on constitutional theory, comparative constitutional law, the First Amendment, the legal regulation of terrorism and political violence, and cuisine and popular culture. He is the recipient of four distinguished teaching awards at Wesleyan: the Carol A. Baker '81 Memorial Prize for Excellence in Teaching & Scholarship, awarded in 1989; the Binswanger Prize for Excellence in Teaching in 1994; and on two occasions the Caleb T. Winchester Award for Teaching Excellence, first in 1997, and again in 2004. He was also the recipient of the Association of Princeton Graduate Alumni Teaching Award for distinguished teaching while a graduate student at Princeton. The American Political Science Association described his syllabus for American Constitutional Interpretation as “an ideal model.”

Professor Finn is an internationally recognized expert on constitutional law and political violence. His public lectures include testimony in front of the U.S. House Judiciary Committee, as well as lectures in Chile, Bolivia, Spain, Italy, Canada, England, and France.

Professor Finn has published widely in the fields of constitutional theory and interpretation. Among his publications are *American Constitutional Law: Essays, Cases, and Comparative Notes*, 2nd edition (Rowman & Littlefield, 2004), with Donald P. Kommers of Notre Dame University and Gary Jacobsohn of Williams College, once described as “the Cadillac of constitutional law casebooks,” and the highly regarded *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1991).

Professor Finn lives in Hartford, Connecticut, with his wife, Linda, and their two children.

Table of Contents

Civil Liberties and the Bill of Rights

Part III

Professor Biography	i
Course Scope	1
Lecture Twenty-Five School Prayer and the Establishment Clause.....	3
Lecture Twenty-Six Religion—Strict Separation or Accommodation?	7
Lecture Twenty-Seven The Free Exercise Clause: Acting on Beliefs	9
Lecture Twenty-Eight Free Exercise and “the Peyote Case”	12
Lecture Twenty-Nine Two Religion Clauses: One Definition?	15
Lecture Thirty Slavery and <i>Dred Scott</i> to Equal Protection	18
Lecture Thirty-One <i>Brown v. Board of Education</i>	22
Lecture Thirty-Two Equality and Affirmative Action	26
Lecture Thirty-Three Equality and Gender Discrimination	29
Lecture Thirty-Four Gender Discrimination as Semi-Suspect	32
Lecture Thirty-Five The Future of Equal Protection?.....	35
Lecture Thirty-Six Citizens and Civil Liberties	38
Timeline of Cases Discussed in the Course	Part I
Annotated List of Cases (Alphabetical Order)	Part I
Glossary	Part II
Biographical Notes	Part II
Bibliography	40
The Bill of Rights	47

Civil Liberties and the Bill of Rights

Scope:

This course is designed to introduce students to a uniquely American invention and, to some ways of thinking, a wonderfully naïve contribution to politics: The written specification of individual liberties and rights that citizens possess and can, through courts, enforce against the state. *Civil Liberties* is not, however, a course on law. It is, instead, a course that has as its subject the relationship of law to the most fundamental sorts of questions about politics, morality, and human nature.

In this course of 36 lectures, we shall see that most of the serious difficulties (and there are many) in the politics of civil liberties arise from conflicts between our commitments to two or more positive values. There are, for example, inevitable and recurrent conflicts (despite our attempts to ignore them) between the values of liberty and equality. As Felix Frankfurter once wrote, these and other such conflicts are “what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs.” We examine these clashes in light of the broader philosophical and institutional problems of the constitutional order. I hope to show that constitutional “answers” to problems like those of abortion, freedom of speech, and affirmative action require a coherent understanding of the Constitution and of the assumptions it makes about human nature and the proper ends of government and civil society.

We will, therefore, examine the doctrinal development of specific liberties and rights, such as due process and privacy, the ultimate denial of liberty entailed by the death penalty, freedom of speech and religion, and equal protection, but we shall consider them in a broader theoretical context. We shall want to know what overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the U.S. Constitution and the polity it both constitutes and envisions.

The course is divided into three sections. We begin with the institutional and interpretive foundations of the American constitutional order. Our purpose here is to provide students with background on the Supreme Court and its role in the constitutional order, as well as an overview of the process of constitutional interpretation. In our first lecture, for example, we focus on the organization, composition, and decision-making authority of the Court. In our second lecture, we take up the “why” and the “what” of constitutional interpretation. We shall see that interpretation is both a choice and a necessity: a choice because we must choose among many diverse methods and strategies and a burden because such choices are often difficult to justify or even to explain. In Lectures Three and Four, we take up the intersection of Lectures One and Two by considering how and why the power of constitutional interpretation—and, hence, the power to decide the most pressing issues of civil liberties—came to rest with the Supreme Court through the mechanism of judicial review.

In the second section of the course, we begin our inquiry into the Bill of Rights. In every case that arises under the Bill of Rights, we must reconcile our desire for individual liberty with the need for public order, personal autonomy with the needs of the community. Considered in its totality, and not simply provision by provision, a bill of rights sketches the broad outlines of the relationship between individual liberty and the needs of the community. In this larger sense, a bill of rights indicates how conflicts between liberty and community should be conceived and, to some extent, resolved. In our fifth lecture, we consider the history and theory of the Bill of Rights. Was a bill of rights really necessary? And why, initially, did its protections run only against the federal government, not the states? In the sixth lecture, we take up the fascinating doctrine of *incorporation*, or the torturous and winding road the Court followed to make the Bill of Rights applicable to state and local governments—arguably a constitutional revolution no less significant than the Founding in Philadelphia.

In the third and, by far, the largest section of the course, comprising 30 lectures, we consider the individual provisions of the Bill of Rights and the development of several other specific liberties. In deference to the Founders, we begin with the constitutional right to property. The protection of private property, broadly defined, was a central purpose of the constitutional order, and the rise, fall, and possible resurgence of property as a constitutional right of magnitude has had important implications for civil liberties more generally. After property, we take up the fundamental rights of privacy and personhood, rights that cover a broad spectrum of liberty issues, including procreation and abortion, the definition of family, sexual orientation and preference, capital punishment, and the right to die.

We then devote a series of lectures to the speech and religion clauses of the First Amendment. We start with speech. Among the issues we will consider will be the definition of speech, hate speech and fighting words, indecency and pornography, and freedom of association. Our examination of the religion clauses likewise includes questions concerning the definition of religion, as well as consideration of the meaning of the establishment and free exercise clauses and how they interact.

In the final part of the course, we explore the many intricacies of the equal protection clause of the Fourteenth Amendment. When, if ever, does the equal protection clause allow the state to discriminate on the basis of race? Is there a constitutional difference between malignant discrimination, such as Jim Crow laws, and affirmative action, or so-called “reverse discrimination”? Should the Constitution be colorblind? The equal protection clause also applies to other forms of discrimination; thus, we will want to consider how the Supreme Court has addressed discrimination based on gender, sexual orientation, and national origin.

In addressing these issues, whether under the equal protection clause, the First Amendment, or the Eighth Amendment, we will confront a welter of difficult and controversial questions. It is unlikely that we will succeed in our attempts to answer them fully or finally. What we can hope to achieve, however, is an improved and more sophisticated appreciation of the importance of our commitment to civil liberties and of the sacrifices we must make if we choose to honor that commitment.

Lecture Twenty-Five

School Prayer and the Establishment Clause

Scope: The Court's earliest cases on the establishment clause tended to center on the role of religion in public schools and on the volatile issue of school prayer in particular. In this lecture, we consider what Justice Rutledge called "two great drives" behind this issue: religious observances in public schools and public funds for private religious schools. We begin with the well-known school prayer cases, starting with *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), and continuing with the Court's more recent work in *Lee v. Weisman* (1992) and *Wallace v. Jaffree* (1985). We will also consider the Court's work in the complicated area of public financial support for private schools, beginning with the Court's first effort, in the important case of *Everson v. Board of Education* (1947), through *Zelman v. Simmons-Harris* (2002), in which the Court upheld a voucher system that enabled some low-income families to send children to elementary schools of their own choice, including religious schools.

Outline

- I. In this lecture, we start our examination of the establishment clause. As we shall see, the nation's public schools have long been a central staging point for the establishment clause.
 - A. This should not be a surprise. As Justice Rutledge once observed:

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority.... One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools.
 - B. There is another reason why we should not be surprised about the intersection of the establishment clause and public schools. Until fairly recently, well into the 20th century, primary school education in the United States was largely a private affair, not in the hands of the state but, rather, a function of churches and church organizations.
- II. Some of the earliest and still most controversial religion cases involve the role of prayer in the classroom.
 - A. In *Engel v. Vitale* (1962), the Court invalidated a practice in New York schools of reciting a short prayer at the beginning of the school day.
 - B. In his majority opinion, Justice Black concluded that the establishment clause must at least mean that it "is no part of the business of government to compose official prayers for any group of the American people...."
 - C. Justice Black continued: "We think that by using the public school system to encourage the recitation of the Regent's prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."
 1. The state had argued that the prayer was nondenominational and, thus, presented no constitutional difficulty because it preferred no religion over another.
 2. The Court responded that it was the simple presence of the state's involvement that was relevant: "The Establishment Clause stands as an expression of principle on the part of the Founders that religion is too personal, too sacred, too holy" to permit state regulation in this area.
 - D. Justice Stewart wrote a strongly worded dissent:

I think this decision is wrong. I cannot see how an official religion is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of the nation.
 - E. Implicit in these two opinions, I would suggest, are fundamentally different conceptions of religion in general. Justice Black's opinion for the Court underscores the "privateness" of religious faith, or the way in

which faith and autonomy are intertwined. Justice Stewart, in contrast, notes how important public expressions of faith can be.

- III.** In a second case, *Abington v. Schempp* (1963), the Court invalidated Bible readings and the recitation of the Lord's Prayer in public school classrooms.
- A.** In both cases, the Court concluded that the challenged practices had no valid secular purpose and, thus, could not stand. However, the study of religion, and even the Bible, would be constitutionally permissible "when presented objectively as part of a secular program of education."
 - B.** *Engel* and *Schempp* initiated a volatile public debate on the role of prayer in the schools that shows no sign of abating nearly 50 years later.
 - 1. Many schools, especially in parts of the South, have long ignored the Court's rulings.
 - 2. The role of prayer in schools has been a pronounced issue in several presidential campaigns.
 - 3. For example, in 1964, Barry Goldwater argued, "The Court ruled against God."
 - 4. U.S. Representative George Andrews (D-Ala.) complained, "They put the Negroes in schools and now they have driven God out."
- IV.** The continuing controversy over prayer in schools has also kept these cases on the Court's agenda. Three more recent cases have provoked intense debate both inside the Court and in the public square.
- A.** In *Wallace v. Jaffree* (1985), the Court struck down an Alabama law that mandated a one-minute "moment of silence" at the beginning of the school day. Relying heavily on the legislative history on this particular statute, a majority concluded that the purpose of the law was to promote religion. Presumably, a moment of silence designed to further a secular purpose would be constitutionally permissible.
 - 1. This case is central to the establishment clause, not simply because of the moment of silence issue, but because in it, the Chief Justice proffered a fundamentally different approach to thinking about the meaning and purpose of the establishment clause.
 - 2. On the other hand, it may be that the more immediate aspects of *Wallace* are less significant in light of *Lee v. Weisman*, our next case.
 - B.** In *Lee v. Weisman* (1992), the Court considered the constitutionality of a recitation of a "nondenominational" prayer at a high school graduation ceremony. In his opinion for the Court, Justice Kennedy argued that although attendance at the ceremony was voluntary as a matter of law, in practice, the event was of "singular importance" and the "objecting student had no real alternative to avoid."
 - 1. Consequently, the prayer was unconstitutional, because "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise."
 - 2. Justice Kennedy continued:

The lessons of the First Amendment are as urgent in the modern world as the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.
 - 3. The Court also took up the issue of "coercion," or the claim that students might feel coerced by the state into participating in such expressions of faith. As we saw, this issue loomed large in the Court's first school prayer cases.
 - 4. In dissent, Justice Scalia reminded the Court, "The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition.... From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations."
 - 5. He then continued: "Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, why our Nation's commitment to prayer through the First Amendment must be embraced by citizens, perhaps even more than judges."
 - 6. Justice Scalia also tried to reframe the basic posture of the case, noting, "The reader has been told much in this case about the personal interests of Mr. Weisman and his daughter, the plaintiff, and very little about the personal interests of the other side." He continues: "They are not inconsequential. Church and State would not be such a difficult subject if religion were, as the Court's approach thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography in the privacy of one's room. For most believers, it is not that and has never been."

7. Justice Scalia concluded: “One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.”
- C. Finally, in *Santa Fe v. Doe* (2000), the Court struck down a school district policy that permitted students to lead a prayer before high school football games.
- V. Another area involving the establishment clause and public schools where the Court has been active concerns the use of public monies and other kinds of public support for private schools.
 - A. We begin with the landmark case of *Everson v. Board of Education* (1947), in which the Court insisted that the establishment clause envisions a strict “wall of separation” between church and state.
 - B. In this case, the Court nevertheless went on to uphold a state program that used public funds to provide transportation of students to parochial schools.
 1. The primary purpose of the funding, the Court argued, was secular and intended to benefit the schoolchildren, not the school or the religion in question, thus giving rise to the *child benefit theory*.
 2. The “wall of separation” reference in *Everson* remains deeply controversial, both on and off the Court.
 - C. One year later, in *McCormick v. Illinois* (1948), the Court struck down a program permitting public school students to attend weekly religious classes on school premises. In contrast to *Everson*, the Court concluded, the primary purpose of the “released time” program was not secular.
 - D. Since *Everson* and *McCormick*, the Court has produced an astonishingly complex body of case law, sometimes upholding state aid, as in the case of state subsidies for books and tests, and in other cases condemning it, as in subsidies for teacher salaries and field trips.
 - E. In *Mitchell v. Helms* (2000), the Court approved a federal program that provided aid for school districts that purchased curricular materials and lent them to private schools.
 - F. *Mitchell* was followed by the important case of *Zelman v. Simmons-Harris* (2002), in which the Court upheld a voucher system that enabled some low-income families to send children to elementary schools of their own choice, including religious schools.

Essential Reading:

Everson v. Board of Education (1947).

McCormick v. Illinois (1948).

Engel v. Vitale (1962).

Abington v. Schempp (1963).

Wallace v. Jaffree (1985).

Lee v. Weisman (1992).

Santa Fe v. Doe (2000).

Mitchell v. Helms (2000).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, pp. 461–462.

Supplementary Reading:

Leonard Levy, *The Establishment Clause: Religion and the First Amendment*.

Jo Renee and Hubert Morken, *Everson Revisited: Religion, Education, and Law at the Crossroads*.

Frank Ravitch, *School Prayer and Discrimination: The Civil Rights of Minorities and Dissenters*.

Frank Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State*.

Questions to Consider:

1. The establishment clause provides that Congress shall make no law respecting an establishment of religion. What does *establish* mean? We might give it a narrow meaning and insist that *establish* means to “make official,” or to designate a state religion. Alternatively, we might give it an expansive meaning and insist that

establish means to give aid or to promote, even if only indirectly. Is there a constitutionally grounded reason to prefer one definition to the other?

2. How, exactly, does prayer in public schools tend to establish religion?
3. Is there a constitutional difference between mandatory and voluntary prayer ceremonies in public schools?

Lecture Twenty-Six

Religion—Strict Separation or Accommodation?

Scope: In the previous lecture, we addressed the cases of *Everson* and *Jaffree* in light of the Court's school prayer jurisprudence. As we shall see here, however, these two cases are also a useful introduction to another, perhaps larger issue that has troubled the Court in recent years: Does the establishment clause require government neutrality to all forms of religious belief and nonbelief, or does it simply prohibit the government from favoring one religion over another? The Court in *Everson* adopted the former position, sometimes called the *strict separationist position*. In recent years, though, several members of the Court have rejected it in favor of the so-called *accommodationist position*, which would allow at least some forms of non-preferential governmental aid to religion. Another and related controversy concerns doctrine. In the well-known case of *Lemon v. Kurtzman* (1971), the Court developed a three-part test for distinguishing between establishment and nonestablishment. In recent years, however, there has been substantial division within the Court about whether and when to use the *Lemon* test, and some justices, notably O'Connor, have proposed alternatives. Behind both positions, we shall see, are different visions about the proper relationship between church and state.

Outline

- I. As we saw in Lecture Twenty-Five, in *Everson v. Board of Education* (1947), the Court insisted that the establishment clause envisions a strict "wall of separation" between church and state.
 - A. The metaphor was taken from a well-known letter by Thomas Jefferson [first cited by the Supreme Court, albeit with a less strict view of separation, in *Reynolds v. United States* in 1878].
 - B. The position adopted by the Court in *Everson* is known as the *strict separationist position*. It dominated the Court's understanding of the establishment clause for just about 40 years after *Everson*.
 - C. Notwithstanding its doctrinal dominance, there was always disagreement within the Court about just how strict the separation between church and state really was. Recall, for example, that in *Everson* itself, the doctrine did not preclude state aid to parochial schools, a result that prompted Justice Jackson, dissenting, to note: "The case which irresistibly comes to mind ... is that of Julia who, according to Byron's reports, 'whispering "I will never consent,"—consented.'"
- II. In *Lemon v. Kurtzman* (1971), the Court adopted a formal three-part test for establishment cases.
 - A. Governmental aid will pass constitutional muster if:
 1. It has a valid secular purpose.
 2. Its primary effect is neither to advance nor inhibit religion.
 3. It does not lead to "excessive government entanglement" with religion.
 - B. The *Lemon* test has been the primary analytical tool for several decades, but several members of the Court have expressed dissatisfaction with the test.
- III. In a few subsequent cases, some members of the Court attacked the strict separationist understanding of the establishment clause. The leading case is *Wallace v. Jaffree* (1985), which we covered in Lecture Twenty-Five. *Jaffree*, you will recall, involved an Alabama statute that established a moment of silence at the beginning of the school day.
 - A. Justice Stevens, writing for the Court, struck the statute. But for our purposes, the opinion is significant because in it, Chief Justice Rehnquist wrote long and eloquently in a dissenting opinion about the strict separationist position.
 - B. Calling appeals to the Jeffersonian wall "a mistaken understanding of constitutional history," Rehnquist went on to conclude that such an understanding of the First Amendment was "highly simplified" and a faulty basis for the Court's jurisprudence.
 - C. In his own review of constitutional history, Rehnquist concluded that the Founders were not opposed to state aid to religion, provided such aid was not itself discriminatory between and among religions. The establishment clause "did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."

- D. It remains unclear whether the Court will hold to the separationist position, adopt the accommodationist position advocated by Chief Justice Rehnquist, or turn in some other direction. The key issue for us is not the doctrine but, rather, what lies behind the doctrinal alternatives.
- IV. The internal divisions on the Court continue. In two recent cases involving the Ten Commandments, the Court was unable to articulate a clear constitutional principle. In *Van Orden v. Perry* (2005), the Court upheld the display of a monument of the Ten Commandments in a Texas state park. On the other hand, in *McCreary v. ACLU* (2005), the Court ruled that a display of the commandments in a Kentucky courtroom violated the establishment clause.
- A. The two cases produced more than 140 pages in at least six different opinions, prompting Chief Justice Rehnquist to remark, “I didn’t know we had that many people on our Court.”
 - B. Writing for the majority in *McCreary*, Justice Souter found that the display in the courtroom violated the first prong of the *Lemon* test.
 - C. In dissent, Justice Scalia reprimanded the Court for its use of *Lemon*.
 - D. In contrast, in the Texas case, Chief Justice Rehnquist did not use the purpose prong, stating that it was not necessary for “the sort of passive monument” in Texas. The display of the commandments had a “dual significance, partaking of both religion and government,” he wrote.
- V. Different understandings of the establishment clause point to two very different understandings about the proper relationship between church and state.
- A. The separationist position, at least in theory, seeks to erect a high wall—a clear, clean, and high barrier—between the secular and the sacred, between the civic-public and the religious-private.
 - B. In contrast, the accommodationist perspective rejects that distinction, falling closer to Justice Douglas’s oft-quoted remark in *Zorach v. Clauson* (1952): “We are a religious people whose institutions presuppose a Supreme Being....”

Essential Reading:

Everson v. Board of Education (1947).

Zorach v. Clauson (1952).

Lemon v. Kurtzman (1971).

Wallace v. Jaffree (1985).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, pp. 458–462.

Supplementary Reading:

Robert Cord, *Separation of Church and State: Historical Fact and Current Fiction*.

Leonard Levy, *The Establishment Clause: Religion and the First Amendment*.

Michael Malbin, *Religion and Politics*.

Questions to Consider:

1. Justice Black’s opinion for the Court in *Everson*, like Rehnquist’s dissent in *Jaffree*, relied heavily on appeals to constitutional history. Is history a sufficiently unambiguous source to be of any help in constitutional interpretation? Would finding the meaning of the establishment clause be easier if we disregarded history and, instead, appealed to the purposes of the establishment clause?
2. In fact, as we have seen, the strict separationist position has permitted all sorts of “accommodations” between church and state. Does this suggest that constitutional doctrines have little practical effect on the results of specific cases? If so, why do the justices spend so much time and energy arguing about them?

Lecture Twenty-Seven

The Free Exercise Clause: Acting on Beliefs

Scope: Liberalism's demand for tolerance seems to require freedom of conscience in a constitutional democracy. And as is true with the establishment clause, there is at least one undisputed understanding of the free exercise clause: The state may not punish individuals for holding or rejecting particular religious beliefs. When one *acts* on belief, however, he or she is more likely to bump up against the rights of others or of the community. At what point should the community's interest in public order restrict an individual's right to free exercise? We begin in this lecture with the Court's earliest cases, many of which concerned the religious beliefs and practices of the fledgling Mormon Church. In *Reynolds v. United States* (1878) and *Davis v. Beason* (1890), the Court weighed the balance with its thumb firmly on the public order side of the scale, upholding in both cases state regulations designed to put an end to polygamy within the Church. In the 20th century, too, the Court sought to find the right balance, as evidenced in the two Flag Salute cases (1940 and 1943) and in the fascinating case *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993), involving animal sacrifices as a part of a religious ceremony.

Outline

- I. The free exercise clause is an essential part of our First Amendment freedoms, if only because constitutional democracy seems to require freedom of conscience.
 - A. Like freedom of speech, therefore, the free exercise clause has as one of its primary purposes protecting individual autonomy and rights of conscience, partly an inheritance from the political philosophy of John Locke.
 - B. In part because expression and religion are so closely tied, however, many of the cases that involve free exercise issues are decided on the basis of the speech clauses.
- II. This purpose, coupled with the language of the constitutional text, means that there is at least one undisputed understanding of the free exercise clause:
 - A. The state may not punish individuals for holding or rejecting particular religious beliefs.
 - B. If there is an absolute right in American constitutional law, it is this right to believe whatever one wants. It is difficult to imagine any situation in which a state government could have the constitutional authority to punish an individual simply on the basis of belief alone.
- III. On the other hand, as we have seen, the exercise of individual freedoms always takes place in a larger community. One may believe whatever one wants, but once we act on our beliefs, we become more likely to run up against the beliefs of others or the interests of the community.
 - A. At what point should a claim of free exercise excuse practices that implicate the interests of others? This is the central question in most free exercise cases and with which the Court has struggled since it first took up such cases in the late 19th century.
 - B. In *Reynolds v. United States* (1878), the Court considered the constitutionality of a congressional statute that prohibited polygamy in U.S. territories. The law was directed against the Mormons, who had migrated to Utah to avoid religious persecution.
 - C. In *Davis v. Beason* (1890), the Court upheld another anti-Mormon statute. The law in question limited the right to vote to males who had not been convicted of certain crimes or to males who swore an oath that they did not practice polygamy or were a member of a sect that "advises, counsels, or encourages" polygamy.
 1. The Court had no difficulty upholding the law. In response to Mormon claims that the law denied them free exercise, the Court, speaking through Justice Field, observed: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man."
 2. He continued: "To call their advocacy a tenet of religion is to offend the common sense of mankind."
 3. Finally, Justice Field concluded by arguing:

It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.... While legislation for the establishment of a religion is forbidden and its free exercise permitted, it does not follow that everything which may be called a religion can be tolerated.... Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

5. Justice Field's opinion introduces us to the so-called *belief-conduct distinction*, a recurrent part of the Court's free exercise jurisprudence.
6. Although it may seem clear, the belief-conduct distinction is not the only available reading of the free exercise clause nor necessarily the most obvious one. In addition, the line between belief and conduct may not be so easy to find in any particular case.

IV. The belief-action distinction, so prominent in the Mormon cases, remains a part of the Court's doctrinal tool chest.

- A. As we saw, the distinction was a part of Justice Frankfurter's opinion for the Court in *Minersville*, for example. And, as we shall see in Lecture Twenty-Eight, the Court still calls on it from time to time.
- B. But the distinction is just one way to strike the balance between liberty and community. In more recent cases, the Court has developed different frameworks.
- C. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993), the Court considered the constitutionality of a municipal ordinance, adopted in an emergency session, that prohibited the ritual sacrifice of animals "not for the primary purpose of food consumption." The ordinance was directed against a Santerian church, which combines elements of Catholicism and some traditional African religious practices, including ritual animal sacrifice.
- D. In striking the ordinance, the Court, in an opinion by Justice Kennedy, noted that city officials had not acted neutrally—in other words, the law they passed was not neutral toward religion—in pursuit of some larger secular end, but instead, the law had as its very purpose "the suppression of religion" and "animosity to Santeria adherents and their religious practices."
 1. Justice Kennedy wrote: "Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the nation's essential commitment to religious freedom."
 2. Recall that the first prong of the *Lemon* test requires that the purpose of a governmental regulation at issue must be secular in nature. Only rarely will the state fail to pass the first prong, but this is one of the cases. As Justice Kennedy concluded, "The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinance."
 3. Thus, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void."
- E. One might conclude that *Hialeah* is an easy case—no matter the doctrinal test one uses, whether the *Lemon* test or one's understanding of the free exercise clause more generally, a governmental policy specifically and explicitly designed to burden a particular religion must be unconstitutional.
 1. In other words, the *Hialeah* law failed a basic command of the free exercise clause: that the state must be neutral toward religion.
 2. But questions about whether neutrality should be the rule—and what it requires—prompted a heated exchange among the justices, especially between Justices Kennedy and Souter and, to a lesser extent, Scalia.
 3. Justice Souter, for example, wrote: "A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires" or, alternatively, by "requiring something that religion forbids.... A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine" in their services. He went on to use a specific example: "Without an exception for sacramental wine, Prohibition may fail the test of religion neutrality."
 4. We might call such an account of neutrality "formal," in that *neutrality* means to make no account for religion. Such an approach leads us not to ask after the specific effects of rules upon any particular

- religion. There is much to commend formal neutrality, but there is a cost as well, for it does not account for the damage that might be done to believers or communities of faith.
5. Alternatively, we might adopt a position known as *substantive neutrality*. Although this is a little misleading, we might say that substantive neutrality demands that laws must be neutral not only in purpose but also in effect. Such a position, of course, would contradict Justice Field's opinion in *Davis*, where he argued that the Founders did not intend an understanding of the free exercise clause that would allow some individuals to be exempt from laws of general application by virtue of what they believe. But such an approach might well promote an understanding of the free exercise clause that sees its primary purpose to be the promotion of faith or of religious diversity.
 6. *Hialeah* is "easy" because it is exceptional—there could be little question, at least to the majority, about whether the law was, in fact, neutral. Imagine a case, though, where the state does not tip its hand—where the community wants to exclude Santerians but does so without saying so. What lessons will this community take from the Court's opinion in *Hialeah*?
 7. Surely such a community will understand the necessity for formal neutrality. Will the next Court find that enough? Or should it adopt a position of substantive neutrality?
 8. The principle of comity, we should recall, would prohibit the Court from saying, at least so coarsely, that it "knows" what the true and the illegitimate purposes of the new rules are.

Essential Reading:

Reynolds v. United States (1878).

Davis v. Beason (1890).

Church of the Lukumi Babalu Aye, Inc. v. Hialeah (1993).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, pp. 456–458.

Supplementary Reading:

Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*.

Questions to Consider:

1. In several cases, the Court has distinguished between state regulation of religious beliefs and actions. Is the distinction implicit in the language of the free exercise clause? Does it make assumptions about religion itself? For example, isn't the distinction between religious belief and action itself premised on a particular definition of *religion*?
2. Is it clear that we can regulate action without trampling on religious belief? Or consider: How valuable is a constitutional right to believe without a corresponding liberty to act on that belief?
3. What kinds of interests might provide the state with a "legitimate" reason to regulate religious conduct?

Lecture Twenty-Eight

Free Exercise and “the Peyote Case”

Scope: As we saw in our review of the establishment clause, the Court has hinted at sweeping changes in its establishment clause jurisprudence. The same is true in the area of free exercise. In this lecture, we consider one such change. Imagine a law that is evidently neutral toward the exercise of religion—say, a law requiring all buildings to have fire escapes or a law that prohibits the consumption of certain kinds of drugs. Should a claim of free exercise excuse some individuals from the application of these otherwise “neutral” laws? For many years, following the case of *Sherbert v. Verner* (1963), the Court ruled that the free exercise clause did compel an exemption, unless the state could advance a “compelling reason” that ought to preclude such an exemption. In *Employment Division v. Smith* (1990), however, the Court reversed this position, ruling in an opinion by Justice Scalia that the free exercise clause does not require the state to “accommodate” a claim of free exercise. Of course, the Court left intact the rule requiring a compelling interest in those cases when the states do seek to purposefully burden religion directly. As before, behind these two rules are fundamentally different understandings about the relationship between church and state and of the role of the Court in moderating that relationship.

Outline

- I. As we have seen in the last two lectures, in most free exercise cases, we encounter a familiar tension, the conflict between the demands of liberty and the needs of the community.
 - A. These kinds of conflicts are especially pronounced in free exercise cases, in part because it is here, more than anywhere else, that constitutionalism prizes individual autonomy in matters of faith. But acting on faith often implicates the rights and liberties of others.
 - B. In every case, therefore, the Court struggles with a basic question: how to weigh the balance between liberty and community?
 - C. The Court has developed different doctrinal tools to help it weigh the balance. It is important to recognize that behind the tools are basic assumptions and different visions of human dignity, individual freedom, and the nature of our shared public life.
- II. One of these tools, as we saw in Lecture Twenty-Seven, is the belief-action distinction. One of the difficulties with this doctrine, however, is that on its own, it tells us almost nothing about when and why the state may regulate religious actions or about how to weigh the balance between liberty and community in such cases.
- III. Before we take up the Court’s recent work, however, we should note that the construction of constitutional meaning is an enterprise not confined to the Court alone. As we shall see in this lecture in particular, Congress and the executive branch also play important roles in the protection of civil liberties and in the larger enterprise of constitutional interpretation.
- IV. In the important case of *Sherbert v. Verner* (1963), the Court advanced a rule designed to tip the scale in favor of religious liberty.
 - A. The Court ruled that a state regulation that is neutral toward religion in purpose, but nonetheless “substantially burdens” a religious practice, must be justified by a “compelling state interest.” This test is the same one the Court uses in fundamental rights cases, such as privacy cases.
 - B. In this case, the Court ruled unconstitutional a state law that denied Sherbert unemployment compensation because, as a Seventh Day Adventist, she refused to accept a job that required her to work on Saturdays. The law did not single out religion as a reason for the denial of benefits, but it did, the Court concluded, have a “substantial” effect on her religious practices.
 - C. Writing for the Court, Justice Brennan said, “The ruling by the state forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion to accept benefits, on the other hand.” The burden on Sherbert is having to choose between the precepts of her faith and unemployment compensation.

- D. Justice Harlan dissented, complaining about the direction of the majority's opinion; he concluded that it led to the following: "The state, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior is not religiously motivated."
 - E. Justice Harlan's words point to another difficulty: Should we ever inquire into the sincerity of belief? If we make an exception for *Sherbert*, do we run a risk that other claimants will suddenly find religious reasons not to work on certain days?
 - F. We must ask also: What interest could the state advance for overcoming the free exercise claim? You will recall from earlier lectures that the state's interest must be compelling.
 - 1. In this case, the state's interests, presumably, are fiscal responsibility and administrative convenience.
 - 2. The Court has repeatedly held that neither interest is compelling.
 - G. Finally, we should reopen the question we addressed in our last lecture. How should we understand the secular regulation rule in light of the concept of neutrality in free exercise?
 - 1. It seems most likely that the secular regulation rule points to a conception of substantive, instead of formal, neutrality.
 - 2. But to fully understand the issue, we must also inquire into the purposes of the free exercise clause. If one purpose is to protect an individual's right to believe, then which conception of neutrality should we adopt? Perhaps, we might argue, we should adopt a position of formal neutrality, which might lead us to think that *Sherbert* was decided incorrectly.
 - 3. But another way to understand the clause is to see in it a purpose to promote religious diversity and communities of believers. On this understanding, *Sherbert* may be correctly decided.
- V. The Supreme Court overruled *Sherbert* (and the so-called "secular regulation" rule) in the important and controversial case of *Employment Division v. Smith* (1990).
- A. Justice Scalia, writing for the majority, described the case: "Respondents in the present case contend that their religious motivation for using peyote places them beyond the reach of the criminal law that is not specifically directed at their religious practice."
 - B. Justice Scalia continued by arguing: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,' ... contradicts both constitutional tradition and common sense."
 - 1. This, of course, is precisely what the secular regulation rule requires.
 - 2. According to Justice Scalia, however, this rule defies "common sense" and "constitutional tradition."
 - C. He continued in his opinion to overrule *Sherbert* and to replace it with a new rule: The free exercise clause does not require the state to "accommodate" a claim of free exercise. In other words, in cases where the state regulation does not purposefully burden religion, the state need no longer demonstrate that there is a compelling state interest.
 - D. Instead, the state need only show that the law is "rational," thus recalling the rational basis test the Court uses in cases of nonfundamental rights.
 - E. Of course, the Court left intact the rule requiring a compelling interest in those cases where the states do seek to purposefully burden religion directly.
 - F. The decision prompted a strongly worded dissent by Justice Blackmun, who noted, "This Court over the years painstakingly has developed a consistent and exacting standard.... Until today, I thought this was a settled and inviolate principle."
 - G. Other criticisms of the new rule suggest that it may be fundamentally hostile to the purpose of the free exercise clause because it fails to account for the harm actually done to communities of faith.
- VI. The Court's decision in *Smith* provoked considerable controversy outside the Court, especially among religious organizations and in Congress.
- A. For example, in 1993, Congress passed the Religious Freedom Restoration Act. The act specifically found that the free exercise clause demands the compelling state interest test utilized in *Sherbert*, not the weaker rationality test advanced in *Smith*.

- B. The Court announced that the act itself was unconstitutional in *Boerne v. Flores* (1997), because it “contradicts vital principles necessary to maintain separation of powers and the federal balance.”
- C. The ongoing interaction between Congress and the Court thus underscores the point I made at the beginning of this lecture: Constitutional interpretation is not an enterprise confined to the Supreme Court.

Essential Reading:

Sherbert v. Verner (1963).

Employment Division v. Smith (1990).

Boerne v. Flores (1997).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, pp. 641–643.

Supplementary Reading:

Michael McConnell, “Free Exercise and the *Smith* Decision,” 57 *University of Chicago Law Review* 1109 (1990).

Questions to Consider:

1. The majority’s decision in *Sherbert* recognized that the “secular regulation rule” might sometimes impose significant hardships on individuals with sincerely held religious beliefs. How did the Court attempt to minimize those hardships? Was the Court insensitive to them in *Smith*?
2. Did *Smith* revitalize the belief-action distinction? If so, does *Smith* signal the end of constitutionally required accommodations for free exercise?
3. Justice Scalia wrote in *Smith*:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system ... in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Is this assertion more reminiscent of *Minersville v. Gobitis* (1940) or *West Virginia v. Barnette* (1943)?

4. One critic has complained that *Smith* is “troubling, bordering on shocking....” Why? Do you agree?

Lecture Twenty-Nine

Two Religion Clauses: One Definition?

Scope: In a great many cases, the religion clauses work in tandem to secure religious freedom. In some cases, however, they appear to be at odds. As Justice Stewart noted in *Abington v. Schempp* (1963), the military's use of federal monies to pay chaplains might well violate the establishment clause. What about a soldier who complains that the government has not provided a chaplain appropriate to the faith of that soldier? In such instances, should our aim be to reconcile the clauses or to give each full expression, even if in doing so they appear to conflict with each other? Or consider the case of *Wisconsin v. Yoder* (1972), in which the Court struck down a compulsory education law as applied to Old Order Amish. The exception might be required by the free exercise clause, but the exemption itself might be said to "establish" the Amish religion. Is the problem better resolved by adopting two different definitions of *religion*—one for the establishment clause and another for the free exercise clause?

Outline

- I. As we have seen, the two religion clauses often work together to offer a wide-ranging set of protections for religious freedom.
 - A. In some cases, however, the establishment and free exercise clauses appear to be in some tension with each other.
 - B. In "the Peyote Case" [*Employment Division v. Smith*, 1990], for example, the Court ruled that the state need not make an exemption for the use of peyote in religious ceremonies. What if the Court had ruled otherwise, holding that the free exercise clause demands such an exemption? Would such an exemption, presumably required by the free exercise clause, run afoul of the establishment clause, because it tends to establish the Native American Church?
 - C. Justice Stewart also observed, for example, in *Abington v. Schempp* (1963), that the demands of free exercise might sometimes require governmental accommodation, but any such accommodation might implicate the establishment clause. He wrote "A lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for personal guidance was ... prohibiting the free exercise of his religion."
- II. In such instances, should our aim be to reconcile the clauses as best we can? Or, alternatively, should we give each full expression even if they appear to conflict?
 - A. We must remember, as I have stressed before, that these issues are not just abstractions. Consider, for example, the case of *Wisconsin v. Yoder* (1972). In this case, Wisconsin required all children to attend school until the age of 16. The members of an Old Order Amish sect refused to send their 14- and 15-year-old children to public schools.
 1. One might describe the claims advanced by the Amish in several ways. We might see the claim as a version of a parental liberty to direct the upbringing of their children.
 2. Alternatively, we might describe this as a classic free exercise claim.
 - B. The Court's decision to exempt the Amish from compulsory attendance laws might be a fair reading of the free exercise clause. But doesn't a special exemption for the Amish from these otherwise general and universal laws tend to "advance" religion?
 - C. Chief Justice Burger began his opinion for the Court by noting, "Providing public schools ranks at the very apex of the function of the state."
 1. Chief Justice Burger starts with this point because there can be little doubt that this is an important and substantial state interest.
 2. Would such an interest, however, be compelling? There is little doubt that the Court would find the provision of public education a compelling state interest in the abstract, but here, the interest might be more narrow—we would ask, does the state have a compelling interest in providing these children with a public education between the ages of 13 and 16?

- D. Continuing, the Chief noted: “Formal high school education, beyond the eighth grade, is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish belief, but also because it takes them away from their community.”
 - 1. Under the old *Sherbert* rule, we would ask, first: Is the state’s law neutral in purpose? If so, does the state have a compelling interest (see above) in overriding the claimed right or rights?
 - 2. On the other hand, under the *Smith* rule, the test is: Does the state’s admittedly neutral law pass the rationality test? Here the answer is almost certainly yes.
 - 3. Consequently, these two different tests likely lead to very different results when applied to the *Yoder* case.
 - E. These different doctrinal results point again to different understandings of the purpose of the free exercise clause.
 - 1. One understanding, we saw, is that the purpose of the clause is to establish a principle of formal neutrality and to protect an individual right to freedom of belief or nonbelief.
 - 2. Another understanding of free exercise, however, sees a purpose to protect communities of faith and to promote the flourishing of religion in American society.
 - 3. Although neither understanding commands a specific result, it should be clear that they point to potentially different results in *Yoder*.
 - 4. In particular, the Court’s discussion about the negative effects of exposure to secular culture on the beliefs of Amish children recalls the second purpose we described.
 - F. Chief Justice Burger thus concluded: “A state’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights interests, such as those specifically protected by the Free Exercise Clause.” The task, first, is to balance these competing constitutional interests. Moreover, we must balance them using a constitutional calculus—it is not enough for a judge simply to announce that one value ranks higher than another.
 - G. In a dissent, Justice Douglas argued that the majority’s decision was flawed because it failed to consider the constitutional interests of the Amish children. He argued that the Court’s decision failed to account for those children who might want to leave their communities but would be inhibited from doing so without a proper or complete public school education.
- III. Now we can return to the issue we began with: Does the exemption for the Amish, whether required by the free exercise clause or not, offend the establishment clause?
- A. Some judges, such as Chief Justice Rehnquist, have noted that any conflict between the two clauses is an artifice of judicial decisions that have defined one or both of the clauses, especially the establishment clause, too broadly.
 - 1. Chief Justice Rehnquist likewise suggested that if we adopt an accommodationist perspective of the establishment clause, instead of a strict separation perspective, many of these problems would disappear. (See Lecture Twenty-Six.)
 - 2. This, however, might privilege religion over irreligion and, in so doing, contradict one of the central purposes of the First Amendment: to protect our commitment to individual autonomy in matters of belief and nonbelief.
 - B. This should remind us that constitutional interpretation is a complex and difficult enterprise and that it nearly always involves questions that reach beyond the specifics of any particular case or decision.
 - C. Another approach might be to insist, as some scholars and judges have, that we adopt a single standard of *neutrality* for both clauses. This might result, however, in real hardships for some religions. And that might conflict with one of the underlying purposes of the religion clauses: to promote religious diversity.
 - D. The key issue, from a perspective concerned with constitutional interpretation, must be the necessity of grounding one approach or the other in the Constitution itself. To fail to do this is to reopen the *Lochner* criticism—that judges are simply imposing their personal preferences on the community.
- IV. This concludes our examination of the First Amendment. We have seen that the Constitution’s speech and religion clauses point to profound and recurring issues.
- A. Some of those issues, of course, are definitional in nature. The constitutional text, at least, gives us very little guidance on the meaning and definition of *speech* and *religion*.

- B.** In addition, the Constitution fails to say very much about when, if ever, other kinds of constitutional interests, such as the welfare of other individuals or the community at large, ought to outweigh our commitments to speech and religion.

Essential Reading:

Everson v. Board of Education (1947).

School District of Abington v. Schempp (1963).

Wisconsin v. Yoder (1972).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 8, p. 470.

Supplementary Reading:

Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*.

Questions to Consider:

1. Justice Rutledge argued in *Everson* that there should be only one definition of *religion*, a definition that applies to both the establishment and free exercise clauses alike. Do you agree? Are the purposes of the two clauses sufficiently different to warrant different definitions?
2. Is there really any conflict between the establishment and free exercise clauses? Is the conflict a function of Supreme Court decisions, or is it inherent in the First Amendment itself?

Lecture Thirty

Slavery and *Dred Scott* to Equal Protection

Scope: Equality has always been one of the basic ideals of the American constitutional order. The original text of the Constitution, however, did not completely reflect this ideal. Several original provisions of the Constitution, such as the fugitive slave clause and the three-fifths clause, reflect a series of difficult and painful compromises over the institution of slavery, compromises that at least some of the Founders saw as the price of the Union. Indeed, fundamental disagreement over slavery may be the reason why the Constitution did not contain an explicit guarantee of legal equality until the Fourteenth Amendment was ratified in 1868. The Fourteenth guarantees: “No State shall make or enforce any law which shall ... deny to any person ... the equal protection of the law.” Slavery and racial discrimination have long represented the greatest challenges to that promise of equality. In this lecture, we examine the Court’s treatment of racial discrimination from the Founding to the important case of *Dred Scott v. Sandford* (1856 session, decided 1857), in which the Court declared unconstitutional the Missouri Compromise, in the process denying that African Americans could be citizens. Instead, the Court ruled that slaves were “articles of merchandise” and, hence, part of the property rights of their owners.

Outline

- I. “We hold these truths to be self-evident,” wrote Thomas Jefferson, “that all men are created equal.” Yet these ringing words from the Declaration of Independence were found nowhere in the Constitution ratified in 1789.
 - A. There were provisions in the original text that implied a kind of political equality, such as Article I, Section 9, which prohibits titles of nobility, and the full faith and credit clause.
 - B. Madison remarked of the proposed Bill of Rights, “It may be said in some circumstances that the proposed Amendments do no more than state the perfect equality of mankind. This, to be sure, is an absolute truth.”
 - C. On the other hand, the Constitution also reflects the many ways in which we compromised our commitment to equality.
 1. Several original provisions of the Constitution, such as the fugitive slave clause and the three-fifths clause, reflect a series of difficult and painful compromises over the institution of slavery, compromises of the principle of equality that at least some of the Founders saw as the price of the Union.
 2. Indeed, specific language concerning slavery was omitted in final drafts of the Declaration itself, in large measure because South Carolina and Georgia objected to it.
- II. We should note, too, that the Fourteenth Amendment, which includes the equal protection clause, was not ratified until 1868, as a part of the Reconstruction Amendments.
 - A. Its passage did not make the equal protection clause an important part of the constitutional order, much less a significant part of the Court’s jurisprudence. As late as 1927, in the infamous case of *Buck v. Bell*, Justice Holmes wrote, “It is the usual last resort of constitutional arguments to point out shortcomings of this sort.”
 - B. This does not mean that there were no equal protection clauses in the late 1800s; there were several, and a few of them are of some significance. But as a rule, the equal protection clause, which is now such an important part of the Court’s work and such an important part of our shared constitutional experience, is really a post-World War II phenomenon.
- III. In this lecture, we take up racial discrimination under the Fourteenth Amendment from the Founding to *Dred Scott v. Sandford* (1856 session, decided 1857).
 - A. To understand the case, though, we must first address the very concept of equality itself. The Constitution itself says little or nothing by way of definition.
 - B. The state—state governments—routinely “discriminates.” A state “discriminates” every time it makes a classification.
 1. Indeed, modern government would be impossible if we denied the state the authority to discriminate in this sense.

2. Instead, we are concerned, as a constitutional matter, not with the fact of discrimination, but with the reasons the state offers to justify any act of discrimination.
 3. In particular, we are concerned, at least in this lecture, with what the Court calls “malignant” or noxious forms of state-generated discrimination.
 4. We should recall, too, that the state action doctrine means that the Constitution does not apply to private acts of discrimination.
- IV. At the time of the Founding, there were approximately 697,000 slaves in the United States, in a total population of 3.9 million people.
- A. In some states, especially in the South, slaves accounted for more than 20 percent of the population.
 - B. Although the word *slavery* never appears in the Constitution, there are a number of references to the practice:
 1. Article V, for example, provided that there could be no amendments to Article I, Section 9, before 1808.
 2. Article I, Section 9, in turn, declared that “the migration or importation of such Persons as any of the States now existing shall think proper to admit” could not be prohibited by Congress.
 3. Article VI contained the fugitive slave clause, providing that slaves had to be returned to states from which they had escaped.
 4. Article I contained the three-fifths clause for determining the apportionment of taxes and state representation in Congress.
- V. Although Congress prohibited the slave trade in 1808, it continued for many years.
- A. As a political issue, slavery played a prominent role in national politics. Slavery was a major issue, for example, in the expansion of the United States toward the western coast. Congress sought to ban slavery in the western territories under Article IV, Section 3.
 - B. When Congress sought to ban the further introduction of slaves into Missouri—a slave territory—as a condition of statehood, a major conflict erupted, in which several Southern states threatened to secede.
 - C. The conflict was resolved by the Missouri Compromise of 1820, which admitted Missouri as a slave state and Maine as a free state and prevented slavery in the Louisiana Territory north of latitude 36° 30'.
 - D. The compromise was short-lived and was finally scuttled in the important case of *Dred Scott v. Sandford* (1856 session; decided 1857).
- VI. The issue in *Dred Scott* was whether Scott, a Missouri slave who had traveled with his owner to the free state of Illinois, remained a slave or had become free by virtue of the move to Illinois. Scott sued for his freedom in a state court. He won, but the state Supreme Court reversed the ruling. After an arranged sale, Scott attempted to sue in a federal court.
- A. Chief Justice Taney, writing for the Court, declared that Scott was still a slave.
 - B. The decision turned technically on whether Scott was a citizen and, thus, had the right to sue his owner in a federal court.
 - C. Chief Justice Roger Taney opens the majority opinion with the following: “The question is simply this: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States?”
 - D. Taney also professed an unwillingness to inquire into the justice of the matter, stating, “It is not the province of the Court to decide upon the justice or injustice, the policy or the impolicy, of these laws. The decision of that question belonged to the political or lawmaking power....”
 - E. Coming to the merits of the case, Taney concluded that when the Constitution was ratified, African Americans, slaves or not, were not citizens. Was Scott—or any of the slaves—a citizen? “We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution ... On the contrary, they were at that time”—he meant the Founding—“considered as a subordinate and inferior class of beings.” And he continued; this “subordinate, inferior class of beings,” he wrote, is “... altogether unfit to associate with the white race ... and so far inferior that they had no rights which the white man was bound to respect.”

- F. The Chief Justice might have concluded his opinion here, but he went on to say that because African Americans had been bought and sold as “articles of merchandise,” they were property within the meaning of the Fifth Amendment. Consequently, Congress could not interfere with the slave trade because to do so would violate the property rights of slave owners. This had the effect of rendering the Missouri Compromise—the last great political effort to settle the slavery question—unconstitutional.
 - G. It is probably not correct to claim that *Dred Scott* drove the United States into the Civil War. But far from settling the matter, the Court’s decision galvanized Northern abolitionists, who feared that it would mean the spread of slavery throughout the territories.
- VII.** The Court’s decision thus reopened fundamental questions about the constitutional order, including questions about the nature of citizenship and community.
- A. It also reopened questions about constitutional interpretation and judicial power. In his 1861 inaugural address, President Lincoln, sounding a Jeffersonian theme, said, “I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court....”
 - B. He continued, however, by observing, “At the same time, the candid citizen must confess that if the policy of the government ... is to be irrevocably fixed by decisions of the Supreme Court ... the people will have ceased to be their own rulers....”
 - C. The implications of this position are several.
 - 1. First, the position recalls the Jeffersonian stance on institutional responsibility for constitutional interpretation—that of departmentalism, in which the Court is not necessarily entrusted with final authority to interpret the Constitution.
 - 2. Second, it suggests, explicitly, that all actors take an oath to support the Constitution, and that oath does not mean, necessarily, that other actors must accept the Court’s interpretation about what the Constitution means or requires.
- VIII.** The Constitution did not contain an explicit guarantee of legal equality until, following the conclusion of the Civil War, the Fourteenth Amendment was ratified in 1868.
- A. After the war, Congress adopted the Reconstruction Amendments—the Thirteenth, which prohibits slavery; the Fourteenth, which guarantees due process of laws and equal protection; and the Fifteenth, which provides that the right to vote cannot be abridged on the basis of race, color, or previous condition of servitude.
 - B. The Fourteenth guarantees: “No State shall make or enforce any law which shall ... deny to any person ... the equal protection of the law.” Congressman John Bingham, who drafted it, explained that the Fourteenth Amendment rests on “the great democratic idea that all men, before the law, are equal in respect of those rights of person which God gives and no man may rightfully take away....”
 - C. We should recall, as I mentioned earlier, that the mere passage of these amendments did little to change anything in 1868 or for some time thereafter.

Essential Reading:

The Declaration of Independence.

Dred Scott v. Sandford (1856 session; decided 1857).

Abraham Lincoln, First Inaugural Address, 1861; available in Kommers, Finn, and Jacobsohn, *American Constitutional Law*, Appendix C.

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 9, pp. 567–573.

Supplementary Reading:

Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*.

Daniel Farber, *Lincoln’s Constitution*.

Donald E. Fehrenbacher, *The Dred Scott Case*.

Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order, 1776 to Present*.

Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity*.

Questions to Consider:

1. Why did the original text of the Constitution, unlike the Declaration of Independence, not include a formal and far-reaching guarantee of political equality? Is such a principle an implicit part of the Constitution? Madison, for example, in introducing the Bill of Rights to the first Congress, noted, “It may be said, in some circumstances, [that the proposed amendments] do no more than state the perfect equality of mankind. This, to be sure, is an absolute truth.”
2. Does the Constitution define *equality* or *equal protection of the law*? In some ways, the language seems remarkably expansive and inclusive. Nowhere, for example, does the equal protection clause suggest that it applies only to racial discrimination.

14th Amendment to the U.S. Constitution, Section 1

Passed by Congress June 13, 1866. Ratified July 9, 1868.

Section 1.

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lecture Thirty-One

Brown v. Board of Education

Scope: In the infamous case of *Plessy v. Ferguson* (1896), the Supreme Court sustained the constitutionality of a Louisiana law requiring separate railroad cars for whites and blacks and, in so doing, inaugurated the doctrine of *separate but equal*. What followed was a system of virtual apartheid in some parts of the country and less formal but pervasive discrimination in others. The profound inequalities of the separate but equal doctrine were perhaps most obvious and important in the area of public education. In the 1930s, the National Association for the Advancement of Colored People, led by Thurgood Marshall, began a systematic campaign for school desegregation. In this lecture, we explore that campaign, beginning with the earliest cases, including *Missouri ex rel. Gaines v. Canada* (1938) and *Sweatt v. Painter* (1950), and culminating in the historic case of *Brown v. Board of Education* (1954).

Outline

- I. Notwithstanding the expansive promises of the equal protection clause, most of the early judicial decisions tended to give the clause a narrow reading.
 - A. Indeed, despite the Reconstruction Amendments, many states adopted repressive *black codes* that discriminated against African Americans.
 - B. In a series of decisions, the Court restricted the scope of the Civil Rights Acts of the 1860s and 1870s.
 - C. In another series of decisions, the Court restricted the reach of the Fifteenth Amendment by upholding literacy tests, poll taxes, and white primaries.
- II. In the infamous case of *Plessy v. Ferguson* (1896), the Court sustained a state statute requiring separate railroad cars for blacks and whites. Homer Plessy, with the support of local civil rights organizations, brought a test case to challenge the constitutionality of the law.
 - A. Writing for the Court, Justice Brown said:

The object of the amendment [the Fourteenth] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.
 - B. The Court thus agreed that the purpose of the equal protection clause was to guarantee the legal equality of the races.
 1. The Court, in other words, constructed a distinction between political equality, social equality, and cultural equality, on the one hand, and legal equality, on the other.
 2. Legal equality was therefore the only kind of equality guaranteed by the equal protection clause.
 - C. The Court further reasoned that the discrimination advanced in this case was not invidious because it affected whites and blacks equally. In other words, the requirement of separate railroad cars applied to whites as well as blacks—both races were forbidden to share a car with members of the other race.
 1. This recalls the earlier distinction between formal and substantive equality.
 2. In a much later case, *Loving v. Virginia* (1967), the Court would reject similar reasoning offered in support of a state miscegenation law.
 - D. The Court further concluded that “reasonable statutes” enacted “not for the annoyance or oppression of a particular class” did not violate the equal protection clause. Thus, Brown wrote, “So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature.”
 1. Please note, first, that the Court insists that the constitutionality of the statute depends on whether it is “reasonable.”
 2. Second, the Court notes that the primary authority for determining what is reasonable must rest with the state legislature.

- E. Finally, Justice Brown responded to the claim that the statute, whatever its claim to equality, in fact, discriminated against blacks:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

And likewise, "If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."

- F. In a well-known dissent, Justice Harlan wrote, "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.... Our Constitution is color-blind."

1. He wrote also, though, "The white race deems itself the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time...."

2. Harlan's later remarks do not undermine the importance of his dissent, but it should remind us that if we adhere to a theory of the Constitution that guarantees legal equality but does not speak to social or cultural or other forms of equality, we run the risk that our stereotypes will influence our thinking about what the test should be or, more importantly, about how we make sense of, interpret, and apply that test.

- G. As a matter of doctrine, *Plessy* inaugurated the separate but equal rule and mandated that racial classifications would be measured against the lowly rule of rationality. In practice, the doctrine was never enforced. What followed *Plessy* was a system of virtual apartheid. Voter registration of blacks dropped precipitously, for example, and degrading Jim Crow laws, demanding strict racial separation in nearly every area of human interaction, became the *de facto* law of the land.

III. The profound inequalities of separate but equal were perhaps most obvious and important in the area of public education. In the 1930s, the Legal Defense Fund of the National Association for the Advancement of Colored People, led by Thurgood Marshall, began a systematic campaign for school desegregation.

- A. The Legal Defense Fund aimed initially not at overturning *Plessy* directly but, instead, sought to overturn Jim Crow incrementally.
- B. The first step was to hold states fast to the "equal" standard in separate but equal. The hope was that the enormous cost to the states of providing genuinely equal facilities would eventually destroy segregation.
- C. The first significant victory for the NAACP LDF was in the important case of *Missouri ex rel. Gaines v. Canada* (1938). Missouri, which lacked a separate law school for blacks, had denied Gaines, a black man, admission to its whites-only law school. Instead, it offered to pay his tuition for another law school in another state.
- D. The Court found this violated the equal protection clause, but the decision did not directly challenge the ruling in *Plessy*.
- E. The NAACP continued its attack in *Sweatt v. Painter* (1950). In this case, the state of Texas maintained a separate law school for blacks. This time, the NAACP introduced expert testimony, foreshadowing *Brown*, that separate facilities were inherently unequal, even if the state otherwise equalized physical resources—which, of course, it had not done in this case.
- F. Critical to the Court's opinion and, eventually, to the end of *Plessy* was the Court's willingness in this case to consider intangible inequalities between the two schools, such as differences in prestige and academic reputation.

IV. *Sweatt* presaged the fall of separate but equal, but the doctrine had not yet been discarded. The NAACP knew full well that segregation had a powerful emotional appeal for some whites, especially in the field of elementary education.

- A. It was one thing for the Court to begin to dismantle separate but equal in the nation's colleges and professional schools but quite a different thing in the local schoolhouse.
- B. This understanding was partly the reason that the earliest cases were directed to higher educational institutions.

- V. *Brown v. Board of Education* (1954) was actually a combination of several different cases from different states. In each, the state had laws prohibiting the integration of public schools, and, in every case but one, lower courts had denied the efforts of black schoolchildren to attend white schools on the basis of *Plessy*.
 - A. The Court first heard oral argument in 1952. It seemed likely that the Court would split 5–4, probably in favor of Brown. Justice Frankfurter, fearing the consequences of such a split, urged the Court to order re-argument in 1953. The Court ordered re-argument, directed to the question of whether the framers of the Fourteenth Amendment had intended it to apply to public schools.
 - B. One month before the new term began, Chief Justice Vinson—probably the most committed of *Plessy* supporters on the Court—died. President Eisenhower named Earl Warren to replace him as Chief Justice.
- VI. Nearly every account of the Court’s decision in *Brown* gives Earl Warren much of the credit for leading the Court to a unanimous opinion.
 - A. The opinion is notable for its brevity. The Court overruled *Plessy* and announced: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”
 - B. In its opinion, the Court began by noting how important education is to the constitutional order as a whole and to citizens as individuals. This importance is partly what led the Court to abandon the traditional deference to legislative authorities, a deference that had been central to the Court’s decision in *Plessy*.
 - C. The Court also noted that the separation of children by race “generates a feeling of inferiority” in minority schoolchildren “that may affect their hearts and minds in a way unlikely ever to be undone.”
 - D. In a decision the following year, *Brown II*, the Court considered a question it had left open in *Brown I*: How were the nation’s schools to implement *Brown I*? Here, the Court seemed to revert to its typical posture of deference, ordering local officials to desegregate “with all deliberate speed” but noting that such policies were primarily the responsibility of local officials, albeit subject to review in federal courts.
- VII. The *Brown* decisions are among the most controversial the Court has ever handed down. Much of the reaction in Southern states, by the public and public officials alike, was unrelentingly hostile and often violent.
 - A. Some, such as Governor Faubus of Arkansas, openly defied the Court, leading President Eisenhower eventually to send in the National Guard.
 - B. Several Southern states issued a “Manifesto,” in which they claimed the constitutional authority to “nullify” the Court’s decision. Nearly 100 congressmen signed a resolution condemning the decision as a “clear abuse of judicial power.”
 - C. There was also much scholarly and academic criticism of the decision. Some scholars, for example, decried the Court’s use of social science data to establish psychological harm to schoolchildren.
 - 1. Other critics focused on the Court’s failure to address the First Amendment associational rights of students and parents opposed to integration.
 - 2. In a famous and controversial footnote, the Court cited the work of Kenneth B. Clark, Gunnar Myrdal, and others to support this conclusion within the overall decision.
 - D. Recently, some critics have argued that *Brown* itself is a racist decision, in part because the decision’s “individualistic” emphasis neglects systemic and pervasive institutional forms of discrimination.

Essential Reading:

Plessy v. Ferguson (1896).

Missouri ex rel. Gaines v. Canada (1938).

Sweatt v. Painter (1950).

Brown v. Board of Education (1954).

Brown v. Board of Education II (1955).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 9, pp. 573–579.

Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*.

Supplementary Reading:

Gunnar Myrdal, *An American Dilemma: The Negro Problem and American Democracy*.

Raymond Wolters, *The Burden of Brown*.

C. Vann Woodward, *The Strange Career of Jim Crow*.

Questions to Consider:

1. Do the differences between *Plessy* and *Brown* ultimately depend upon how we define *equality*?
2. In *Plessy*, the majority insisted that social equality and legal equality are not the same things. Is there anything in *Brown* that challenges this conclusion? What, if anything, does the distinction tell us about the ability of law to work social change?
3. Did *Plessy* hold that racial segregation was constitutionally permissible if it did not rest on assumptions of inferiority or have the purpose of burdening a particular race? If so, can we imagine forms of racial discrimination that do not rest on such assumptions?
4. What, if anything, did *Brown* change? Many children in the United States continue to attend heavily segregated schools. Why? Did *Brown* do anything to upset those factors?
5. Consider the words of Derrick Bell: “[*Brown*] cannot be understood without some consideration of the decision’s value to whites [able] to see the economic and political advantages at home and abroad that would accompany the abandonment of segregation.” If true, does this suggest that *Brown* was itself racist?

Lecture Thirty-Two

Equality and Affirmative Action

Scope: As we saw in the last lecture, much of the Court's early work on racial discrimination tended to concentrate on legislative classifications that were malign or invidious in intent or effect. Affirmative action programs, however, raise somewhat different problems because they seek to compensate for the effects of historic discrimination against minorities. Accordingly, affirmative action programs classify on the basis of race to benefit minorities instead of harming them. Does the remedial or benign purpose of these policies suggest the need for a special judicial test under the equal protection clause? As we shall see in this lecture, the Court has answered this question several times and in several different ways. We begin with the Court's well-known opinion in *Regents of the University of California v. Bakke* (1978) and conclude with the Court's decisions in *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), both of which involved affirmative action policies at the University of Michigan.

Outline

- I. *Brown* stands as a ringing condemnation of racism in the nation's elementary schools, but the decision itself said nothing about how the nation's schools should conduct the project of desegregation.
 - A. The Court addressed this issue the following year in *Brown II*. Here, the Court ordered schools to desegregate "with all deliberate speed."
 - B. Whatever the intended meaning of this vague command, in practice, it encouraged Southern states, in particular, to find ways to forestall their compliance. And, as a practical consequence, there are pockets of *de facto* substantial school segregation even today, though not *de jure* discrimination.
 - C. This raises an obvious question: How, if at all, can we as a society overcome racial discrimination?
- II. Before *Brown*, most of the Court's equal protection jurisprudence tended to focus on statutory classifications that were clearly invidious in purpose or effect.
 - A. Remember that the Court uses the compelling state interest test in cases where the classification is suspect.
 1. Remember, under the old *Plessy* rule, racial discrimination would not offend the Constitution so long as it was rational.
 2. Under the new test, however, racial discrimination offends the equal protection clause unless it furthers a compelling state interest.
 - B. Affirmative action programs, however, raise somewhat different problems because they seek to compensate for the effects of historic discrimination against minorities.
 1. Does the "compensatory" purpose of such programs constitute a compelling state interest?
 2. Alternatively, does the remedial or benign purpose of these policies suggest the need for a special judicial test under the equal protection clause?
 - C. The Court has struggled with these questions for many years, and as we shall see, judicial efforts to deal with questions concerning affirmative action reopen important and recurrent questions about the meaning of equality and about the proper role of judges in a constitutional democracy.
 1. In other words, our question becomes whether affirmative action programs advance a compelling state interest, or an interest so strong that it overcomes the discrimination perpetrated by the program itself.
 2. Behind the doctrinal issue, of course, is a thorny question of moral philosophy and basic justice: When, if ever, is it permissible for the state to discriminate on the basis of race?
- III. The Court's first substantial effort to deal with these questions was in *Regents of the University of California v. Bakke* (1978).
 - A. Bakke, a white man, was twice denied admission to the medical school at the University of California at Davis. Bakke filed suit, claiming that he had higher MCAT scores and a better GPA than a number of minority applicants admitted under a special program that reserved 16 seats out of a class of 100 for "economically and/or culturally disadvantaged" applicants.
 - B. The Court concluded that the Davis program was unconstitutional. But the Court did not say that race is always a prohibited factor in admissions decisions.

- C. Four justices, in an opinion by Justice Stevens, argued that the plan violated the Civil Rights Act of 1964 but did not reach the constitutional question.
 - D. Four other justices, in an opinion by Justice Brennan, concluded that the plan satisfied both the Civil Rights Act and the equal protection clause. Justice Brennan argued that affirmative actions in general should not be subject to strict scrutiny but, instead, held to a less demanding “intermediate” standard.
 - E. The critical opinion in the case was a concurrence by Justice Powell, who agreed with the Stevens bloc that the plan violated the Civil Rights Act. But Powell also concluded that the plan was a violation of the Fourteenth Amendment.
 - F. In Powell’s view, a program that prefers “members of any one group for no reason other than race or ethnic origin” is discrimination “for its own sake” and unconstitutional.
 - 1. He noted, too, that notwithstanding the alleged purpose of the program, “it may not always be clear that a so-called ‘preference’ is benign.”
 - 2. Continuing, he argued, “Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens simply to enhance the societal standing of others.”
 - 3. Powell went on: “Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.” He continued:

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic backgrounds may vary depending on the ebb and flow of political forces.
 - G. Nevertheless, Justice Powell did not say that the use of race in university admissions is always unconstitutional. Sometimes, he wrote, race may be a “plus” in an applicant’s file.
 - H. Finally, Justice Powell, unlike the Brennan bloc, argued that racial discrimination is always malignant and, hence, must be judged by the strict scrutiny test.
- IV. Much like *Brown* before it, *Bakke* initiated a fierce debate over the merits and constitutionality of affirmative action plans.
- A. In a series of decisions handed down between 1978 and 1995, the Court seemed unable to agree on even the most basic kinds of questions. Much of the debate centered on whether “benign” racial classifications should be subjected to the same scrutiny as invidious classifications.
 - B. For example, the Court ruled that strict scrutiny should be applied to affirmative action programs adopted by city and state governments but seemed to suggest that the less demanding intermediate standard was appropriate for programs adopted by the federal government.
 - C. In most of these cases, the Court seemed to argue about matters of doctrine—the justices, in other words, argued about whether they should apply strict scrutiny or an intermediate standard of review.
- V. Two cases decided in 2003 may finally have settled the doctrinal issues, but they will do little to settle the underlying constitutional and ethical issues that surround affirmative action.
- A. Before we take up these cases in detail, it is important to remember that these apparent doctrinal disputes mask more fundamental disagreements about the meaning and nature of equality as a constitutional ideal.
 - 1. For example, one might understand equality as a commitment to equality of opportunity.
 - 2. Alternatively, we might understand the concept as a commitment to a substantive equality of condition or position.
 - 3. We should ask how these alternative understandings about the meaning of equality influence our approach to affirmative action programs.
 - B. In *Grutter v. Bollinger* (2003), the first of two cases prompted by affirmative action programs at the University of Michigan, the Court ruled 5–4 that strict scrutiny applies to all affirmative action programs.
 - 1. Nevertheless, the Court upheld the constitutionality of the law school’s program, because the program was “narrowly tailored” to achieve a compelling state interest in the attainment of racial diversity.
 - 2. Unlike the inflexible program in *Bakke*, the Court ruled, the law school program was “highly individualized” and “gave serious consideration to all the ways an applicant might contribute to a diverse educational environment.”

3. O'Connor also wrote, "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training ..." and educational access to the various professions.
- C. In *Gratz v. Bollinger* (2003), on the other hand, the Court in a 6–3 vote struck down Michigan's so-called "point system." Justices O'Connor and Breyer joined the four dissenters in *Grutter* in concluding that the point system was the functional equivalent of a racial quota.
- VI. If *Grutter* and *Gratz* seem to settle most of the basic doctrinal issues, they do little to address the underlying constitutional concerns and issues that surround affirmative action programs.
 - A. So observed Justice Scalia in his dissent in *Gratz*: "The *Gratz-Grutter* split double-header seems perversely designed to prolong the controversy and the litigation."
 - B. One of those concerns reaches at least as far back as Justice Harlan's dissent in *Plessy*: Is the Constitution color-blind?

Essential Reading:

Regents of the University of California v. Bakke (1978).

Grutter v. Bollinger (2003).

Gratz v. Bollinger (2003).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 9, pp. 579–583.

Supplementary Reading:

Stephen Carter, *Reflections of an Affirmative Action Baby*.

J. Wilkinson Harvie, III, *From Brown to Bakke*.

Charles Lawrence and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action*.

Questions to Consider:

1. Is the Constitution color-blind? If so, is it possible to conclude that any affirmative action program could be squared with basic constitutional principles? On the other hand, are there definitions of equality that do not assume that the Constitution should be color-blind?
2. In her opinion for the Court in *Grutter*, Justice O'Connor noted that the university emphasized the importance of future confidence and the educational benefits of diversity, whereas in *Bakke*, the focus seemed to be on remedying past discrimination. Does it matter why an institution adopts an affirmative action program?
3. Agreeing with the Court's holding in *Grutter* that racial discrimination in higher education will be illegal in 25 years, Justice Thomas concluded: "I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months." Do you agree?

Lecture Thirty-Three

Equality and Gender Discrimination

Scope: As we saw in the previous three lectures, the ideal of equality is deeply rooted in our constitutional culture, even if we frequently fail to live up to this ideal. In this lecture, we take up one such area—that of discrimination on the basis of gender. Discrimination on the basis of sex has a long history in the United States. Throughout much of that history, the Court has taken a hands-off approach, ruling on more than one occasion that discrimination on the basis of gender did not violate equal protection unless it was arbitrary or irrational. In 1971, however, the Court began to review gender discrimination more aggressively. Hence, in *Reed v. Reed* (1971), the Court found unconstitutional an Idaho statute preferring men to women in the administration of a decedent's estate. Just two years later, in *Frontiero v. Richardson* (1973), a plurality of the Court suggested that gender should be treated like race and, thus, subject to strict scrutiny as a suspect classification. Later Courts, however, proved reluctant to embrace strict scrutiny for gender classifications.

Outline

- I. I suggested in Lecture Thirty-Two that *Grutter* and *Gratz* may have settled some of the doctrinal issues in the debate over affirmative action.
 - A. But even so, affirmative action still gives rise to a wide variety of constitutional concerns.
 - B. For example, in his important dissent in *Grutter*, Justice Thomas wrote, quoting Frederick Douglass, ““What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice.”” He continued: “Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.”
 - C. Another point of controversy concerns Justice O'Connor's opinion in *Grutter*, where she wrote: “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity....” She continued: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”
 - D. Justice Thomas responded: “I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.... I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.”
- II. Like classifications based on race, gender classifications have a long history in the United States. And, as with racial classifications, for a long time, American courts refused to recognize that gender classifications often do little more than restate and reify outdated and pernicious stereotypes.
 - A. In *Bradwell v. State of Illinois* (1873), for example, the Court upheld the state's rule that prohibited women from practicing law. Just two years later, the Court peremptorily dismissed the claim that women have a constitutional right to vote in *Minor v. Happersett* (1875).
 - B. Women achieved the right to vote in 1920 with the adoption of the Nineteenth Amendment, but, in most ways, women were still subject to unequal treatment in the law. In *Hoyt v. Florida* (1961), for example, the Court unanimously ruled that a Florida law prohibiting women from serving on juries did not violate the equal protection clause.
 - C. Like its cases on racial discrimination, the Court's early gender cases often seemed to reflect larger social and cultural understandings about the meaning of race or gender in society.
 - D. The Court's treatment of gender cases is similar to the Court's treatment of race in another respect as well: Both lines of cases involve important questions about the meaning of equality and about the limits of judicial power.
 - E. The Court's gender cases, then, like its race cases, often turn on disputes about when and why the Court ought to upset decisions undertaken by popularly elected legislatures.
- III. The Court's modern gender cases begin in 1971, in the case of *Reed v. Reed* (1971).
 - A. In *Reed*, a unanimous Court found unconstitutional an Idaho statute preferring men to women in the administration of a decedent's estate.

- B. In its decision, the Court said simply that the Idaho law was “the very kind of arbitrary legislative choice forbidden” by the Constitution. Implicit, of course, is an understanding about the reach of judicial power vis-à-vis the legislature.
 - 1. The Court’s use of the word *arbitrary* might suggest that this particular statute would fail to satisfy even the basic rationality test.
 - 2. But there are other parts of the opinion that seem to call for a higher degree of judicial scrutiny.
- IV. Left unspecified in *Reed* was the doctrinal question of whether gender classifications, like race, should be subject to strict scrutiny.
- A. The Court took up the doctrinal question in *Frontiero v. Richardson* (1973). In this case, the Court invalidated a federal law denying servicewomen benefits given to males.
 - B. Citing *Reed*, Justice Brennan wrote for a plurality: “At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect.... We agree....”
 - 1. This would mean that gender classifications would be subject to the strict scrutiny/compelling state interest test.
 - 2. However, the standard was adopted only by a plurality of the Court, not a majority.
 - C. Before we take up the other opinions in the case, we should consider why some classifications might be suspect—we should, in other words, try to identify the reasons that make a classification, such as race, suspect, then determine whether those reasons apply with equal force to gender classifications.
 - 1. The Court has often said, first, that racial classifications are suspect because there is a long history of racial discrimination in the United States.
 - 2. Racial classifications are also suspect, the Court has ruled, because it is difficult to imagine situations in which the state might discriminate for reasons that are not stereotypical or invidious.
 - 3. The Court has also argued that race is an immutable characteristic, one that cannot be changed and one that is beyond the control of the individual.
 - D. Part of the plurality opinion in *Frontiero* is dedicated to a discussion of whether and to what extent these same considerations apply to gender discrimination. Justice Brennan stated: “With these considerations in mind, we can only conclude that classifications based on sex are inherently suspect, and must, therefore, be subjected to strict judicial scrutiny.”
 - E. Justices Powell, Blackmun, and Stewart agreed that the denial in this case was unconstitutional but disagreed with the statement that gender classifications should be suspect and, thus, tested against strict scrutiny.
 - F. Justice Powell also argued that the plurality’s decision was ill timed, because the Equal Rights Amendment was still pending in the states: “The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.” If passed, he noted, “It will represent the will of the people accomplished in the manner prescribed by the Constitution.” If not, judges would be well advised to follow majoritarian sentiments unless they are irrational or arbitrary. He concluded: “By acting prematurely and unnecessarily, as I view it, the Court assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.”
 - G. Justice Rehnquist was the only dissenter. He argued that gender classifications should be subject to the rationality test.

Essential Reading:

Reed v. Reed (1971).

Frontiero v. Richardson (1973).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 10, pp. 657–661.

Supplementary Reading:

Judith A. Baer, *Equality under the Constitution: Reclaiming the Fourteenth Amendment*.

Kenneth M. Davidson, Ruth Bader Ginsburg, and Herma Hill Kay. *Text, Cases, and Materials on Constitutional Aspects of Sex-Based Discrimination*..

Reva B. Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective," 150 *University of Pennsylvania Law Review* 297 (2001).

Suzanne M. Marilley, *Woman Suffrage and the Origins of Liberal Feminism in the United States*.

David L. Kirp, Mark G. Yudof, and Marlene Strong Franks, *Gender Justice*.

Questions to Consider:

1. In what ways, precisely, is gender discrimination similar to racial discrimination? Are there any differences between them? If so, are those differences of any constitutional relevance?
2. In *Frontiero*, both Justice Brennan, writing for the plurality, and Justice Powell, in concurrence, mentioned the pending Equal Rights Amendment. For Brennan, the amendment was some evidence that Congress thought gender classifications should be suspect. For Powell, it was evidence that the issue was being worked out in the political arena. Are these positions mutually exclusive? Do they rest on different understandings about the role of the judiciary in a democratic society? Is one of greater constitutional significance than the other?

Lecture Thirty-Four

Gender Discrimination as Semi-Suspect

Scope: As we saw in the previous lecture, the Court has struggled with equal protection and gender. In particular, the Court has been unable to identify the standard of review that should govern gender classifications. Clearly, something more than simple rationality is required, but to date, the Court has been unwilling to afford to gender classifications the same kind of strict scrutiny that it applies to racial classifications. Instead, in *Craig v. Boren* (1976), a majority settled on an intermediate standard of review. Consequently, gender classifications must be “substantially related to an important governmental interest.” The result is a test that demands more than simple rationality but is not as demanding as strict scrutiny. The “accordion-like” character of this intermediate standard has meant that it is extremely difficult to predict the outcome of any particular case. Moreover, it should remind us that constitutional interpretation always involves an element of judgment.

Outline

- I. As we saw in Lecture Thirty-Three, a plurality of the Court in *Reed* argued that classifications based on gender ought to receive strict scrutiny.
 - A. A majority of the Court, however, never agreed to such a rule. Ultimately, those justices arguing for the middle ground—Powell, Blackmun, Stewart, and Stevens—managed to persuade a majority of the Court to reject the plurality opinion in *Reed*, as well as the dissenting position occupied by Justice Rehnquist.
 - B. In *Craig v. Boren* (1976), a majority settled on an intermediate test for gender classifications. Calling gender classifications quasi- or semi-suspect, the Court announced: “To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”
 1. The Court thus adopted what we sometimes call an intermediate-tier review. This intermediate tier, reserved for “semi-” or “quasi-” suspect classes, requires more than rationality but does not require that the state’s interest be compelling.
 2. In this particular case, the Court concluded that the state interest could not pass this intermediate test.
 - C. *Craig* points to another issue that hides behind the question regarding standards of review. The discrimination in *Craig* was directed against males. Is this kind of discrimination different, as a constitutional matter, than discrimination against women?
 1. We might, in general, attempt to distinguish between *suspect classes* and *suspect classifications*.
 2. Discrimination against a suspect class would encompass discrimination, for example, against traditionally disfavored minorities—such as African Americans, one might argue, or women. If we adopt this approach, we might well decide that there is an important constitutional difference between discrimination directed against women and that directed against men.
 3. Alternatively, we might be more concerned with suspect classifications—or classifications that utilize race or gender no matter who is harmed or helped. In such cases, we might argue, the constitutional harm consists in the very use of a racial or gender classification. In these cases, the same standard of review should apply no matter the purpose or the effect of the classification.
 - D. In an important concurrence, Justice Stevens objected to the new test. “There is,” he wrote, “only one equal protection clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”
 - E. In dissent, Justice Rehnquist argued that the majority decision was “objectionable on two grounds.”
 1. First, Rehnquist noted that the discrimination in this case was directed against men.
 2. Second, Rehnquist objected to the enunciation of the new standard “without citation to any source.” In addition, Justice Rehnquist observed that the test was sufficiently elastic to allow, indeed, would necessitate judges to make “subjective judgments” that are best left to the political branches.

- II. The development of the intermediate standard of judicial review in *Craig* means that the Court has developed a three-tier system for assessing cases under the equal protection clause.
 - A. For cases involving suspect classifications, such as race, the test is strict scrutiny, requiring the state to advance a compelling state interest.
 - B. For cases involving semi-suspect classifications, such as gender, the test is intermediate scrutiny, which provides that the classification must be “substantially related to an important governmental interest.”
 - C. For cases involving nonsuspect classifications, the Court uses the rational basis test.
- III. What does the intermediate test actually demand? Some judges have argued that it is little more than a play on words and that such words as *substantial* and *important* invite judicial disagreement.
 - A. A series of cases decided after *Craig* seems to demonstrate the “accordion-like” character of the test.
 - B. In *Michael M. v. Superior Court of Sonoma County* (1981), Chief Justice Rehnquist, writing for a plurality, upheld the constitutionality of a statutory rape law that punished males for engaging in unlawful sexual intercourse with underage females but not females so engaged with underage males.
 1. According to Chief Justice Rehnquist, the law was substantially related to the state’s strong interest in preventing illegitimate teenage pregnancies.
 2. Justices Brennan, White, and Marshall dissented, arguing that the law was based on “outmoded sexual stereotypes.”
 - C. In *Mississippi University for Women v. Hogan* (1982), on the other hand, the Court struck down an admissions policy that excluded males from entering the nursing school.
 - D. Although he normally voted with Justices Brennan, White, and Marshall, this time, Justice Blackmun dissented, writing, “I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination.”
 - E. In a second university-related case, *United States v. Virginia* (1996), the Court invalidated the Virginia Military Institute’s males-only admissions policy.
 1. Writing for the majority, Justice Ginsburg rejected VMI’s claim that its single-sex institution contributed to diversity in educational approaches, largely because the state had not provided similar educational opportunities for women.
 2. Justice Ginsburg wrote, “Measuring the record in this case against the standard of review, we conclude that Virginia has shown no exceedingly persuasive justification for excluding all women from VMI.”
 3. Ginsburg’s language is a bit confusing: Scholars wonder if this is simply a restatement of the middle tier or whether it works a substantial change in the test.
 4. Justice Ginsburg also addressed the underlying discrimination, noting, “However liberally this plan serves the state’s sons, it makes no provision whatever for her daughters. That is not equal protection.”
 5. In an important dissent, Justice Scalia raised a number of familiar issues. He began by noting, “Today, the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.” He continued, “Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education. Closed-minded they were—as every age is, including our own....”
 6. Justice Scalia also addressed the issue of levels of review:

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that “equal protection” our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society’s values regarding (among other things) equal protection, not to *revise* them Today, however, change is forced upon Virginia, and reversion to single sex education is prohibited nationwide, not by democratic processes but by order of this Court.... This is not the interpretation of a Constitution, but the creation of one.
- IV. The Court’s cases reveal that basic divisions about the meaning of equality, about the doctrinal tests governing equal protection, and about judicial power itself still run deep among the justices.

Essential Reading:

Craig v. Boren (1976).

Michael M. v. Superior Court of Sonoma County (1981).

Mississippi University for Women v. Hogan (1982).

United States v. Virginia (1996).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 10, pp. 658–661.

Supplementary Reading:

Nguyen v. Immigration and Naturalization Service (2001).

Sylvia Law, “Rethinking Sex and the Constitution,” 132 *University of Pennsylvania Law Review* 955 (1984).

Sandra F. Van Burklee, *Belonging to the World: Women’s Rights and American Constitutional Culture*.

Questions to Consider:

1. What is the difference between strict scrutiny and intermediate scrutiny? Is either test a useful guide for predicting when and whether a governmental classification will run afoul of the equal protection clause?
2. Justice Stevens wrote that there is only one equal protection clause and that “It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.” Should there be only one test for the clause? If so, what should it be, and why?

Additional note about the intermediate standard of review

The Court has been badly splintered in its application of the intermediate standard of review. Whereas the intermediate test sometimes seems a cover for strict scrutiny, as in *United States v. Virginia* (1996), in other cases, the intermediate test seems to become a guise for the Court to apply a rationality test. For example, in *Nguyen v. Immigration and Naturalization Service* (2001), the Court sustained a classification relating to the acquisition of U.S. citizenship. The federal statute granted citizenship automatically to nonmarital children born outside the United States to a citizen mother and a noncitizen father, but it denied citizenship to such children born to a citizen father and a noncitizen mother.

Writing for the majority, Justice Kennedy found that the statute survived intermediate scrutiny because the important governmental objective was the assurance that there exists a biological parent-child relationship: “In the case of the mother, the relation is verifiable from the birth itself,” whereas in the case of the father, paternity would have to be established in some other way.

In a sharply worded dissent, Justice O’Connor criticized the majority for relying on common assumptions about the parenting roles of mothers and fathers. A gender-neutral statute, combined with DNA tests and other evidence of paternity, claimed the dissenters, could just as easily achieve the state’s legitimate interest in verifying the existence of a meaningful parent-child relationship.

Lecture Thirty-Five

The Future of Equal Protection?

Scope: The Court's equal protection jurisprudence extends far beyond race and gender. In the early 1970s, for example, the Court began to review cases involving resident aliens and those involving classifications based on economic status. In both, the Court refused to apply strict scrutiny. As we shall see in this lecture, the Court has likewise refused to extend strict scrutiny to cases involving discrimination on the basis of sexual orientation, mental or physical incapacity, illegitimacy, and age. And although the justices continue to bicker over standards of review, there does appear to be an overarching trend: Except for cases involving race and gender, the Court's general posture in equal protection cases is that of deference to the majoritarian preferences expressed through the democratic process.

Outline

- I. As we saw in Lectures Thirty-Two through Thirty-Four, one of the defining features of the Court's equal protection jurisprudence has been the extension of the clause beyond cases that turn on racial classifications to other areas of discrimination, including gender.
 - A. We saw, too, that the Court has developed an equal protection jurisprudence that is constructed around the notion that different kinds of classifications warrant different degrees of judicial scrutiny.
 - B. At this point in the course, we appear to have three tiers of review:
 1. For so-called suspect classifications, such as race, the Court uses strict scrutiny.
 2. For semi-suspect classifications, such as gender, the Court uses the intermediate test, which requires the state to advance an important and substantial interest.
 3. For nonsuspect classifications, the Court uses the rationality test.
- II. In this lecture, we take up cases involving the equal protection clause and classifications based on disability, economic status, age, sexual orientation, and alienage.
 - A. In each of these areas, the Court has considered a familiar question: What standard of review—strict, intermediate, or rational basis—should it use to assess the state's action?
 - B. We shall see, too, that some justices appear anxious to replace the “tier” analysis with some other set of doctrinal tools.
- III. In *Harper v. Virginia Board of Elections* (1966), the Court noted, “lines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored.”
 - A. Such language might suggest that wealth classifications are suspect, but it is important to note that the Court had not yet fully articulated the concepts of tiers of review.
 - B. Whatever the import of *Harper*, in the leading case of *San Antonio v. Rodriguez* (1973), the Court declared that economic classifications are subject only to the rational basis test. *San Antonio* is an important case, in large measure because the majority devoted a good deal of discussion to issues about constitutional interpretation and the limits of judicial power.
 1. This case involved a Texas scheme for the funding of public schools that was a complicated mix of local property taxes and state subsidies. The plaintiffs challenged the scheme, claiming that impoverished school districts suffered discrimination based on their financial status.
 2. Justice Powell concluded that the economic classification involved in the case did not trigger heightened judicial scrutiny and must, instead, be subject to the rationality test.
 3. Powell noted that it was difficult in this case to attach any certainty to the “class” harmed by the financing scheme. Wealth classifications, he argued, are permeable, and such concepts as *poor* and *poverty* are inherently subjective.
 4. In addition, Justice Powell argued that, unlike other equal protection cases, here there was “no absolute deprivation” of the interest claimed. The claim, instead, was that the quality of education suffered, not that there was a denial altogether of the liberty interest.
 5. For Powell, then, the case reduced to the question: Is the school property funding system “rational” in a constitutional sense? The Court had little difficulty finding that it was.

- C. Justice Marshall wrote an important dissent, a good part of which goes directly to the question of tiers.
 - 1. He wrote: "To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis." In Marshall's view, the Court's actual work disclosed a "sliding scale" of review, or a system in which the Court, in fact, engaged in a sophisticated, nuanced, and particularized form of review tailored to the specifics of individual cases.
 - 2. Thus, he concluded, "In summary, it seems to me inescapably clear that this Court has consistently adjusted with care what or how it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classifications."
- IV. In *Romer v. Evans* (1996), the Court did strike an amendment to the Colorado Constitution that barred local governments from enforcing regulations that granted protected minority status to homosexuals.
 - A. But the Court did not find that sexual orientation triggered higher scrutiny under the equal protection clause. Instead, it ruled that the amendment served no legitimate legislative purpose.
 - 1. One question in *Romer*, then, concerns the meaning of the rationality test itself.
 - 2. Some observers, for example, think that the state interest advanced in *Romer* would certainly have passed the test, at least as historically applied.
 - B. In this case, however, the rationality test seemed to require more than it had in the past. Once again, the Court's equal protection analysis raised issues about the tier analysis and the integrity of constitutional interpretation.
- V. In *Trimble v. Gordon* (1977), the Court invalidated an Illinois statute that disadvantaged nonmarital children. The Court refused to utilize strict scrutiny for this classification, but it did seem to utilize the intermediate standard of review.
- VI. The Court considered classifications based on mental handicap in the case of *Cleburne v. Cleburne Living Center* (1985).
 - A. The Court struck a residential zoning restriction that discriminated against the mentally handicapped.
 - B. Writing for the Court, Justice White said, "We conclude, for several reasons, that the court of appeals erred in holding mental retardation a quasi-suspect classification."
 - 1. This represents a clear decision to put the classification into the nonsuspect category, thus triggering rationality review.
 - 2. One of the reasons for this decision is the following observation by the Court:

Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action ... is rooted in considerations that the Constitution will not tolerate."
 - 3. Interestingly, however, having established that rationality is the correct test, the Court concluded: "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."
 - C. Although the Court applied the rationality test, many observers thought the test, in its application, was closer to intermediate scrutiny.
 - D. Any ambiguity in *Cleburne*, however, was settled in *Heller v. Doe* (1993), in which the Court, in an opinion by Justice Kennedy, clearly applied the rationality test in upholding a Kentucky statute providing for the involuntary commitment of mentally ill persons.
- VII. Finally, in *Massachusetts Board of Retirement v. Murgia* (1977), the Court upheld a state law that required police officers to retire at age 50.
 - A. The Court again utilized the rationality standard, noting that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."
 - B. Classifications based on age, the Court concluded, did not satisfy those requirements. "The state's classification rationally furthers the purpose identified by the state through mandatory retirement at age 50. The legislature seeks to protect the public by assuring physical preparedness of its police officers."

VIII. Two trends emerge from this complicated thicket of cases.

- A.** First, as a general rule, the Court has proven unwilling at all to add to the category of suspect classifications. The Court has proven almost as unwilling to add to the category of semi-suspect. For the most part, the Court has tended to apply the rationality standard to most classifications.
- B.** Second, this fixation on standards of review remains a source of discord both on and off the Court. Some justices, such as Chief Justice Rehnquist, have argued that the rationality test is typically most appropriate—other, more searching tests, he argued in *Trimble*, have led the Court into “an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.”
- C.** Other justices, notably Justice Marshall, have agreed that a two-tier or three-tier approach is “outdated and intellectually disingenuous.” Writing in *Murgia*, Marshall called for a “sliding-scale” approach, in which the standard of review would be specifically tailored for each case, commensurate with the nature of the classification and the burden it imposes on the individual.
- D.** In sharp contrast, Justice Stevens has argued instead for a single standard of review to apply in all equal protection cases. As we saw in *Craig*, Justice Stevens urged the adoption of a single standard of rationality. In *Cleburne*, however, he suggested that the rationality test might have more bite than it has had in the past: “the word ‘rational’—for me at least—includes elements of legitimacy and neutrality.”
- E.** The Court’s extended disagreement about standards of review ought not to hide the larger issue: Behind these doctrinal disputes are disagreements over the most fundamental issues—especially, and most obviously, about when and why the Court ought to defer to the legislative process.

Essential Reading:

San Antonio v. Rodriguez (1973).

Romer v. Evans (1996).

Trimble v. Gordon (1977).

Cleburne v. Cleburne Living Center (1985).

Massachusetts Board of Retirement v. Murgia (1977).

Kommers, Finn, and Jacobsohn, *American Constitutional Law*, chapter 10, pp. 661–664.

Supplementary Reading:

Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians and the Failure of Class-Based Equal Protection*.

Elizabeth Hull, *Without Justice for All: The Constitutional Rights of Aliens*.

Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment*.

Questions to Consider:

- 1. Except for cases involving race and gender, the Court’s general posture in equal protection cases is that of deference to the majoritarian preferences expressed through the democratic process. Is this deference constitutionally mandated? Is it implicit in the equal protection clause itself, or is it grounded in some other part of the Constitution?
- 2. Sometimes it seems as if the Court’s internal squabbles over standards of review have little if anything to do with how it decides particular cases. Why do the justices spend so much time debating these “doctrinal” issues?
- 3. Can one standard of review do justice to the many kinds of statutory classifications that arise in the modern welfare state? Is there a single constitutional standard, in other words, that the Court should apply both to racial classifications and other innocuous kinds of classifications?

Lecture Thirty-Six

Citizens and Civil Liberties

Scope: Felix Frankfurter once wrote that most of the basic conflicts in civil liberties are “what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs.” In this final lecture, we examine these clashes in light of the broader philosophical and institutional problems of the constitutional order. We thus return to some of the themes and questions we explored in the first lecture. What overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the Constitution? By now, we have seen that our attempts to answer these questions yield only modest and tentative results. What we can hope to achieve, however, is an improved and more sophisticated appreciation of the importance (or not) of our commitment to civil liberties and of the sacrifices we must make if we choose to honor that commitment.

Outline

- I. In our final lecture, I want to emphasize some of the issues and themes that we have explored.
 - A. We have seen, I think, that most of the questions that we have addressed are not so much questions about specific cases or specific rules and doctrines but are, instead, questions about the nature of the Constitution itself and about the kind of society it envisions.
 - B. We have seen, too, that honoring our commitment to the Constitution may sometimes force us to choose between the values of civil liberty and other constitutional imperatives.
- II. Felix Frankfurter once wrote that most of the basic conflicts in civil liberties “are what the Greeks, thousands of years ago, recognized as a tragic issue, tragedy in the Greek sense, of a clash of rights between values that we treasure and cherish, and not the clash of right and wrong, much less of two wrongs.”
 - A. I think what Frankfurter meant was that the kinds of issues we see in civil liberties are not usually simple contests between wrong and right. Instead, we see cases in which there are competing demands—say, between liberty and security, between individual rights and the collective good—and it is not often the case that the Constitution exhibits a clear and unambiguous preference for one resolution or another.
 - B. If we are to resolve such cases in ways faithful to the Constitution, then, we need some understanding of the entire Constitution and some understanding of the values it seeks to advance. Cases cannot be resolved by simple appeals to one provision or another or by taking provisions and cases out of context.
- III. As we have seen, some issues seem to transcend specific cases and controversies.
 - A. One of the most important of these issues concerns constitutional interpretation and the authority of the Supreme Court.
 - B. In nearly every case, the Court must wrestle with questions about the nature and limits of its own authority. I have sometimes called this the issue of *decisional authority*.
 1. Put simply, this issue concerns the breadth of judicial authority in a constitutional democracy—or, we might say, the tension between our commitment to self-governance and our commitment to constitutionalism.
 2. In many instances, these two values seem to pull in different directions. But they also point to a shared value, because behind both values is a vision of the human person that stresses our equal moral worth and our shared human dignity.
 - C. In many of the Court’s most controversial cases, such as *Lochner*, *Brown*, and *Roe*, the role of the Court in overseeing the democratic process was one of the most controversial aspects of the decision. Thus, it is worth asking again: Under what conditions, precisely, should the Court undertake to review and, perhaps, to overturn decisions made through the democratic process?
- IV. There is a final point implicit in Frankfurter’s observation—indeed, often explicit and always implicit in every case we have read: Who, ultimately, bears responsibility for taking care of the Constitution?
 - A. I call this the question of *constitutional maintenance*: Who is responsible, or should be responsible, for preserving the Constitution, not as a symbol, but as a living guide to self-governance?

- B. Here is another version of the same question, perhaps at a more practical level of abstraction: Who ultimately bears responsibility for protecting our civil liberties and constitutional principles?
 - C. Of course, there is an important role for the Court to play—and no understanding of civil liberties could be even marginally complete without some knowledge of the Court’s work and the complicated case law it has generated.
 - D. But implicit in Frankfurter’s words is some suggestion that “We the People” have a role to play, too, that ultimately the best and most substantial safeguard of liberty is a vigilant people.
- V. A final note about the Constitution: Does the Constitution command our reverence or our respect?
- A. These need not be, and likely are not, the same thing. Some accounts of constitutional maintenance think the rule of law and constitutional values are best promoted when citizens learn to revere the Constitution, instead of taking up its mysteries and ambiguities directly.
 - 1. It is possible to read the *Federalist Papers* as promoting this understanding of constitutional maintenance.
 - 2. This was also the position advocated, for example, by President Lincoln, and it may be implicit in conceptions of judicial supremacy.
 - B. Alternatively, some understandings, perhaps closer to the Frankfurter position and to departmental theories of constitutional interpretation, suggest that constitutional values are best preserved when citizens have an ongoing and direct sense of responsibility for the Constitution.
 - C. I leave you with one final question: Knowing what you know now, would you sign the Constitution or reject it as profoundly flawed?

Essential Reading:

Ralph Ketcham, ed., *The Federalist Papers*, No. 1.

Sanford Levinson, *Constitutional Faith*.

Supplementary Reading:

Abraham Lincoln, Inaugural Address of 1861; available in Kommers, Finn, and Jacobsohn, *American Constitutional Law*, Appendix C.

Questions to Consider:

1. Is the Supreme Court the ultimate authority on what the Constitution means? When, if ever, might another branch of government be justified in failing to follow a Supreme Court decision?
2. Is respect for the Constitution the highest civic value or the most important responsibility of governmental officials? Consider, once again, President Lincoln’s Inaugural Address of 1861.
3. Would you sign the Constitution, or is it flawed in ways that you could not accept?

Bibliography

The cases we read throughout this course are available in many places and formats. Full copies of the cases are available at most public libraries and there are several sites on the Internet, including the official site of the U.S. Supreme Court, which has most of the cases. However, the cases are often extremely long and include information not directly relevant to our inquiry. For this reason, I advise students to purchase a casebook, or a collection of edited cases. Many such collections are available. The readings and cases I have recommended are from Donald P. Kommers, John E. Finn, and Gary J. Jacobsohn, *American Constitutional Law: Essays, Cases, and Comparative Notes*, Volume 2, 2nd edition (Lanham, MD: Rowman & Littlefield Publishers: 2004), but any casebook will have most of the cases.

Essential Reading:

Amar, Akhil Reed. "Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?" 19 *Harvard Journal of Law and Public Policy* 443 (1999). This important article discusses whether the Fourteenth Amendment should make the Bill of Rights applicable to state governments.

Banner, Stuart. *The Death Penalty: An American History*. Cambridge: Harvard University Press, 2003. A comprehensive history of the death penalty in the United States.

Berlin, Isaiah. *Four Essays on Liberty*. 2nd ed. New York: Oxford University Press, 2002. The classic treatise on the differences between positive and negative liberties.

Burt, Robert A. "The Constitution of the Family." 1979 *Supreme Court Review* 329. Provides a comprehensive account of the role of the family in constitutional law.

Chafee, Zechariah, Jr. *Free Speech in the United States*. Cambridge: Harvard University Press, 1948. A classic history of freedom of speech in America.

Cooper, Phillip J., and Howard Ball. *The United States Supreme Court: From the Inside Out*. Englewood Cliffs, NJ: Prentice Hall College Division, 1995. Provides an excellent window into the structure and operation of the U.S. Supreme Court.

Ely, John Hart. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*." 82 *Yale Law Journal* 920 (1973). This classic article marshals a series of criticisms about the Court's decision in *Roe v. Wade*.

———. *Democracy and Distrust*. Cambridge: Harvard University Press, 1981. Outlines an important theory about the proper role of the Court and the limits of judicial review in a constitutional democracy.

Greenawalt, Kent. *Fighting Words*. Princeton: Princeton University Press, 1995. Makes a set of arguments about the fighting words doctrine and the meaning of the First Amendment.

Hamburger, Phillip. *Separation of Church and State*. Cambridge: Harvard University Press, 2002. Examines the history and meaning of the establishment clause, tracing it from the 1840s.

Howe, Mark De Wolfe. *The Garden and the Wilderness*. Chicago: University of Chicago Press, 1965. This important book argues that religious freedoms are as much to protect religion from the state as the state from religion.

Hutson, James H. *Religion and the New Republic: Faith in the Founding of America*. Littleton, CO: Rowman & Littlefield Publishers, 2000. A collection of essays that explores the importance of religious faith at the Founding.

Kalven, Harry, Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988. A comprehensive history of freedom of speech in the United States.

Ketcham, Ralph, ed. *The Federalist Papers*. New York: Signet Classics, 2003. This collection of essays on the Constitution is mandatory reading.

Kluger, Richard. *Simple Justice: The History of "Brown v. Board of Education" and Black America's Struggle for Equality*. New York: Vintage, 2004. The leading account of the facts and issues in *Brown v. Board of Education*.

Kommers, Donald P., John E. Finn, and Gary Jacobsohn. *American Constitutional Law: Essays, Cases and Comparative Notes*. Vol. 2. Littleton, CO: Rowman & Littlefield, 2004. This casebook covers the major topics and issues in civil liberties and includes edited versions of the Court's most important cases.

Levinson, Sanford. *Constitutional Faith*. Princeton: Princeton University Press, 1989. Explores issues basic to the constitutional order, including questions about why and when the Constitution ought to be reaffirmed by individual citizens.

Phillips, Michael J. *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*. Westport, CT: Praeger Publishers, 2000. This important book situates the *Lochner* decision against the Court's general treatment of substantive due process, arguing that the decision in *Lochner* is not representative of the Court's general approach.

Rubinfeld, Jed. "The Right of Privacy." 102 *Harvard Law Review* 737 (1989). Offers a comprehensive set of arguments about the origins, meanings, and limits of privacy as a constitutional concept.

Sunstein, Cass R. *Democracy and the Problem of Free Speech*. New York: Free Press, 1995. Examines the relationship between democratic theory and the First Amendment, calling for a New Deal vision of the First Amendment, in which political speech is more fully protected than commercial speech.

Weschler, Herbert. "Toward Neutral Principles of Constitutional Law." 73 *Harvard Law Review* 1 (1959). An important article on the necessity of neutral principles in constitutional interpretation.

Whittington, Keith. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence, KS: University Press of Kansas, 2001. Examines and evaluates various methods of constitutional interpretation and how they influence our understanding of judicial review.

Supplementary Reading:

Abel, Richard. *Speech and Respect*. London: Sweet & Maxwell, 1994. Discusses the relationship among speech, respect, and human dignity.

Ackerman, Bruce. *Private Property and the Constitution*. New Haven: Yale University Press, 1978. A comprehensive account of the importance of property to the constitutional order.

Baer, Judith A. *Equality under the Constitution: Reclaiming the Fourteenth Amendment*. Ithaca, NY: Cornell University Press, 1983. Argues for a reinvigorated and more expansive conception of equal protection of the laws.

Barber, Sotirios A. *Welfare and the Constitution*. Princeton: Princeton University Press, 2003. This important book argues for a broader understanding of welfare rights as basic constitutional rights.

Beard, Charles. *An Economic Interpretation of the Constitution*. Reissue ed. New York: Free Press, 1986. A classic treatise that argues that the Founders meant for the Constitution to protect the propertied classes.

Becker, Theodore. *The Declaration of Independence: A Study in the History of Political Ideas*. New York: Vintage, 1958. A classic examination of the political philosophy behind the Declaration of Independence.

Bedau, Hugo Adam. *The Death Penalty in America: Current Controversies*. Reprint ed. Oxford: Oxford University Press, 1998. A wide-ranging overview of various aspects of the death penalty.

Berns, Walter. *For Capital Punishment: Crime and the Morality of the Death Penalty*. Reprint ed. Lanham, MD: University Press of America, 1991. This book is still one of the best defenses of the constitutionality and sensibility of the death penalty.

———. *The First Amendment and the Future of American Democracy*. Reprint ed. Washington, DC: Regnery Publishing, 1976. Examines the argument that speech is a critical component of democracy.

Bernstein, Anita. "For and Against Marriage: A Revision," 102 *Michigan Law Review* 129 (2003). In this article, Bernstein provides an important and comprehensive overview of the arguments for and against marriage as an institution.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd ed. New Haven: Yale University Press, 1986. Provides an excellent account of when and why the Supreme Court should defer to the democratic process.

Black, Charles L. *Capital Punishment: The Inevitability of Caprice and Mistake*. 2nd ed. New York: W.W. Norton & Co., 1981. Provides a set of arguments about why the death penalty is flawed and should be unconstitutional.

Bollinger, Lee C. *The Tolerant Society*. Reprint ed. New York: Oxford University Press, 1995. Argues that the First Amendment is critical to the development of a tolerant and informed society.

Bork, Robert H. "Neutral Principles and Some First Amendment Problems." 47 *Indiana Law Journal* 1 (1971). In this classic article, Judge Bork examines a number of critical problems raised by the Court's First Amendment jurisprudence.

———. *The Tempting of America*. New York: Free Press, 1997. In this influential book, Judge Bork argues in favor of a method of constitutional interpretation called "originalism" or "original understanding."

Brill, Alida. *Nobody's Businesses: Paradoxes of Privacy*. Reprint ed. Redwood City, CA: Addison-Wesley, 1991. Provides a comprehensive overview of privacy as a legal concept and the difficulties that inhere in it, arguing that privacy issues are related to prenatal rights, the right to die, and the AIDS crisis.

Carter, Lief. *Constitutional Interpretation: Cases in Law and Religion*. New York: Longman Publishing Group, 1991. This primer introduces readers to the religion clauses and addresses a set of cases and interpretive problems generated by the religion clauses.

Carter, Stephen L. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. Garden City, NY: Anchor, 1994. Argues that American law and culture tend to devalue the importance of religious faith.

———. *Reflections of an Affirmative Action Baby*. Reprint ed. New York: Basic Books, 1992. Examines the arguments surrounding affirmative action.

Cogan, Neal. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*. New York: Oxford University Press, 1997. Contains a complete history and a collection of documents relating to the Bill of Rights.

Cord, Robert. *Separation of Church and State: Historical Fact and Current Fiction*. Brooklyn, NY: Carlson Publishing, 1982. Examines the history of the establishment clause.

Cortner, Richard C. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of the Bill of Rights*. Madison, WI: University of Wisconsin Press, 1980. Traces the rise of the incorporation doctrine through the Fourteenth Amendment.

Curtis, Michael Kent. *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*. Durham, NC: Duke University Press, 1986. An excellent history of the relationship between the Fourteenth Amendment and the Bill of Rights.

Downs, Donald A. *The New Politics of Pornography*. Chicago: University of Chicago Press, 1989. Provides an overview of pornography as a political and constitutional issue.

———. *Nazis in Skokie: Freedom, Community, and the First Amendment*. Notre Dame: University of Notre Dame Press, 1986. A compelling account of the Nazi march in Skokie, Illinois.

Davidson, Kenneth M., Ruth Bader Ginsburg, and Herma Hill Kay. *Text, Cases, and Materials on Constitutional Aspects of Sex-Based Discrimination*. St. Paul, West Publishing Company, 1974. This is an edited collection of materials, including Supreme Court and lower court cases, that address the constitutional issues surrounding sex discrimination.

Dworkin, Ronald. *Life's Dominion*. Reprint ed. New York: Vintage, 1994. Addresses human life values and the role they play in the constitutional order.

———. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge: Harvard University Press, 2002. Presents a series of arguments about the meaning and importance of equality in the legal system.

Ely, Richard. *The Guardian of Every Other Right: The Constitutional History of Property Rights*. New York: Oxford University Press, 1992. Provides a complete history of the right to private property in the American constitutional system.

Emerson, Thomas. *The System of Freedom of Expression*. New York: Vintage Books, 1971. Covers an important theory of freedom of speech.

Epstein, Richard. *Takings: Private Property and the Power of Eminent Domain*. Reprint ed. Cambridge: Harvard University Press, 1989. Provides a comprehensive account of the takings clause and argues for its reinvigoration.

Farber, Daniel. *Lincoln's Constitution*. Chicago: University of Chicago Press, 2003. This important new book examines the constitutional philosophy of President Lincoln as forged by the Civil War.

Fehrenbacher, Donald E. *The Dred Scott Case*. New York: Oxford University Press, 2001. The complete account of the facts and issues in *Dred Scott*.

Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity*. Chapel Hill, NC: University of North Carolina Press, 1981. Examines the role of slavery and Federalism in the formation of the Union.

Fisher, Louis. *Religious Liberty in America: Political Safeguards*. Lawrence, KS: University Press of Kansas, 2002. Examines the role of religious liberty in the political system and how it is protected by political as much as judicial institutions.

Fishkin, James S. *Justice, Equal Opportunity, and the Family*. New Haven: Yale University Press, 1983. Explores the relationship between the family and the constitutional values of merit and equality.

Formicola, Jo Renee, and Hubert Morken. *Everson Revisited: Religion, Education, and Law at the Crossroads*. Littleton, CO: Rowman & Littlefield Publishers, 1997. A complete history of the facts and issues in the case of *Everson v. School Board* (1947).

Garrow, David J. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. Updated ed. Berkeley: University of California Press, 1998. A complete history of the facts and issues in *Roe v. Wade* (1973).

Gerstmann, Evan. *The Constitutional Underclass: Gays, Lesbians and the Failure of Class-Based Equal Protection*. Chicago: University of Chicago Press, 1999. Argues that current equal protection doctrines fail to protect gays and lesbians.

———. *Same-Sex Marriage and the Constitution*. Cambridge University Press, 2003. In this provocative book, Gerstmann argues that the right to marry must be fundamental, and should extend to same sex couples.

Gillman, Howard. *The Constitution Besieged*. Durham, NC: Duke University Press, 1995. Argues that *Lochner* was not motivated by laissez-faire market views but, instead, was an effort to preserve a conception of the police power that held that it could be used only in a neutral manner to benefit the general welfare.

Ginsburg, Ruth B. "Speaking in a Judicial Voice." 67 *New York University Law Review* 1185 (1993). Justice Ginsburg defends intermediate scrutiny.

Glendon, Mary Ann. *Abortion and Divorce in Western Law*. Reprint ed. Cambridge: Harvard University Press, 1989. A comprehensive and comparative account of abortion and divorce policies in Western democracies.

Gordon, Sarah Barringer. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 2002. A history of polygamy and the Mormon conflict in the United States.

Harvie, J. Wilkinson, III. *From Brown to Bakke*. New York: Oxford University Press, 1993. Examines the Court's work on race and affirmative action up to the *Bakke* case.

Horwitz, Morton. *The Transformation of American Law, 1780–1860*. Cambridge: Harvard University Press, 1979. This classic book traces the transformation of property as a constitutional right from the Founding to the Civil War.

Hull, Elizabeth. *Without Justice for All: The Constitutional Rights of Aliens*. Westport, CT: Greenwood Press, 1985. Examines the constitutional rights of aliens.

Irons, Peter. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*. Reprint ed. New York: Penguin, 1990. Each of the 16 chapters in this book explores the personalities and issues involved in a famous Supreme Court case.

Kauper, Thomas. "Penumbras, Peripheries, Things Fundamental and Things Forgotten." 64 *Michigan Law Review* 235 (1965). Explores the doctrine of fundamental rights advanced in *Griswold v. Connecticut*.

Kirp, David L., Mark G. Yudof, and Marlene Strong Franks. *Gender Justice*. Reprint ed. Chicago: University of Chicago Press, 1986. Examines the relationship among gender, justice, and equality.

Lahav, Prina. "Holmes and Brandeis: Libertarian and Republican Justifications of Free Speech." 4 *Journal of Law and Politics* 451 (1987). Explores the philosophical arguments behind the Holmes-Brandeis understanding of freedom of speech.

Law, Sylvia. "Rethinking Sex and the Constitution." 132 *University of Pennsylvania Law Review* 955 (1984). Explores the relationship between gender and basic constitutional rules and principles.

Lawrence, Charles, and Mari J. Matsuda. *We Won't Go Back: Making the Case for Affirmative Action*. Boston: Houghton Mifflin, 1997. Advances a series of arguments in favor of affirmative action.

Lessig, Lawrence. "Reading the Constitution in Cyberspace." 45 *Emory Law Journal* 869 (1996). A pioneering article about the Constitution and its role in cyberspace.

Leuchtenberg, William. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. Oxford University Press, 1995. This is an important collection of essays that explores the Roosevelt Court, with particular emphasis upon how the various social and political movements of the 1930s influenced the Court and its relationship with the Roosevelt administration.

Levy, Leonard. *Origins of the Bill of Rights*. New Haven: Yale University Press, 2001. An important history of the origins of the Bill of Rights.

———. *The Emergence of a Free Press*. Chicago: Ivan R. Dee, Publisher, 2004. A history of freedom of the press and its meaning at the Founding.

———. *The Establishment Clause: Religion and the First Amendment*. 2nd/rev. ed. Chapel Hill, NC: University of North Carolina Press, 1994. This important book provides a complete history of the origins and original purposes of the establishment clause.

Low, Susan Bloch, and Thomas Krattenmaker, eds. *Supreme Court Politics: The Institution and Its Procedures*. Minneapolis, MN: West Publishing Company, 1994. Offers detailed information about the Court, its internal operation, and its procedures.

MacKinnon, Catherine A. *Only Words*. Reprint ed. Cambridge: Harvard University Press, 1996. Makes an important argument that certain kinds of speech, including pornography, should be limited because they can harm.

Malbin, Michael. *Religion and Politics*. Washington, DC: American Enterprise Institute Press, 1978. Examines the religion clauses and what they meant at the Founding.

Marilley, Suzanne M. *Woman Suffrage and the Origins of Liberal Feminism in the United States*. Cambridge: Harvard University Press, 1996. A history of the right to vote for women and the rise of liberal feminism as a political movement.

McConnell, Michael. "Free Exercise and the *Smith* Decision." 57 *University of Chicago Law Review* 1109 (1990). This important article examines and criticizes the Court's decision in the celebrated *Peyote* case (*Employment Division v. Smith*), decided in 1990.

———. "The Right to Die and the Jurisprudence of Tradition," *Utah Law Review* 665 (1997). In this important law review article, McConnell rejects the claim that there should be a constitutionally recognized right to privacy.

McGrath, C. Peter. *Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck*. New York: W.W. Norton, 1966. A complete account of the Yazoo land fraud and the case of *Fletcher v. Peck*.

Meisel, Alan. *The Right to Die*, 2nd ed. New York: John Wiley, 1995. Although it is somewhat dated, this book provides a comprehensive overview of the legal and constitutional issues that surround the right to die, including an overview of various right to die statutes and cases.

Mill, John Stuart. *On Liberty*. New York: Penguin Books, 1975. Presents a classic argument about the meaning of liberty and the conditions under which it can be limited.

Miller, John C. *Crisis in Freedom: The Alien and Sedition Acts*. Mattituck, NY: Amereon Ltd., 2002. A complete history of the Alien and Sedition Acts.

Myrdal, Gunnar. *An American Dilemma: The Negro Problem and American Democracy*. Reprint ed. New Brunswick, NJ: Transaction Publishers, 1996. The classic account of race in the United States.

Nieman, Donald G. *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present*. New York: Oxford University Press, 1991. An overview of the role that race has played in American constitutional history.

Noonan, John T., Jr. *The Luster of Our Country: The American Experience of Religious Freedom*. Berkeley: University of California Press, 2000. Examines the history and role of religious freedom in American constitutional history.

Okin, Susan Moller. *Justice, Gender, and the Family*. Reprint ed. New York: Basic Books, 1991. Explores the relationship between the family and gender in the legal order and how current conceptions fail to promote the ideal of justice.

Paul, Ellen Frankel, and Howard Dickman, eds. *Liberty, Property, and the Foundations of the American Constitution*. Albany, NY: State University of New York Press, 1989. Examines the centrality of liberty and property to the constitutional order and provides a history of property as a constitutional right.

Posner, Richard. *Sex and Reason*. Cambridge: Harvard University Press, 1992. Explores the relationship among sex, public policy, and the Constitution, often through the use of economic analysis.

Rabban, David. *Free Speech in Its Forgotten Years*. New York and Cambridge: Cambridge University Press, 1999. Explores the meaning of free speech before the First World War.

Ravitch, Frank S. *School Prayer and Discrimination: The Civil Rights of Minorities and Dissenters*. Boston: Northeastern University Press, 1999. Boston: Northeastern University Press, 2001. Ravitch argues that treating the prayer in schools controversy as a First Amendment problem only is insufficient to protect the rights of religious minorities.

Rehnquist, William H. *The Supreme Court: How It Was, How It Is*. Revised and updated ed. New York: Vintage, 2002. Examines the history and functions of the Supreme Court.

Sarat, Austin. *When the State Kills: Capital Punishment and the American Condition*. Princeton: Princeton University Press, 2001. Argues that the death penalty plays a “major and dangerous role in the modern economy of power.”

Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press, 1998. Justice Scalia sketches a theory about the role of courts in a democratic society.

Siegan, Bernard. *Economic Liberties and the Constitution*. Chicago: University of Chicago Press, 1981. A classic account of property rights and economic liberties.

Siegel, Reva B. “Text in Contest: Gender and the Constitution from a Social Movement Perspective.” 150 *University of Pennsylvania Law Review* 297 (2001). Examines the politics of gender and constitutional law.

Smith, James Morton. *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca, NY: Cornell University Press, 1966. A comprehensive history of the Alien and Sedition Acts.

Smith, Rogers. “The Constitution and Autonomy.” 60 *Texas Law Review* 175 (1982). This important article examines autonomy as a constitutional interest.

Smith, Steven D. *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*. New York: Oxford University Press, 1999. Argues that no single principle can adequately account for the complexity of the religion clauses.

Sorauf, Frank. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton: Princeton University Press, 1976. An outstanding though dated account of the establishment clause and the constitutional politics surrounding it.

Strasser, Mark. *On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads*. Praeger, 2002. Strasser argues that the right of same sex couples to marry is indistinguishable from other constitutional protections afforded to the family more generally.

Strossen, Nadine. *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights*. New York: New York University Press, 2000. Argues that a commitment to free speech, as well as to women’s rights, must mean that pornography will sometimes be protected under the First Amendment.

Sunstein, Cass R. “*Lochner*’s Legacy.” 87 *Columbia Law Review* 873 (1987). Undertakes a critical review of *Lochner v. New York*.

———. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge: Harvard University Press, 2001. This important book argues that a correct understanding of the role of judicial review in a democracy calls for a restrained Court.

———. “The Right to Marry,” 26 *Cardozo Law Review* 2081 (2005). Sunstein provides an excellent overview of the right to marry as a constitutional liberty.

———. *The Second Bill of Rights: FDR’S Unfinished Revolution and Why We Need It More Than Ever*. New York: Basic Books, 2004. Builds on a speech by Roosevelt to argue for a “second” bill of rights.

Thayer, James Bradley. “The Origin and Scope of the American Doctrine of Judicial Review.” 7 *Harvard Law Review* (1883). The classic statement on behalf of judicial restraint in constitutional law.

Tribe, Laurence H. *Abortion: The Clash of Absolutes*. Updated/revised ed. New York: W.W. Norton & Company, 1992. Examines the constitutional issues surrounding abortion.

Tushnet, Mark. *Taking the Constitution away from the Courts*. Princeton: Princeton University Press, 1999. This book rejects judicial supremacy in constitutional interpretation and argues for the importance of extrajudicial constitutional interpretation.

Van Alstyne, William. “A Critical Guide to *Marbury v. Madison*.” *Duke Law Journal* 1 (1969). One of the leading studies of *Marbury v. Madison* (1803).

Van Burkleo, Sandra F. *Belonging to the World: Women's Rights and American Constitutional Culture*. New York: Oxford University Press, 2000. This comprehensive book examines the role of women's rights in the American constitutional order.

Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." 4 *Harvard Law Review* 193 (1890). This article is the classic argument in favor of a right to privacy in the American legal order.

West, Robin. *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment*. Durham, NC: Duke University Press, 1994. Argues for a more progressive account of the Fourteenth Amendment and the equal protection clause.

Whittington, Keith. "Extrajudicial Constitutional Interpretation: Three Objections and Responses." 80 *North Carolina Law Review* 773 (2002). Examines constitutional interpretation by nonjudicial actors.

Wildenthal, Bryan H. "The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment." 61 *Ohio Law Journal* 1051 (2000). Reexamines the history of the Fourteenth Amendment and the process of incorporation.

Wolters, Raymond. *The Burden of Brown*. Nashville: University of Tennessee Press, 1984. An examination of *Brown v. Board of Education* and its aftermath, both politically and constitutionally.

Woodward, C. Vann. *The Strange Career of Jim Crow*. Commemorative ed. New York: Oxford University Press, 2001. An important history and analysis of Jim Crow laws in the United States.

Zipursky, Benjamin C. "DeShaney and the Jurisprudence of Compassion." 65 *New York University Law Review* 1101 (1990). Examines the Court's decision in *DeShaney* and the role of compassion in the various opinions.

Internet References:

Cases

<http://www.law.cornell.edu/supct/index.html>. Cornell Law School's Legal Information Institute archive contains all opinions of the court issued since May of 1990. In addition, a collection of 610 of the most important historical decisions of the Court is available on CD-ROM and (with reduced functionality) over the Internet.

<http://www.findlaw.com/casecode/>. This is an excellent source for finding cases, both at the federal level and the state level. Searches Supreme Court cases by name or year from 1893 to the present; however, retrieves even earlier cases if searched by case number.

<http://www.landmarkcases.org/>. This useful site includes a wide range of materials about landmark cases, including secondary sources and a helpful glossary.

The Supreme Court and the Justices

<http://www.supremecourtus.gov/>. This is the official site of the Supreme Court. It has information about the history and operation of the Court and links to cases, as well as biographical information about the justices.

<http://www.supremecourthistory.org/>. The official site for the Historical Society of the Supreme Court, it is an excellent resource for information about the Court. It includes a timeline, biographies of the justices, and information about landmark cases.

<http://www.oyez.org/oyez/frontpage>. This is a superb multimedia site. It includes audio transcripts of oral arguments in major cases and a virtual tour of the Court, as well as biographical information for sitting justices, information about pending cases, and news items about the Court.

News and Press Coverage

<http://news.findlaw.com/legalnews/us/sc/>. This site carries news about the Supreme Court and other federal courts.

<http://www.law.com/jsp/scm/index.jsp>. Provides news and commentary about the Supreme Court.

<http://jurist.law.pitt.edu/currentawareness/ussupremes.php>. This comprehensive site includes news about the Supreme Court, as well as links to blogs and others sources of information and commentary about the Court.

Academic Centers/Journals

<http://stu.findlaw.com/journals/>. A comprehensive database of academic journals and law reviews.

<http://www.lawreview.org/>. This site allows students to do full text searches of online law reviews.

<http://www.loc.gov/law/guide/lawreviews.html>. A list of online law reviews.

Blogs

<http://www.scotusblog.com/movabletype/>. This well-established blog is dedicated to discussions about the Court and its cases.

<http://scotus.blogspot.com/>. This blog includes information about pending cases.

<http://supremecourtwatch.tpmcafe.com/>. This blog has commentary about current cases and Supreme Court news.

U.S. Constitution and Other Founding Documents

<http://memory.loc.gov/ammem/help/constRedir.html>. Hyperlinks to the Declaration of Independence, the Constitution, the Bill of Rights, later amendments, *The Federalist Papers*, and other materials.

<http://www.law.indiana.edu/uslawdocs/declaration.html>. The Declaration of Independence.

<http://www.usconstitution.net/>. A comprehensive, annotated online guide to the Constitution.

<http://www.constitution.org/>. Includes secondary information about the Constitution.

<http://www.law.ou.edu/hist/federalist/>. *The Federalist Papers*.

<http://www.yale.edu/lawweb/avalon/federal/fed.htm>. *The Federalist Papers*, annotated.

<http://confinder.richmond.edu/>. Links to other constitutions.

The Bill of Rights (Amendments I-X)

Transmitted October 2, 1789.

Ratified by three-fourths of the states, December 15, 1791.

The Conventions of a number of the States having, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution;

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States; all or any of which articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes as part of the said Constitution, namely:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.