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# Law School for Everyone
## Constitutional Law

Course Guidebook

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After law school, Professor Berger clerked for the Honorable Merrick B. Garland on the US Court of Appeals for the District of Columbia Circuit. He then practiced in Jenner & Block's Washington DC law office, where he worked on litigation in several state and federal trial and appellate courts, including the US Supreme Court. Professor Berger's work there included cases involving lethal injection, same-sex marriage, the detention of foreign nationals at Guantánamo Bay, and internet obscenity.

Professor Berger's scholarship focuses on constitutional law. Much of his work has explored judicial decision making in constitutional cases, with special attention to deference and other undertheorized factors driving constitutional outcomes. His article *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making* was named the winner of the American Constitution Society's Richard D. Cudahy Writing Competition on Regulatory and Administrative Law. Another of his articles, *The Rhetoric of Constitutional Absolutism*, was reviewed in the online journal *Jotwell*. Professor Berger has also written extensively about lethal injection and Eighth Amendment doctrine.

Professor Berger teaches Constitutional Law I, Constitutional Law II, Constitutional History, Federal Courts, and Statutory Interpretation. He has been voted Professor of the Year by the upperclass law students at Nebraska five times. He has also received the College of Law Distinguished Teaching Award and the Law Alumni Council Distinguished Faculty Award. ■

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# LAW SCHOOL FOR EVERYONE
# CONSTITUTIONAL LAW

This course provides an introduction to the field of US constitutional law. The US Constitution is the world's oldest constitution still in use today. It sits atop the US legal system. If the judiciary concludes that a federal or state law conflicts with the US Constitution, it must invalidate such law as unconstitutional. In other words, the US Constitution is the crucial document in understanding what other laws our governments may pass. Quite simply, it sets the rules by which politics operate.

On one level, the Constitution's core purposes are easy to articulate. First, it creates the three branches of the federal government, defines the qualifications of and election rules for several federal office holders, and outlines the relationship of the different branches to each other. Second, it governs the relationship between the federal government and the state governments. Third, it guides the relationship between both state and federal government on the one hand, and individuals on the other.

On another level, however, the Constitution is perplexing. American people constantly argue over the Constitution's meaning. The Constitution is very short, and many of its key provisions are written in broad, open-ended language. As a result, we need to interpret the Constitution, and we rarely agree on those interpretations. Indeed, the justices of the US Supreme Court also rarely agree. With some important exceptions, many of the Supreme Court's most important decisions have provoked fierce dissenting opinions.

The stakes of these differing interpretations can be very high. Many of the most divisive issues in American politics in recent decades have been, at their hearts, constitutional issues. These include, among others, abortion, affirmative action, sexual privacy, same-sex marriage, and the scope of congressional, presidential, and judicial power. This course will explore each of these issues, providing the legal context to understand how the US Supreme Court considers these and other constitutional questions.

While conflicting understandings of the Constitution can be perplexing for law students and laypeople alike, the multifaceted nature of our core political document is part of what makes it endlessly rich for exploration. Indeed, there are usually powerful arguments on both sides of the constitutional ledger. While a lawyer or judge may ultimately find one side's arguments more persuasive than another's, the good lawyer and judge must understand a problem from all sides. To do so, the lawyer and judge must give careful consideration to each party's arguments. With that in mind, this course provides an introduction to some of the most important and controversial areas of constitutional law.

Lecture 1 provides an introduction to the subject, including some important historical background on the creation of the Constitution. Lecture 2 then juxtaposes two of the most famous important cases of the Supreme Court's early days when it was headed by Chief Justice John Marshall. Though these two seminal cases, *Marbury v. Madison* and *McCulloch v. Maryland*, focus on very different questions, they both raise related fundamental questions of how closely courts should police the actions of the political branches.

Lecture 3 introduces executive power by examining the power of the president and the terrific growth in the 20th century of administrative agencies, which greatly expanded the executive branch's power. Lectures 4 and 5 examine the scope of congressional power, focusing on the Supreme Court's changed views of Congress's power to regulate interstate commerce at various points in American history.

Lectures 6 and 7 explore individual liberty under the Fourteenth Amendment, including issues such as rights to contract, contraception, abortion, sexual privacy, and same-sex marriage. Lectures 8 and 9 examine equal protection under the Fourteenth Amendment.

Lecture 8 focuses on the evils of racial segregation and the Supreme Court's (limited) role in bringing about the end of legal segregation. Lecture 9 contemplates race-based affirmative action, an issue that continues to divide the public and the Supreme Court.

Lecture 10 then continues the exploration of equal protection by considering sex-based discrimination. Lecture 11 explores courts' role in deciding constitutional disputes, including various judge-made doctrines that limit judges' authority to reach the merits of certain cases. Finally, Lecture 12 asks whether constitutional law can be understood as "law" in the same sense as other areas of law or whether, alternatively, it is really politics by another name. ■

Lecture 1

# ORIGINS AND FUNCTIONS OF THE CONSTITUTION

To understand American government, politics, and law, we must understand how the Constitution works, how it has been interpreted, and why we have the document in the first place. This lecture begins that exploration with the Constitution's origins in the 18th century.

## A NATION IN CRISIS

In the year 1786, the United States was in crisis. The young country had won its independence from Great Britain with the end of the Revolutionary War in 1783, but its problems were far from over. The states, which had been allied with each other in the war against England, now were becoming bitter rivals. They quarreled over a variety of important issues.

For example, the states disagreed about the proper rules for commerce between their borders. States enacted laws that aided their own citizens, but they put other states and citizens from other states at real disadvantage when conducting business or trade.

Matters began to come to a head when negotiations between Maryland and Virginia over fishing and trading rights on the Potomac River grew into an open invitation to all the states to meet at Annapolis, Maryland's capital, in 1786. As it happened, delegates from only five states showed up, and they concluded that they could not accomplish much without more states represented. They put out a call for a broader meeting the next year in Philadelphia. That meeting would become the Constitutional Convention of 1787.

## THE ARTICLES OF CONFEDERATION

By the time the delegates met in Philadelphia, it was clear that the Articles of Confederation, which had taken effect in 1781, were insufficient to govern the young country. The Articles of Confederation provided for only a very weak central government, which was unable to manage either disputes between the states or the various external and internal threats the nation faced.

For example, under the Articles, the Confederation Congress could not impose taxes, and national defense and prosperity had suffered as a result. America also faced several other external challenges to the national welfare in the wake of the Revolutionary War.

One problem among many was that American merchants were eager to restore prewar patterns, the bulk of which included trade with England itself and English colonies in the Caribbean. Britain, still angry at the colonies, promptly closed its harbors to American ships both on the British Isles and in the Caribbean. Meanwhile, British ships sailed into American harbors, bringing goods that had been missed during the war.

Many countries would have imposed large taxes on British ships or simply closed their ports in response. But the Confederation Congress lacked both the power to tax and to regulate either interstate or foreign commerce. Other foreign-relations problems gnawed at America as well.

On top of all this was internal chaos. The most famous example is Shays' Rebellion in western Massachusetts, born out of farmers frustrated by taxes and threats of farm seizure. The rebels were eventually defeated, but the event still had enormous political impact. The rebels were eventually defeated, but the event still had enormous political impact.

About a decade after the Declaration of Independence, Americans were fighting against and killing other Americans. It was not just strangers fighting each other, but neighbors fighting neighbors. The government had been able neither to cool tensions beforehand nor suppress the uprising once it arose, even in Massachusetts.

## THE CONSTITUTIONAL CONVENTION

It was against this backdrop of multiple and interrelated governmental failures that the delegates met in Philadelphia in the summer of 1787. The states had sent their representatives to revise the Articles of Confederation, but many of the delegates believed that the articles were beyond repair, and that an entirely new charter of government was necessary. They therefore began debating the contents of a new Constitution—even though such a departure from their initial mandate was a lawless action.

From the start, it became apparent that the delegates could not agree on much. Two disagreements dominated the Convention. The first involved the question of how states would be represented in Congress. The Constitution ultimately provided that each state would get two senators, but the delegates would debate the issue again and again.

Second was the question of slavery. Some Southern delegates insisted that the Constitution provide ample protection for slavery, and they got their way. The Constitution that emerged prohibited Congress from abolishing the slave trade for 20 years. It stipulated that runaway slaves be returned to their owners, even if they had managed to flee to a state without slavery.

Perhaps most notoriously, it provided that each slave be counted as three-fifths of a person for purposes of a state's representation in the House of Representatives. As a result, states with large slave populations got disproportionately large representation in the House of Representatives and, through the Electoral College system, in presidential elections. In other words, though slaves did not enjoy the right to vote, their presence meant that white citizens in slave states who did enjoy the right to vote got increased representation in the federal government.

## THE RESULT

It is interesting to note that the Framers did not spend a lot of time debating many of the issues we care about most today. For instance, they said very little about individual rights. They said very little about the power of the federal courts to review the constitutionality of governmental action. They also did not come to much agreement on the power of the US president.

The final document was very much a compromise that most delegates agreed was imperfect. James Madison himself was disappointed by several features of the Constitution, including the convention's decision not to give the federal government a veto power over state governments.

By its own terms, the Constitution could only take effect if 9 of the 13 states ratified it. During the ratification debates that followed throughout the country, it became clear that there was widespread disagreement not just about whether to adopt the new Constitution but also about what it meant. These debates foreshadowed centuries of disagreement to come.

## THE CONSTITUTION'S PURPOSES

While the Constitution left many important issues unresolved, it was clearly designed to serve some primary purposes. First and foremost, the Constitution establishes a national government, and it allocates power among the branches—executive, judicial, and legislative—of that national government. It also sketches the relationship between the federal and state governments. It is a federalist system, meaning that two kinds of governments—national and state—have jurisdiction over the same territory. There was already a federalist system in place under the Articles of Confederation, of but power resided almost entirely with the states.

The framers of the Constitution recognized that there were certain governmental functions that could be performed much better by one central government rather than multiple different states. In particular, they thought a national government was necessary for defending the country, for relations with other countries, for a national currency, and for the regulation of national commerce.

However, the framers still left much power with the states themselves. For example, Article I grants Congress certain enumerated powers, but if the Constitution does not grant Congress a specific power, Congress lacks that power. Of course, subsequent amendments to the Constitution added to Congress's power.

Most notably, the Thirteenth, Fourteenth, and Fifteenth Amendments, which were adopted between 1865 and 1870 after the Civil War, vested more power in the national government to enforce new rights created by those amendments. Additionally, the Tenth Amendment stipulates that the powers not delegated to the United States by the Constitution or prohibited to the states are reserved to the states and to the people.

The takeaway from those two principles is that congressional action is only valid if the Constitution authorizes it, and state action is valid unless it is prohibited. In other words, under our original constitutional system, federal action is presumptively invalid, and state action is presumptively valid.

However, it is also worth noting that once federal laws are properly enacted, Article VI of the Constitution makes clear that those laws are the supreme law of the land and trump any state laws to the contrary. The government has more limitations on the kinds of laws it is allowed to make than do state governments, but the Supremacy Clause stipulates that, when in conflict, valid federal law is supreme over otherwise valid state law.

## INDIVIDUAL RIGHTS

Another goal of the Constitution is to protect individual rights. The original Constitution said very little about individual rights. Most of the important liberties that many Americans consider core constitutional rights—such as free speech, free exercise of religion, and freedom from unreasonable search and seizures—were added to the Constitution as the Bill of Rights. These were the Constitution's first 10 amendments, which were ratified in 1791.

The Bill of Rights of 1791 was much more limited in scope than the provisions that so pervade our constitutional consciousness today. It originally applied only to the federal government, meaning that the US Constitution's Bill of Rights did not protect against state governmental infringement of these rights. (Many states had their own bill of rights in their own state constitutions.) Most of the rights in the Bill of Rights were much later applied to the states through the 1868 Fourteenth Amendment, but in many cases that did not occur until well into the 20th century.

Almost all constitutional rights protect people from governmental action, not private conduct. The only exception is the Thirteenth Amendment, which prohibits slavery (including slaveholding by private individuals).

## INTERPRETING THE CONSTITUTION

For better or worse, the Constitution often does not speak for itself. Sometimes in cases, issues arise that are not directly addressed by any constitutional provision. In other cases, the Constitution's broad, open-ended language raises questions as to when they should apply.

### PRIVATE LAW VERSUS CONSTITUTION LAW

Constitutional rights only involve the relationship between the government and individuals, not the relationship between different individuals. Individuals are protected from each other by private law, such as tort law and contract law.

Even when the Constitution is written in absolute terms, most people agree that, at least with regard to individual rights, it usually does not function in absolutes. Circumstances matter. The First Amendment, for example, is written in absolute terms and prohibits Congress from making any law impinging the freedom of speech.

However, Justice Oliver Wendell Holmes famously said that falsely shouting fire in a theater and causing a panic is not protected. Most people would agree that the right to free speech, though crucial in a free society, must have certain limitations. Lawyers and judges are therefore left to argue about how best to interpret the Constitution.

Historically, they have drawn on a variety of sources, including the Constitution's text and structure, judicial precedent, original understandings, past governmental practices, practical concerns, moral concerns, and more. Lawyers and judges frequently disagree with each other about not just how to decide particular constitutional cases but also about interpretive methodologies.

## Suggested Reading



- Bowen, *Miracle at Philadelphia*.
- Rakove, *Original Meanings*.
- United States Constitution.

## Questions to Consider



- The content of the US Constitution is, in some part, a reflection of the political anxieties of its age. If we were to design a new Constitution today, what differences might we expect? What features of the Constitution might we deliberately change? Why?
- In comparison to most other active constitutions, the US Constitution is old and short. Are these characteristics advantages or disadvantages? What are the benefits of a venerable Constitution? What are the drawbacks?

Lecture 2

# THE MARSHALL COURT AND THE CONSTITUTION

To understand the Supreme Court's role in constitutional decision making, it is necessary to examine a pair of the early court's most famous opinions: *Marbury v. Madison*, decided in 1803, and *McCulloch v. Maryland*, decided in 1819. Interestingly, both opinions were written by Chief Justice John Marshall, yet they offer significantly different visions of the court's role.

## BACKGROUND ON *MARBURY V. MADISON*

*Marbury v. Madison* grew out of the presidential election of 1800. The election pitted the incumbent, Federalist John Adams, against a Republican, Thomas Jefferson. Adams favored a stronger central government. Jefferson favored smaller, decentralized government.

Jefferson won the election, but Jefferson would not take office until March 1801. In the remaining weeks of his presidency, President Adams and his fellow Federalists worked to consolidate the Federalists' control of the federal court system.

Among other things, they engineered Congress's passage of the Organic Act for the District of Columbia, which created 42 justices of the peace. With just two days to go in his term, Adams collected names to fill the new positions, and the next day the Federalist-leaning Senate confirmed them all.

President Adams stayed up late his final night in office signing the commissions. Aides transferred them to the acting secretary of state, John Marshall, who affixed the Great Seal on them as a sign of their finality.

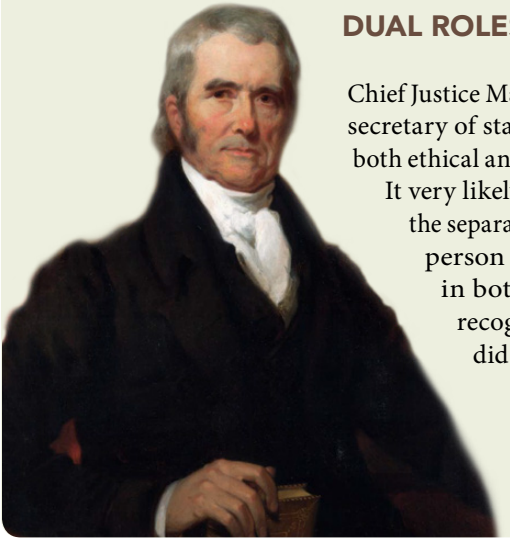
Most of the commissions were then hastily delivered to their intended recipients. However, there weren't enough aides on hand to distribute them all, and four went undelivered. One of these undelivered commissions was for a five-year term for William Marbury.

The next day, March 4, 1801, Thomas Jefferson was sworn in as president, and he ordered his secretary of state, James Madison, not to deliver the remaining commissions. Marbury, however, believed he had a legal right to his commission, and in December 1801, he filed suit to obtain it.

## QUIRKS IN THE CASE

Marbury's suit had a couple of procedural quirks that are worth highlighting. First, Marbury's suit asked the court for a writ of mandamus. A writ is a written order from a court requiring a particular remedy. A writ of mandamus is an order from a court to an executive official ordering that official to properly carry out his or her duties or correct an abuse of discretion.

Second, Marbury took the unusual step of filing his case directly in the US Supreme Court. Most cases originate in lower courts and never make it to the Supreme Court. Why would Marbury file in Supreme Court first? One answer might be that the chief justice of the court was John Marshall—the very same person who, as acting secretary of state, had affixed the seal on Marbury's commission in the waning hours of the Adams administration. Marshall was a committed Federalist, and Marbury may have thought that Marshall would ensure him favorable treatment.



## DUAL ROLES

Chief Justice Marshall's dual role as acting secretary of state and chief justice posed both ethical and constitutional questions. It very likely violated the principle of the separation of powers for the same person to serve simultaneously in both positions. If Marshall recognized these problems, he did not acknowledge them.

## MARSHALL'S RULING

*Marbury v. Madison* put Marshall in a difficult position. As a die-hard Federalist, he not only believed that Marbury and Adams' other appointees deserved their commissions. He also believed that Jefferson was attacking the federal judiciary generally. But the judiciary in the early 19th century didn't have the clout it enjoys today, and Marshall worried that a decision in Marbury's favor would ultimately weaken the Supreme Court.

If the Supreme Court were to order Secretary of State Madison to deliver Marbury his commission, Madison could simply ignore it. Such an outcome would highlight the judiciary's weakness. Even worse, the administration might ignore Marshall and try to impeach him (and possibly the other justices). Therefore, Marshall's challenge was to find a way to defend and even build the judiciary's institutional legitimacy without provoking the executive to attack it.

Writing for the court, Chief Justice Marshall crafted a supremely strategic opinion that framed the case as turning on three key questions.

- First, Marshall asked if Marbury had a right to the commission he requested. The answer was an emphatic yes. When the president signs a commission and the secretary of state seals it, he asserted, the commission becomes official. As a result, William Marbury had a legal right to the job that the Jefferson administration was denying him.

- Having answered his first question, Marshall then turned to his second: "If [Marbury] has a right [to the commission] and that right has been violated, do the laws of his country afford him a remedy?" Once again, the Chief Justice's answer was a resounding yes. Madison had violated a duty, and when executive officials break the law, courts can step in and offer injured parties like William Marbury a remedy.

- Marshall then turned to his final question: Is the proper remedy what Marbury asked for, namely a writ of mandamus issued from the US Supreme Court? To this question, Marshall answered no.

## MARSHALL'S REASONING

It is true, Marshall noted, that a writ of mandamus is the proper remedy to issue against an executive official who, like James Madison, had failed to do a nondiscretionary act. However, the Supreme Court could not issue a writ of mandamus in this case.

The reason found was that the statute purporting to grant the Supreme Court jurisdiction over the case was unconstitutional. Recall that Mr. Marbury had filed his case directly in the US Supreme Court rather than a lower federal court. Federal courts usually do not automatically have jurisdiction over any case that comes their way.

In most instances, Congress needs to pass a law giving them jurisdiction over particular classes of cases. When Marbury filed his case, he cited Section 13 of the Judiciary Act of 1789 as the federal statute that gave the US Supreme

Court original jurisdiction—that is, non-appellate jurisdiction—over actions for mandamus. The court disagreed with Marbury's jurisdictional theory, concluding that the statute expanded the original jurisdiction of the US Supreme Court beyond what the Constitution specified and permitted.

The most famous part of Chief Justice Marshall's opinion was this: Having explained that Congress had attempted to confer original jurisdiction on the Supreme Court where the Constitution forbade such jurisdiction, Marshall asked whether an act "repugnant" to the Constitution could nevertheless be the law of the land. The answer was an emphatic no.

Additionally, Marshall explained that it would be absurd for courts to apply unconstitutional statutes. Rather, courts have a duty to inquire into the legitimacy of the laws before them, and not to apply them if they are unconstitutional.

Indeed, such inquiries get to the very heart of the judicial role. As Marshall famously explained, "It is emphatically the province and duty of the judicial department to say what the law is." This sentence defending the courts' power of judicial review—that is, courts' authority to strike down unconstitutional legislative acts—is one of the most famous sentences in the history of the Supreme Court.

It is important to note, though, that *Marbury v. Madison* did not create the concept of judicial review. Though the Constitution does not explicitly confer the power of judicial review on the federal judiciary, many scholars today agree that that power was more or less accepted by the time the Supreme Court decided *Marbury v. Madison* in 1803. Chief Justice Marshall's opinion is important, then, not for inventing the concept of judicial review, but rather for its defense and elaboration of that authority.

## *MCCULLOCH V. MARYLAND*

*McCulloch v. Maryland* is a case that involved the constitutionality of the Bank of the United States. As with *Marbury v. Madison*, some background facts are essential to understanding the case.

In 1790, not long after the Constitution was ratified, President George Washington's secretary of the treasury, Alexander Hamilton, proposed the creation of a national bank. Before deciding what to do, Washington requested opinions on whether creating the bank would be wise and constitutional.

Hamilton argued that the bill was within Congress's implied powers. Thomas Jefferson, who at the time was secretary of state, and Edmund Randolph, the attorney general, both considered the bank unconstitutional. They pointed out that Congress's powers are enumerated in Article I of the Constitution, and that Article I nowhere grants Congress the authority to create a national bank.

Washington ended up agreeing with Hamilton and signing the bill into law. The Bank of the United States was moderately successful, but its charter expired in 1811 and was not renewed. The War of 1812 shortly followed. Economic chaos ensued, and there was not enough cash to go around.

Partially in response to this new crisis, Congress created the Second Bank of the United States in 1816. A short-lived economic boom followed in 1817, but during a financial panic the next year, the bank called in its loans. State banks with loans from the federal bank were badly hurt, and angry states retaliated by imposing various restrictions on the national bank.

Some states, including Maryland, attempted to tax the national bank. The federal government did not believe that state governments had the authority to tax federal entities, so it did not pay the tax. In 1818, the State of Maryland filed suit against James William McCulloch, the head of the Baltimore branch of the Second Bank of the United States, to recover the unpaid tax.

## *MCCULLOCH V. MARYLAND* IN THE SUPREME COURT

Maryland won its case in the lower state courts, and the case went all the way up to the Supreme Court on the issue of whether a state government can impose a tax on the Second Bank of the United States. Chief Justice John Marshall, once again writing for the full court, broke the case down.

The crucial question was whether Congress had the power to incorporate the bank in the first place. If Congress lacked such a power, then the bank could not exist at all. Marshall's answer was that Congress did have the power to create the bank: It had already done so twice, and the first time, the first Congress passed the bank bill.

The first Congress was closest in time to the Constitutional Convention and the ratification debates. The implication was that if the Constitution as it was originally understood forbade the creation of the bank, then surely Congress and the first president would not have created it.

## CONSTITUTIONAL ARGUMENTS

Maryland also claimed that the authority of the Constitution emanates not from the people, but from the sovereign states. Marshall concluded the opposite. *McCulloch v. Maryland*, thus, rejected a robust view of state sovereignty and established the supremacy of federal law.

Additionally, Maryland claimed that the creation of the bank was illegitimate because the Constitution did not expressly confer on Congress the power to create the bank. Marshall argued that this view misunderstood the very nature of constitutions. Constitutions, he explained, do not provide great detail on how they are to be applied to particular situations. Rather, they provide a broad outline for a structure of government. Accordingly, one cannot infer too much from the absence of a provision expressly empowering Congress to create a bank.

Marshall also pointed out that an entire section of the Constitution—Article I, Section 9—places prohibitions on congressional power. If Congress's powers were truly limited only to those powers expressly conferred in the document, as Maryland had argued, then Article I, Section 9 would have been entirely unnecessary.

## TEXTUAL ARGUMENTS

In addition, Marshall made textual arguments in his opinion. He noted that the Articles of Confederation, which the Constitution had replaced, had provided that each state retains powers "not … expressly" delegated to the Congress—suggesting that any power not specifically granted to Congress remained with the states.

By contrast, the Tenth Amendment to the Constitution deliberately excluded the word *expressly*, reading: "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." Marshall's conclusion was that the framers of the Tenth Amendment made the very conscious decision to omit this word, thus providing Congress more wiggle room than the Confederation Congress had enjoyed.

Finally, using a text-in-context argument, Marshall played his ace: the Necessary and Proper Clause of Article I, Section 8. Article I, Section 8 lists various Congressional powers. It concludes with a clause stating that Congress shall have power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Maryland had argued that this clause limits congressional power, permitting Congress only to act when absolutely necessary for the good of the country. The court emphatically rejected this argument. In addition, Marshall observed that the framers placed the Necessary and Proper Clause in Article I, Section 8, which lists Congress's powers. Had they wished the clause to limit Congress's powers (as Maryland argued), surely they would have put the clause in Article I, Section 9, along with other limitations on Congressional action.

## CONCLUSION

In light of all these arguments, Marshall concluded that Congress did have the power to create the bank. Because Congress could create the bank, it must also have the power to preserve the bank. If states had the authority to tax the bank, they could tax it so heavily that it would cease to exist. The power to tax, Marshall observed, is the power to destroy. Thus, Maryland was asserting a power hostile to federal authority. However, the Supremacy Clause of the Constitution makes clear that where there is a conflict between federal law and state law, federal law must win.

Moreover, if one state had the power to tax a federal entity, it would essentially enjoy the authority to tax people of another state because federal entities represent all the people from all the states. This, Marshall noted, would be taxation without representation—a reference to one of the grievances that sparked the Declaration of Independence and the Revolutionary War.

*McCulloch v. Maryland* reshaped constitutional law by asserting the predominance of federal law over state law; by making clear that Congress's powers are not limited only to what is expressly enumerated in Article I, Section 8; and by setting a precedent of eclectic constitutional interpretation that has continued to the present.

## Suggested Reading

- Farber, "The Story of *McCulloch*."
- Marbury v. Madison.
- McConnell, "The Story of *Marbury v. Madison*."
- McCulloch v. Maryland

## Questions to Consider

- *McCulloch v. Maryland* is widely considered one of the most famous and influential decisions in Supreme Court history. Given the case's unequivocal acceptance of the constitutionality of a strong federal government, why have Americans continued to have bitter disputes about the propriety of vigorous federal governmental power?

- To the extent *Marbury v. Madison* and *McCulloch v. Maryland* reflect different approaches to judicial deference, which approach is wiser? How deferential should courts be when they review the constitutionality of acts of Congress or the executive branch?

Lecture 3

# THE SCOPE OF THE EXECUTIVE POWER

The president of the United States is sometimes referred to as "the leader of the free world" or "the most powerful person on earth." But how much power does the president really have? This lecture digs into that question and explores the constitutional limits of executive power.

## SITUATING THE PRESIDENT

To get at the issue of presidential power, it is necessary to situate the president in the context of the government more generally. The Constitution creates the three branches of our federal government. Article I creates the legislative branch (Congress). Article II creates the executive branch (the president). Article III creates the judicial branch (the federal courts).

**LEGISLATIVE**
**Enacts the Law**

**EXECUTIVE**
**Enforces the Law**

**JUDICIAL**
**Interprets the Law**

This structure constitutes a deliberate separation of powers. Instead of giving all power to one branch of government, the Constitution divides power up among different branches and assigns each branch different powers.

Of all the branches, the executive branch is best equipped to move quickly to address a national problem. Courts are passive institutions that do not go out looking for problems to solve, and in general, it is difficult for Congress to move quickly. The executive branch is the only branch of the federal government that can plausibly act quickly to deal with problems as they arise. However, when the president tries to do so, questions come up about whether the president can act in such a way.

## THE PRESIDENT'S POWERS

When it comes to the president's specific powers, Article II of the Constitution is very general and does not offer a lot of helpful guidance. It does stipulate that the president shall be commander in chief of the US Army and Navy. The president also enjoys substantial power in the field of foreign relations. Article II states that the president can receive ambassadors, which is generally understood to mean that the president can engage in negotiations and diplomacy with foreign governments.

The president can also make treaties, but here he shares the power with the Senate, which must provide two-thirds support. Additionally, the president shares the appointment power with the Senate. The president gets to appoint cabinet positions, ambassadors, and federal judges, but each requires approval from the majority of the Senate. Finally, the president has the obligation to give Congress updates from time to time on the state of the union and to "take care that the laws be faithfully executed."

### PRONOUNS IN THE CONSTITUTION

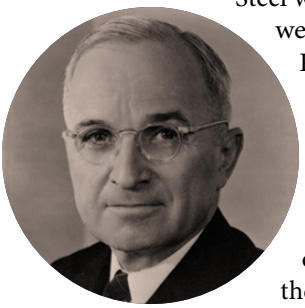
The Constitution refers to the president throughout as a "he," which is to be expected of a document written in 1787. This was a period in history when women could not vote, let alone hold high political office. It is clear today that it would violate equal-protection principles to refuse to permit a woman to serve as president.

These instructions are worded broadly. They do not answer many practical questions that the president and executive staff face in the day-to-day administration of government.

## *YOUNGSTOWN SHEET AND TUBE COMPANY V. SAWYER*

The big question regarding the president's Article II powers is this: Can the president act without Congress to address what the president believes to be a national crisis? That is the question the Supreme Court confronted in the famous case of *Youngstown Sheet and Tube Company v. Sawyer.*

Otherwise known as the Steel Seizure Case, this litigation arose during the Korean War. In 1951, a dispute arose between steel companies and their employees over terms of a new collective bargaining agreement. Efforts to settle the dispute failed, and the union of steelworkers gave notice of a nationwide strike.



Steel was vital to the war effort, as it was used to make weapons and vehicles. Many observers, including President Harry S. Truman, feared that a strike would stop steel production, which in turn would deprive American troops of the weapons and resources necessary to wage the war successfully. In response to the strike, President Truman issued an executive order directing his secretary of commerce, Charles Sawyer, to take possession of the steel mills and to operate them.

The key question in the lawsuit that followed was whether the president could seize the steel mills in the absence of action by Congress authorizing him to do so. The president's lawyers argued that the president needed to do this to avert a national catastrophe resulting from the stoppage of steel production.

The US Supreme Court, however, struck down this assertion of executive authority by a 6-3 vote. President Truman, the court held, had acted unconstitutionally in seizing the steel mills.

The Steel Seizure Case is complicated because even the justices in the majority—that is, those who agreed that the president had overstepped his authority—disagreed with one another in the reasoning they used to reach that conclusion. The view taken by Justice Hugo Black and the other justices who signed on to his majority opinion was that the president could only get the authority to take such extraordinary action from one of two sources: Congress or the Constitution. Neither source had conferred upon the president the authority to seize the steel mills in this case.

## A DIFFERENT OPINION

A majority of the Justices signed onto Justice Black's opinion, but in the years since the case, the most famous opinion was not Black's but a concurrence written by Justice Robert Jackson. Justice Jackson agreed with Justice Black that President Truman could not seize the steel mills as he had done. However, Justice Jackson viewed the issue somewhat differently, and his approach provided the framework future generations of judges and lawyers would follow.

Rather than viewing presidential power as a binary in which either Congress or the Constitution has conferred authority on the president, Justice Jackson articulated a somewhat more nuanced theory of executive power. He said that presidential action falls into one of three categories.

The first category applies when the president acts pursuant to express or implied authorization of Congress. This is when the president's authority is at its maximum.

Justice Jackson's second category applies when it is unclear whether Congress has given the necessary authority to the president. He explained that when the president acts in the absence of either congressional grant or denial of authority, the president must rely on independent presidential powers.

The third category applies when the president takes measures incompatible with the will of Congress. Here, presidential power is at its lowest, because the president is violating instructions from Congress. If a court upholds presidential exercise of power in this scenario, it is also indicating that Congress cannot act on the subject. In such cases, Justice Jackson warns that courts should proceed cautiously.

Decades later, the Court made Jackson's approach even more flexible. In a case called *Dames and Moore v. Regan*, Justice William Rehnquist, who as a young lawyer had clerked for Justice Jackson, said that his former boss's approach was best understood as a spectrum, rather than as three discrete categories. This approach seems to have stuck. When lawyers and judges talk about presidential power today, they cite Jackson's famous concurrence from the Steel Seizure Case, but they usually apply it on a spectrum, as Justice Rehnquist advocated.

## APPLYING JACKSON'S APPROACH

Justice Jackson's approach sounds straightforward enough in theory, but in practice it can be difficult to apply: How do we know whether Congress has authorized the president to do what the president has done? In some cases, it will be clear, such as when Congress explicitly authorizes the president to do something or clearly forbids an action.

More often than not, however, it isn't so clear. Oftentimes, Congress has given the president authority to do something in a related area, but it has not spoken directly to the question at hand. Sometimes, Congress has passed a relevant statute years earlier but did not anticipate the current situation.

## EXECUTIVE ORDERS

A president's executive order has the force of law, but that does not mean it is irrevocable. In general, the less rigorous the procedures used to put in place a new legal rule, the less rigorous the procedures needed to revoke that legal rule.

If a president can issue a new legal rule through executive order, that means that the next president can revoke that same rule, also by executive order. In fact, when a new president takes office and replaces a president from the other political party, it is quite common for the new president to sign executive orders getting rid of the executive orders signed by the previous president.

Also keep in mind that an executive order does not trump other preexisting laws. For example, the president cannot undo a congressional statute by executive order, though the president can give instructions to the administration on how to interpret a particular statute. To that extent, as Justice Jackson explained in the Steel Seizure Case, the legality of an executive order needs to be measured against what Congress has already done.

## ADMINISTRATIVE AGENCIES

An important question at this point is if there is any middle ground here. Legislation is hard to pass and requires the support of both houses of Congress and the president. Executive orders are easy to put in place, but they are vulnerable to legal challenges within the framework of the Jackson concurrence in the Steel Seizure Case, and they are also easily undone by the next president. What else is there?

The answer is administrative regulations. An enormous amount of law at both the federal and state level today is the product of action by administrative agencies. Administrative agencies are departments created by Congress to deal with particular issues of policy. Congress lacks the time, resources, or expertise to deal with all the kinds of problems in the country that need addressing. However, Congress can pass a statute creating an administrative agency and delegating authority to that agency to craft policy in that specific area.

The list of administrative agencies is extremely long, but it includes the Environmental Protection Agency, the Securities and Exchange Commission, the State Department, the Justice Department, the National Labor Relations Board, the Commerce Department, and more.

Presidents exercise much of their policymaking authority through administrative agencies. The degree of presidential power over particular agencies differs, however. For example, the president's ability to influence agency policy is generally greater for executive agencies, whose heads are cabinet members.

By contrast, the heads of independent agencies are not cabinet members and, in some cases, such agencies are led not by a single individual appointed by the president but by a bipartisan commission.

Administrative agencies can create policy in various ways, but one of the most important and common is through a process known as notice and comment rulemaking. This is the process agencies usually use to promulgate new regulations, which have the force of binding law. To do so, the agency needs to give notice of a proposed rulemaking and then give interested parties time to comment on the proposed rule.

In sum, the president can help set the agency's agenda and instruct the political appointees at the agency of the administration's priorities. However, the president cannot force the agency to sidestep the procedures, such as notice and comment rulemaking, which are often mandated by law. Additionally, given relatively robust judicial review of agency action under the 1946 Administrative Procedure Act, agency actions that fail to comply with these requirements can be invalidated by courts.

## CONCLUSION

The scope of executive authority remains difficult to pin down because both the Constitution and the Administrative Procedure Act are short on detail. We know that courts can review administrative-agency actions to make sure that agencies have followed proper procedures, but it is difficult to determine how deferential should courts be to agencies.

Such questions are difficult but exceptionally important. American presidents have asserted more and more power through the generations. As they keep pushing to expand their domain, courts and lawyers have a bigger role to play in making sure that the country strikes the proper legal balance between giving the chief executive enough authority to deal with urgent national issues on the one hand, while ensuring that the president doesn't abuse executive power on the other.

## Suggested Reading

- Bellia, "The Story of the *Steel Seizure* Case."
- Lawson, "The Rise and Rise of the Administrative State."
- Strauss, "The Place of Agencies in Government."
- Youngstown Sheet & Tube Co. v. Sawyer.

## Questions to Consider

- Justice Jackson's famous concurrence in the Steel Seizure Case provides a framework for considering whether particular exercises of executive power are constitutional. But Justice Jackson said very little about how to determine the legality of executive actions when Congress has neither clearly granted nor denied the president the relevant authority. How should courts consider such cases?

- Administrative agencies exercise a great deal of power in the United States today. Indeed, agencies, rather than Congress, have crafted a large amount of federal law. The Constitution says nothing on the topic of administrative agencies. In light of this constitutional silence, are administrative agencies constitutional? If we conclude that agencies are unconstitutional as a matter of original understanding, might they nevertheless be somehow constitutional as a result of decades of accumulated practice?

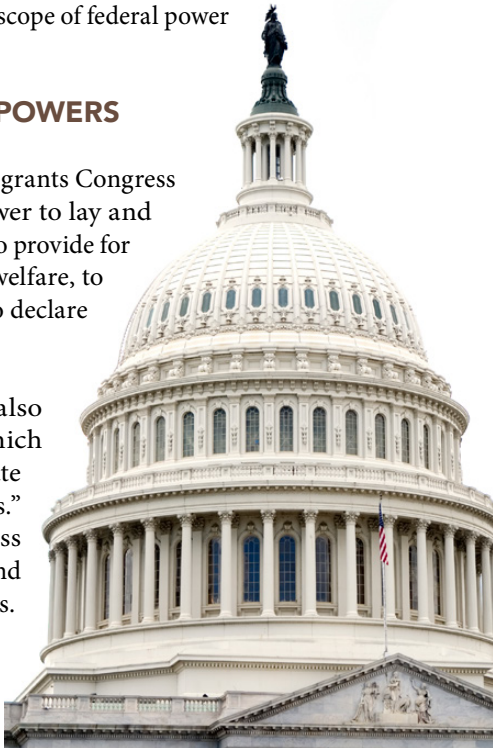
# CONGRESS AND THE NEW DEAL COMMERCE CLAUSE

The power of the US Congress, like the powers of the other branches of government, is set forth in the Constitution. Yet Congress's power as we know it today was shaped in significant part in the 1930s, during one of the most important and sudden constitutional transformations in American history. This change was about federalism—the critical division between state and federal power that has caused fierce controversy throughout US history. It expanded the scope of federal power dramatically and immediately.

## CONGRESS'S ENUMERATED POWERS

Article I, Section 8 of the Constitution grants Congress numerous powers, including the power to lay and collect taxes, to pay the nation's debts, to provide for the common defense and the general welfare, to coin money, to establish post offices, to declare war, and to raise and support armies.

Most notably for this lecture, it also includes the Commerce Clause, which grants Congress the power "to regulate Commerce . . . among the several states." Article I, Section 8 also gives Congress the power to make all laws necessary and proper for carrying out its other powers.



## THE COMMERCE CLAUSE

The Supreme Court's approach to the Commerce Clause through the first 130 years of American history was haphazard. The first major Supreme Court case to interpret the Clause was *Gibbons v. Ogden* in 1824. *Gibbons v. Ogden* arose out of a dispute involving the right to operate a ferry in the waters around New York City. The New York legislature had granted a monopoly for operating steamboats in New York waters to two men named Fulton and Livingston. That meant that no one could operate a ferryboat in New York waters without a license from those two.

Fulton and Livingston had sold a license to Aaron Ogden to operate a ferry between New York City and Elizabethtown in New Jersey. However, a man named Thomas Gibbon also operated a ferry service between those ports, and he did not have a license from Fulton and Livingston. Ogden brought a lawsuit to stop Gibbons's ferry operation on the theory that it violated Ogden's monopoly.

Gibbons, in return, argued that his ferries were properly licensed under a federal law. The Supreme Court ruled in Gibbons's favor and held that the federal law did authorize Gibbons to operate a ferry in New York. In so doing, it concluded that that federal law was within the scope of the commerce power. The federal law therefore was valid and overrode the New York monopoly. Chief Justice John Marshall wrote the unanimous decision.

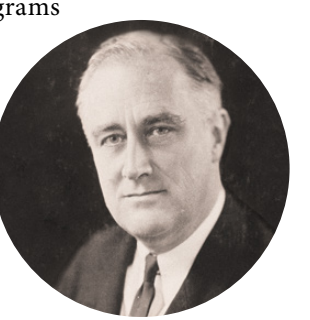
Later in the 19th century, however, the Supreme Court tended to adopt a narrower view of federal power and a narrower construction of the Commerce Clause. In the late 1800s and continuing into the 1930s, the Supreme Court repeatedly invalidated federal laws on the theory that they went beyond Congress's commerce power.

For example, in 1918, in a case called *Hammer v. Dagenhart*, the court struck down a federal statute seeking to protect child laborers by prohibiting the transportation of goods made by child labor. The Supreme Court's theory, in a nutshell, was that the production of goods occurs locally. It therefore is up to state governments, not the federal government, to determine whether kids can be put to work.

## THE 1930s

Following the stock market crash of October 29, 1929, the country spiraled into the Great Depression. People lost their jobs, and many Americans plunged into poverty. Franklin Delano Roosevelt was elected president in 1932 with a mandate for "action, and action now."

President Roosevelt spearheaded an unprecedented wave of legislation designed to revive the struggling economy, protect workers, and ease the crushing effects of poverty. Roosevelt referred to these programs collectively as the New Deal.



Unsurprisingly, big-business lawyers challenged these new laws as beyond the scope of the federal government's constitutional powers. Congress had justified its new laws under the Commerce Clause, so the Supreme Court, once again, needed to interpret that provision.

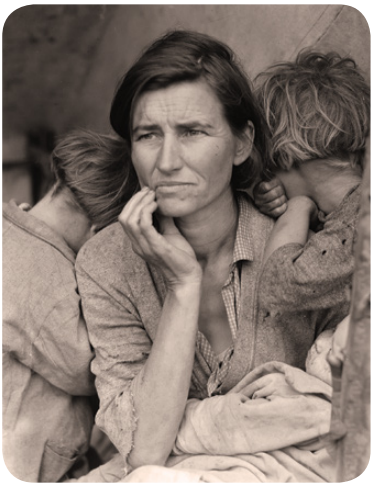
One of the most famous cases from this era was *A. L. A. Schechter Poultry Corporation v. United States*. The case centered on the National Industrial Recovery Act of 1933, which was part of the New Deal. It authorized the president to promulgate codes regarding minimum wages, maximum hours, collective bargaining, and unfair trade practices. The law made it a crime for an employer to violate any code provision.

The case involved Schechter's Brooklyn chicken slaughterhouse, which was found to violate the wage and hour provisions of the code. The Schechter Poultry Corporation argued that the federal law could not constitutionally regulate its slaughterhouse, because the chickens were killed and sold in New York and did not cross state lines. The Supreme Court agreed with the corporation and rejected the federal government's argument that it could regulate labor practices at the slaughterhouse.

In other cases, too, the Supreme Court invalidated New Deal legislation, emphasizing that the Commerce Clause only empowered Congress to regulate goods or activity that were actually involved in interstate commerce, such as buying or selling items across state lines. Activities like mining, harvesting, and manufacturing goods all occurred locally, before the goods entered the stream of commerce.

## ROOSEVELT'S REACTION

The Roosevelt administration did not react favorably to these Supreme Court decisions. In President Roosevelt's eyes, the Great Depression presented a national crisis. He argued that the Supreme Court should not interfere with the federal government's efforts to improve the economy and protect workers. The president also thought the Supreme Court was hopelessly out of step with the American public, which craved legislative action to solve the country's serious problems.



After his landslide 1936 reelection, Roosevelt decided to take matters into his own hands by proposing his now infamous court-packing scheme. The Constitution grants federal judges life tenure, so President Roosevelt could not fire any Justices. However, the Constitution does not set the number of Supreme Court Justices. Over the years, the number of justices has ranged from six to ten.

President Roosevelt came up with the idea to pack the court with new Justices sympathetic to the New Deal. More specifically, he proposed that Congress pass a law permitting the president to appoint a new Justice for each current Justice over the age of 70.

At the time, six of the nine justices met that criterion. Moreover, four of those six, nicknamed the Four Horsemen, were committed conservatives who believed in very limited federal power. The court-packing plan would have allowed President Roosevelt to add enough justices of his own to outvote the Four Horsemen. Despite Roosevelt's popularity, his scheme met fierce criticism. Congress ultimately refused to adopt the plan.

In retrospect, the plan appears to have been a bad political miscalculation by a man who was usually so politically shrewd. President Roosevelt, however, would claim that he may have lost the battle, but he won the war. He may have been right. Later in 1937, the Supreme Court began upholding the very kinds of economic legislation that in 1936 it had been striking down.

## A TURNING POINT

The case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation* epitomizes this switch. This case involved the National Labor Relations Act. Also known as the Wagner Act, this law created a right of employees to bargain collectively. Because the Supreme Court had been hostile to similar laws in recent years, businesses basically ignored the law, figuring that the courts would strike it down as unconstitutional. That was an incorrect assumption.

The federal government charged the Jones & Laughlin Steel Corporation with unfair labor practices because it fired employees who had tried to form a union. The key legal issue was whether Congress had the power under the Commerce Clause to pass the Wagner Act.

Despite ample precedent to the contrary, the court, in a 5-4 decision, said that Congress did have that power under the Commerce Clause. The Supreme Court's reasoning is at odds with earlier cases. As a brief summation, the court argued that Jones & Laughlin Steel Corporation was a major player in the steel business. It was the fourth-largest producer of steel in the country with factories, mines, and other operations spread across several states. The business, then, quite obviously impacted interstate commerce.

Additionally, the court essentially asked: If steel production happens locally in a factory in Pennsylvania, might labor strife at that factory have far-flung economic effects in other states? The answer was yes. The steel industry crossed state lines, so labor unrest in a Pennsylvania factory could most certainly have economic effects elsewhere in the nation.

The case signaled a major shift in the Supreme Court's thinking. Seemingly overnight, Congress's power to pass laws dealing with labor relations and other economic matters went from being very limited to very broad. In the years to come, it would become even broader.

President Roosevelt did not have the opportunity to appoint a single Justice to the Supreme Court during his first term. However, by 1937, the Four Horsemen and several other justices were old men, and many would soon retire or die. In the next few years, President Roosevelt would completely remake the Supreme Court without having to resort to court packing at all.

By the time of his own death in 1945, President Roosevelt had appointed eight new justices, including four of the most important to ever sit on the bench: Hugo Black, Felix Frankfurter, William Douglas, and Robert Jackson. They all agreed it was not the Supreme Court's place to interfere with Congress's economic policies.

## *WICKARD V. FILBURN*

In 1942, the Supreme Court articulated an even more robust vision of Congress's commerce authority in *Wickard v. Filburn*. In an effort to stabilize low and volatile agricultural commodity prices, Congress had passed the Agricultural Adjustment Act of 1938. The act set a quota for the amount of wheat produced by each farmer.

Though Congress's intentions were to help farmers, many did not respond kindly to this plan. Roscoe Filburn owned a dairy farm in Ohio, but he also grew some wheat, which he used for livestock, for home consumption, and for sale. In 1941, Filburn was allotted 223 bushels of wheat, but he grew 462. The government penalized him, and he sued the secretary of agriculture, challenging the constitutionality of the scheme.

The lawsuit focused on the wheat Filburn's family and animals consumed on his farm. Filburn's primary constitutional argument was that because the wheat in question never left his farm and crossed state lines, it lay beyond Congress's commerce clause powers.

The Supreme Court disagreed and upheld the law. The court emphasized the cumulative effects home-consumed wheat would have on the national agricultural economy. While the amount of excess wheat any individual farmer may consume on his own farm may be miniscule, the aggregate effect of homegrown and home-consumed wheat could be substantial.

If Filburn didn't use his own wheat, he would have to buy wheat on the market to feed his animals and family. His failure to purchase wheat on the market, therefore, impacted the national price for wheat. While Filburn's own impact on the market price of wheat might be tiny, the collective impact of all the farmers who grew excess wheat could be significant.

This case introduced into Commerce Clause jurisprudence the concept of aggregation. To determine whether an activity had substantial effects on interstate commerce, the Supreme Court would not look at the isolated activity of the particular party in a particular case.

Rather, the court would aggregate the effects of all similar activity to see if the activity cumulatively had substantial effects on interstate commerce. If it did, then Congress could regulate such activity using its commerce power.

The Supreme Court's broader interpretation of the Commerce Clause has had significant and long-lasting effects on our system of government. The size and reach of the federal government grew tremendously during the 20th century, in large part thanks to the New Deal transformation. Today, the United States code is full of laws justified under Congress's commerce power.

## Suggested Reading

- Ackerman, *We the People*, vol. 2.
- Chen, "The Story of *Wickard v. Filburn*."
- Feldman, *Scorpions*.
- Leuchtenburg, *The Supreme Court Reborn*.

## Questions to Consider

- The United States' economy was far more expansive and interconnected in 1937 than it was in 1788. It is still more expansive and interconnected today than it was in 1937. How should those changes affect courts' interpretations of the Commerce Clause?
- Should courts closely police Congress to make sure that it does not overstep its constitutionally allocated powers?

# CONGRESS AND THE COMMERCE CLAUSE TODAY

During the New Deal era, the Supreme Court reinterpreted the Commerce Clause of Article I, Section 8 to increase Congress's power substantially. The court then expanded that power still more in 1942 in *Wickard v. Filburn*. The country, thus, entered the period after World War II with a newly strengthened federal government. As the nation's population and economy grew, Congress began to use its power to address a variety of pressing societal issues—and the court faced the question of just how far the Commerce Clause would allow Congress's power to reach.

## CIVIL RIGHTS AND THE COMMERCE CLAUSE

The United States remained a very racially segregated society well into the second half of the 20th century. In many parts of the country, African Americans faced terrible discrimination, and in some places, especially the Deep South, segregation was the official policy of state and local governments.

The Supreme Court's famous 1954 decision in *Brown v. Board of Education* held racially segregated public schools unconstitutional. However, this and other rulings—based on equal protection—actually changed little for African Americans on the ground for many years.

It was to address this situation that, a full decade after *Brown*, Congress passed the Civil Rights Act of 1964. It was the Commerce Clause that the government used to justify that statute.

## *HEART OF ATLANTA MOTEL, INC. V. UNITED STATES*

The most famous case here is *Heart of Atlanta Motel, Inc. v. United States*. One provision of the Civil Rights Act prohibited discrimination on the grounds of race in certain places of public accommodation. In other words, the statute forbade certain privately owned businesses, like hotels and restaurants, from refusing service on the basis of race.

The key question in this case was whether Congress's law, which prohibited hotels and motels from denying service on the basis of race, was a constitutional exercise of Congress's commerce power. The motel contended that it served local clientele and that it was therefore beyond the reach of federal authority. The Supreme Court disagreed.

In an era of the automobile, people were increasingly mobile and traveled from state to state. Racial discrimination in places of public accommodation, the Supreme Court found, discouraged African Americans from traveling; it is exceedingly difficult to travel away from home if hotels and motels will not serve you.

Responding to the motel's contention that its discrimination would not affect interstate commerce, the court drew on *Wickard v. Filburn*. The court said that motels' and hotels' practices of discrimination collectively affected interstate commerce by discouraging African Americans all around the nation from traveling.


Simply put, the court did not only ask if the Heart of Atlanta Motel's policy affected interstate commerce. It asked whether similar racially discriminatory practices from countless hotels nationwide did.

A companion case called *Katzenbach v. McClung* involved Ollie's Barbecue, a Birmingham, Alabama, restaurant that served white people at tables in the restaurant but required its black customers to use a take-out window. Though the restaurant contended that it was a small, local business serving only local clientele, the court followed its own reasoning from the Heart of Atlanta case.

## THE COURT'S REASONING

In upholding the relevant provisions of the Civil Rights Act under the Commerce Clause, the Supreme Court indicated that it would review Congress's exercise of its commerce authority very deferentially. In the Ollie's Barbecue case, for instance, the court said that Congress had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. So long as it was not irrational for Congress to think there was such a connection, the court was going to uphold the statute.

## PULLING BACK

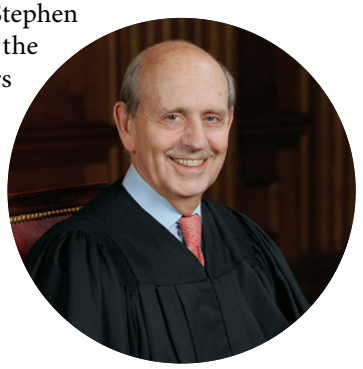
After these cases, it appeared that Congress had virtually unlimited power to legislate under the Commerce Clause, and critics complained that Congress acted as though it could do anything. In more recent years, however, the court has cut back somewhat on this power.

For instance in 1995, the Supreme Court in *United States v. Lopez* struck down the Gun-Free School Zones Act of 1990 as beyond Congress's commerce authority. Mr. Lopez had been charged with violating a federal law prohibiting the possession of guns in school zones. The court struck down the law as unconstitutional. This was the first time since 1936 that the Supreme Court had found a federal law to exceed Congress's commerce power.

The case highlighted the divide between the conservative and liberal justices on questions of federal power. To the five conservative members of the court, led by Chief Justice William Rehnquist, the notion that Congress could prohibit guns in school zones demonstrated that federal power was frighteningly untethered to its origins. Guns in school zones may be a problem, but it was not one that had a substantial effect on interstate commerce.

The government had contended that guns in school zones had an aggregate (and adverse) effect on education, which in turn impacted the nation's economy for the worse. The majority rejected this line of constitutional argument.

The four liberal dissenters, led by Justice Stephen Breyer, disagreed. Breyer pointed out that the court's approach broke from over 50 years of established constitutional doctrine. For better or worse, the court had interpreted the Commerce Clause to give Congress broad powers ever since 1937. The majority's approach was inconsistent with several decades of legal precedent and with Congress's expectations.



Moreover, argued Justice Breyer, Congress had good reason to think that guns in school zones did substantially effect interstate commerce. Gun-related violence in and around schools negatively impacts learning, which, in turn, has adverse long-term effects on the economy and interstate commerce.

## REVISIONS

Interestingly, although the majority did not dispute the minority's reasoning directly, they indicated that there were too many links in the chain between guns in school zones and interstate commerce for there really to be an interstate commerce issue. The Supreme Court in *United States v. Lopez* pointed out several flaws in the gun statute that collectively undermined its constitutionality.


Congress, for instance, had failed to include findings detailing the connection between guns in school zones and interstate commerce. Congress had also failed to include in the statute a jurisdictional element requiring that the prosecution prove that the gun in the school zone had traveled in interstate commerce.

Congress later revised the Gun-Free School Zones Act to include a jurisdictional element. A lower court upheld the constitutionality of this new statute, and the Supreme Court declined to review the case. From this perspective, one could see *United States v. Lopez* as a case about Congressional drafting errors.

## THE FEDERALISM REVOLUTION

In spite of its limited practical effects, the case nevertheless signaled the start of what some scholars have called the Rehnquist federalism revolution. Rehnquist and the justices Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas all felt that federal power had grown too expansive.

The appointment of these justices was no accident. Between 1969 and 1993, Republicans controlled the White House for 20 of 24 years. During that period, Republican presidents appointed 10 consecutive justices to the high court. (To be fair, some of these Republican appointees, like Justice John Paul Stevens and Justice David Souter, often voted in important cases with more liberal members of the court.)

However, the same quintet of justices who had comprised the *United States v. Lopez* majority made clear that that case had not been an anomaly a few years later when it offered similar reasoning in striking down a provision of the Violence Against Women Act of 1994 in a case called *United States v. Morrison*.

Congress had included a civil damages provision in the statute, permitting women who were the victims of gender-motivated violence to sue their assaulters under federal law to recover compensatory and punitive damages. Drawing on its earlier decision in *Lopez*, the Supreme Court struck down the provision, again indicating that these kinds of matters ought to be left to state governments. Again, this was a deeply divided, 5-4 decision.

## THE AFFORDABLE CARE ACT

The inevitable connection between law and politics became readily apparent in 2012, when the Supreme Court confronted yet another Commerce Clause question. In 2010, Congress passed the Patient Protection and Affordable Care Act to address what it perceived to be serious problems with the nation's health care system. Also known as Obamacare—because President Barack Obama had championed health care reform and signed the bill into law—the Affordable Care Act (ACA) was a tremendously significant and controversial piece of legislation.

When a constitutional challenge to some of its provisions reached the Supreme Court in a case called *National Federation of Independent Business v. Sebelius*—*NFIB v. Sebelius* for short—the country realized that the high court's decision would have not only important legal implications, but also enormous political and policy implications as well.

## THE INDIVIDUAL MANDATE

The ACA was a massive, complicated statute, but the Commerce Clause challenge involved a particular provision of it known as the individual mandate. The individual mandate required most Americans to maintain minimum health insurance. Most people who failed to have health insurance would be subject to pay a penalty when they filed their taxes.

One of the government's legal theories was that the individual mandate was a constitutional exercise of Congress's commerce power. The rationale for it, the government explained, was that the health-care market is characterized by a serious cost-shifting problem: Nearly everyone will need health care at some point, but many people cannot predict when they will need it.

Uninsured people who receive bills for care and then do not pay those bills lead to higher costs for everyone: Hospitals will charge more to other people to recoup losses, and to reimburse those higher costs, insurance companies will in turn raise their rates for people who do have insurance. Insurance companies also deny coverage to sick people, or charge more to cover sick than healthy people.

To deal with this cost-shifting problem, Congress included a provision in the ACA that prohibited insurance companies from denying health insurance coverage to sick people and from charging sick people more than healthy people.

These provisions, however, created another problem, which is that some people may wait to purchase health insurance until they get sick. To deal with this problem, and the problem of uninsured people going to emergency rooms without paying for their care, Congress included the individual mandate requiring almost all individuals to have health insurance.

## THE GOVERNMENT'S THEORY

The government's theory was that Congress had the constitutional authority to pass this individual mandate because an individual's failure to purchase health insurance negatively affected interstate commerce by creating this cost-shifting problem. Five justices on the Supreme Court rejected this argument.

As Chief Justice John Roberts explained it, Congress was not regulating commerce so much as compelling individuals not engaged in commerce to purchase an unwanted product.

Four justices disagreed sharply with this characterization. Led by Justice Ruth Bader Ginsburg, these justices argued that Congress was in fact regulating commerce. The health-care market, she explained, is characterized by a unique free-rider problem: Certain people are making the decision to pass on their health-care costs to everyone else.

The chief justice characterized the uninsured person as inactive and therefore outside the stream of commerce. Accordingly, Congress could not say it was regulating commerce when it forced that person to buy health insurance. By contrast, Justice Ginsburg characterized the person as a free rider who would inevitably consume health care. Because that free rider drove costs up for everyone else, that decision necessarily had a serious impact on interstate commerce. Accordingly, Congress, according to Justice Ginsburg, could regulate under the Commerce Clause.

## CONCLUSION

Even though it was notable that the Supreme Court found the individual mandate to go beyond Congress's commerce power, it is not clear that its reasoning will have implications in other cases. It is also important to note that even though the court found that the mandate was not supported by the Commerce Clause, it ultimately upheld the individual mandate as a proper exercise of Congress's taxing power.

As a final note about this case, in 2017, Congress repealed the individual-mandate tax. That repeal does not affect the precedential value of *NFIB v. Sebelius*, but it does affect the way the Affordable Care Act functions.

## Suggested Reading

- Minow, "Affordable Convergence."
- National Federation of Independent Business v. Sebelius.

## Questions to Consider

- Whose Commerce Clause opinion in *NFIB v. Sebelius* (the Affordable Care Act case) is more persuasive? Recall that Chief Justice Roberts concludes that people who do not purchase health insurance are inactive and that Congress therefore cannot regulate them on the theory that it is regulating interstate commerce. Justice Ginsburg, in response, contends that people who do not purchase insurance are in fact very often active in the health-care market: When they get sick or injured (as most people inevitably do), they cannot pay their medical bills, thus passing those costs onto the rest of society. Which characterization is more convincing? Why?

- In *Katzenbach v. McClung* and *Heart of Atlanta Motel v. United States*, the Supreme Court decided to uphold key provisions of the Civil Rights Act of 1964 on Commerce Clause grounds. Is the Commerce Clause justification persuasive? If not, should the court have reconsidered precedent limiting Congress's power to enforce the Fourteenth Amendment's Equal Protection Clause?

# INDIVIDUAL LIBERTY: CONTRACTS AND PRIVACY

The Thirteenth Amendment to the Constitution, ratified in 1865, abolished slavery. The Fifteenth Amendment, ratified in 1870, stipulated that the right of US citizens to vote may not be abridged on account of race or former condition as a slave. In between those two came the Fourteenth Amendment, ratified in 1868. It is just as important as the other two, but quite a bit more complicated.

## OVERVIEW OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment contains five sections. At the time it was written, much debate focused on Sections 2, 3, and 4, which dealt with issues left unresolved by the end of the Civil War, such as black suffrage, former Confederates' political rights, and Union and Confederate debt. Section 5 empowers Congress to enforce the other sections.

Though Congress spent significant time debating Sections 2, 3, and 4, it is Section 1 that draws the most attention today. It contains several important clauses. It states that all persons born or naturalized in the United States are US citizens. Among other things, this provision helped ensure that the former slaves and their descendants would be US citizens.

Another provision holds that states may not abridge the privileges or immunities of US citizens. Still another provides that the states may not deprive any person of life, liberty, or property without due process of law. Another provision adds that states also may not deny to any person the equal protection of the laws.

Section 1 of the Fourteenth Amendment, therefore, contains three clauses—the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause—that seem to say something about rights, thereby at least ostensibly adding to the rights protected elsewhere in the Constitution. Yet, as with many important parts of the Constitution, the language of the provisions is not exactly precise. The big question following ratification was what these provisions meant.

## THE SLAUGHTERHOUSE CASES

The Supreme Court's first big opportunity to address that question was the *Slaughterhouse Cases* in 1873, which involved a Louisiana law that had given one company a monopoly over slaughterhouses for 25 years. As a result of the law, all butchers had to use this one company's slaughterhouse.

The butchers, who were all white, sued, contending that the law interfered with their right to pursue their profession. Their argument was that the right to pursue lawful employment in a lawful manner was one of the privileges or immunities protected by the Fourteenth Amendment and that the Louisiana law violated that provision.

The Supreme Court rejected the butchers' challenge. The court could have done so on narrow grounds, such as by holding that Louisiana's law was a reasonable health and safety regulation addressing the spread of diseases at

slaughterhouses. Instead, Justice Miller, writing for the majority, went out of his way to construe the Fourteenth Amendment very narrowly.

For one, Miller indicated that the Fourteenth Amendment was primarily concerned with protecting African Americans—that is, the newly freed slaves. To this extent, the amendment was not concerned with these white butchers' concerns.

Miller's opinion also gutted the amendment's Privileges and Immunities Clause. Relying primarily on the distinction between the privileges and immunities of United States citizenship and those of state citizenship, Miller argued that the Fourteenth Amendment only protected privileges or immunities of US citizenship. The right at issue here—the right to pursue one's profession—belongs to the bundle of rights provided by virtue of one's state citizenship, and it was therefore beyond the contemplation of the Privileges or Immunities Clause.

The Supreme Court in 1873 seemed to indicate that the Fourteenth Amendment did not change the relationship between the federal and state governments, as some people at the time had claimed. The decision had the effect of insulating state law from judicial interference.

## THE DUE PROCESS CLAUSE

The Fourteenth Amendment's Due Process Clause has played a crucial role in individual rights in two separate ways. First, the court has relied on the Due Process Clause to apply most of the provisions of the Bill of Rights against the state governments. Second, the court has relied on the Due Process Clause to protect other individual rights that are not expressly mentioned elsewhere in the Constitution. The clause stipulates that no state shall "deprive any person of life, liberty, or property, without due process of law." (Incidentally, the Fifth Amendment contains a similar clause that applies to the federal government.)

The idea of using the Due Process Clause to protect substantive rights—as opposed to simply procedural rights—often seems odd to lawyers and non-lawyers alike. However, the Supreme Court has also fashioned a doctrine known as substantive due process that uses the Fourteenth Amendment's Due Process Clause to protect un-enumerated substantive rights.

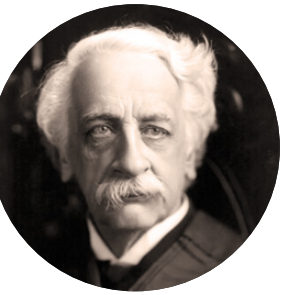
The roots of the substantive due process doctrine can be traced back to the era of the progressive movement in the late 19th century. Progressivism was partially a backlash against the Industrial Revolution, as concern began to grow about the poor and workers' rights. During this period, several states passed laws regulating conditions of industrial labor and labor relations.

## *LOCHNER V. NEW YORK*

One law along these lines was the New York Bakeshop Act. This law prohibited the employment of bakery workers for more than 10 hours a day or 60 hours a week. Joseph Lochner owned a bakery in Utica, New York. He was convicted of violating the statute and fined for working his employees for more than the statutory maximum.

The purported goal of the statute was to protect the health of the workers. Baking exposed workers to hot temperatures, flour dust, and, sometimes, unsanitary conditions. Lochner contended, however, that the law interfered with his liberty of contract. In its 1905 decision in *Lochner v. New York*, the Supreme Court agreed and struck down the Bakeshop Act as unconstitutional.

In so doing, the court said that the right to contract that it protected could be found in the liberty component of the Due Process Clause of the Fourteenth Amendment—the term *liberty* in the phrase "life, liberty, or property." The court reasoned that the right to contract was part of the liberty the clause protected.



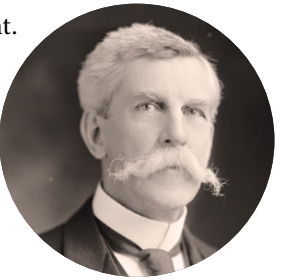
The Supreme Court made clear that its ruling did not mean that a state can never regulate in this area. Courts, Justice Peckham explained, must always ask whether the regulation in question is fair, reasonable, or arbitrary. A genuine health statute would be a reasonable exercise of the state's inherent governmental powers.

For example, the court pointed out that a few years earlier it had upheld a statute regulating the working hours for underground miners, because mining is a hazardous activity. The court did not see baking that way. In the court's eyes, then, this was not a health statute, but an arbitrary infringement on the rights of employers and employees to make contracts with each other.

The dissenting justices, of course, saw things differently. Given that labor law, union organizing, and collective bargaining were only in their infancy, the bakery employees lacked the bargaining leverage to really negotiate favorable terms. In the early 20th century, the employers usually had all the power, and employment conditions could be horrific.

Accordingly, Justice Harlan in dissent argued that the New York legislature had thought there was a health issue that it needed to address, and that it was not the court's place to inquire into the wisdom of that judgment. Justice

Oliver Wendell Holmes Jr. wrote his own dissent. He objected to the majority's decision to strike down a democratically enacted law on the basis of an economic philosophy that appears nowhere in the Constitution.



## WEST COAST HOTEL CO. V. PARRISH

By the late 1930s, however, the court disavowed the use of the Due Process Clause in *Lochner v. New York*. In a famous 1937 case called *West Coast Hotel Co. v. Parrish*, the court upheld a minimum wage law for women, even though an earlier case had struck down a virtually identical law. According to the 1937 court, the freedom of contract vindicated in cases like *Lochner* is nowhere to be found in the Constitution. Moreover, reasonable regulation satisfies due process, and the regulation at issue in *West Coast Hotel Co. v. Parrish* was reasonable.

Moreover, the Supreme Court started paying attention to unequal bargaining power. The court explained that avaricious business owners routinely exploited female workers, and if government chose to try to protect those women, it was not the judiciary's place to undo that decision.

## GRISWOLD V. CONNECTICUT

With *West Coast Hotel Co. v. Parrish*, the concept of substantive due process—of unwritten Constitutional rights materializing via the Fourteenth Amendment's due process clause—seemed moribund. Nearly three decades later, it was revived in 1965, in a case with completely different facts. The case was *Griswold v. Connecticut*, and it involved a Connecticut statute criminalizing the use of contraception or a doctor's prescription of contraceptives. The statute had been enacted in 1879, but by the 1960s it was rarely enforced. In *Griswold v. Connecticut*, however, the state was prosecuting a doctor and the director of Planned Parenthood, who were openly violating the law.

A majority of the justices voted to strike down the Connecticut statute. Though they agreed that the law banning contraception was unconstitutional, they disagreed as to why. Justice Douglas wrote the majority opinion for the court. Instead of relying on substantive due process, Douglas found that the Connecticut law infringed on a married couple's privacy.

The Constitution nowhere promises a general right to privacy, but Douglas believed that the right to privacy could be found in penumbras of the Bill of Rights. A penumbra is a shadowy, indefinite, marginal area surrounding something. Justice Douglas's argument was that various provisions in the Bill of Rights create zones of privacy.

## WIDER APPEAL

Though *Griswold* protected a marital right to contraception, a later case—*Eisenstadt v. Baird*—relied on equal protection norms to extend that right to unmarried people. It is not so uncommon for the court to decide a narrow issue, such as the right to contraception for married couples, and later to broaden its decision so that it applies more widely.

Justice Goldberg agreed that the Connecticut statute was unconstitutional, but he relied primarily upon the Ninth Amendment, which essentially tells us that just because a right is not listed specifically in the Constitution does not mean that that right does not exist.

Justice Harlan, whose grandfather had served on the court and dissented in *Lochner v. New York*, thought the statute banning contraception did violate the liberty component of the Fourteenth Amendment's Due Process Clause. Additionally, Harlan thought that substantive due process contained a limiting principle that would prevent judges from using it whenever they wanted to strike down a law that offended their own personal values.

Harlan thought that the doctrine, properly understood, relied "upon respect for the teachings of history." Based on this history, judges could decide whether a challenged law offended "basic values that underlie our society" and that are "implicit in the concept of ordered liberty." In other words, Harlan thought that judges should look to see whether our society has historically considered a particular liberty interest to be fundamental.

Justices Black and Stewart in dissent concluded that the Constitution nowhere protects the right of privacy. If people in Connecticut did not like the contraception law, they needed to persuade the legislature to change it.

## CONCLUSION

*Griswold* marked the reemergence of substantive due process doctrine. Though Justice Douglas's penumbras opinion won the most votes from his fellow justices, the court in later cases seemed to heed Justice Harlan's words that substantive due process doctrine was not all bad. The court has not been consistent in how it goes about applying the doctrine or in following Harlan's admonition that the judiciary look to history as a guide. In the years after *Griswold*, debates over substantive due process would only become more complex and heated.

## Suggested Reading

- Bernstein, "The Story of *Lochner v. New York*."
- Griswold v. Connecticut.
- Lochner v. New York.
- Sunstein, "Lochner's Legacy."

## Questions to Consider

- The common wisdom today is that *Lochner* was wrongly decided but that *Griswold* was right. (Almost all liberals accept these propositions, and at least some conservatives do as well.) How can these propositions be reconciled with each other?
- Should judges protect rights that are nowhere mentioned in the Constitution's text? What are the dangers of giving judges this authority? What are the dangers of denying judges this authority?
- The framers of the Constitution and Bill of Rights struggled with the question of what rights, if any, to list in the document. If you were drafting a new Constitution from scratch, how would you approach this problem? Would you list particular rights or not? If so, what rights would you list?

Lecture 7

# LIBERTY DISPUTED: ABORTION AND GAY RIGHTS

This lecture looks at how the Supreme Court has handled cases regarding abortion and gay rights. It focuses on several specific cases, including *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Lawrence v. Texas*.

## ROE V. WADE

The 1973 case *Roe v. Wade*, involving the issue of abortion, produced arguably the most controversial Supreme Court decision in the nation's history. Writing for the majority, Justice Harry Blackmun began by rooting the decision in substantive due process—that is, in the liberty component of the Due Process Clause of the Fourteenth Amendment. This liberty, he argued, includes the right to privacy, which encompasses a woman's decision about whether or not to terminate her pregnancy.

However, Justice Blackmun also made clear that a woman's right to abortion is not absolute. To the contrary, he noted that the state may assert its interests in protecting the health of the mother and in protecting potential life.

To decide when a woman's right to an abortion trumped the state's interests, Justice Blackmun developed a trimester approach. In the first trimester of pregnancy (the first three months), the abortion decision is left up to a woman, in consultation with her doctor.

In the second trimester, the state may regulate abortion procedures in a way that is reasonably related to maternal health. In the third trimester, the state may regulate or even prohibit abortions.

Not all of the justices agreed. Justice White in dissent wrote that abortion policy should be left to the people in each state, not judges. Justice Rehnquist, in his own dissent, reasoned similarly, arguing that courts should apply rational basis review when reviewing abortion regulations.

### POLITICAL BACKLASH

*Roe v. Wade* created a fierce political backlash. In fact, some scholars argue that abortion lacked much political salience in the years before *Roe v. Wade*. It was the Supreme Court's decision in *Roe*, they say, that galvanized the pro-life movement and thrust abortion into the center of a national culture war that continues to this day.

## *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY*

Nineteen years after *Roe*, in 1992, the Supreme Court confronted a new abortion case: *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The case considered a Pennsylvania law that placed some restrictions on access to abortion, but the solicitor general of President George H. W. Bush's administration filed a brief arguing that the court should use the case to overrule *Roe*.

There was good reason to think that the Supreme Court would do just this. In the nearly 20 years since *Roe*, Republican presidents had appointed six consecutive justices. Nevertheless, though Republican appointees dominated the court by 1992, the court in *Casey* upheld *Roe* by a narrow 5-4 vote. In fact, four of the six post-*Roe* Republican appointees voted to do so. Perhaps most galling to anti-abortion activists, the majority opinion was coauthored by three Reagan or Bush appointees: Justices O'Connor, Kennedy, and Souter.

The court's opinion in *Casey* focused on the importance of stare decisis—that is, following judicial precedent. To have true liberty, the court indicated, people need to know what their rights are. For people to know what their rights are, courts need to interpret and apply the law consistently.

*Roe* might or might not have been right when it was decided, but it had been an important part of the legal and cultural fabric of the country for nearly two decades. People had counted on *Roe*, organizing their intimate relationships and making choices in reliance on the availability of abortion should contraception fail. If the court were to overturn *Roe*, it would pull the rug out from under people's expectations. The resulting legal uncertainty would weaken the court's legitimacy.

Of course, the court acknowledged, as it had to, that the court sometimes does overturn constitutional precedent, particularly when earlier decisions rested on false factual assumptions. However, the *Casey* majority argued that nothing had undermined the factual underpinnings of *Roe*.

## NEW DEVELOPMENTS

Interestingly, though *Casey* relied heavily on the importance of following precedent in upholding *Roe*, it nevertheless departed from *Roe* in some important respects. First, whereas *Roe* seemed to tether the right to abortion to privacy, *Casey* seemed to root the right instead in a conception of decisional autonomy.

*Casey* also emphasized an equality component that had been less central in the opinion in *Roe*. The ability of women to participate fully in the social and economic life of the nation depends on women's ability to control their own reproductive lives.

*Casey* also abandoned *Roe*'s trimester framework and articulated a new legal test. Under *Casey*, states may not impose an undue burden on a woman's right to seek an abortion before viability—that is, before the baby can survive outside the mother's uterus. In applying this framework to the Pennsylvania statute at issue, the justices upheld some provisions and struck down others.

For instance, it upheld a 24-hour waiting period that required a woman to wait a day after she consults with a physician about the nature of the abortion procedure before having the abortion.

By contrast, the Supreme Court struck down a spousal notification provision in the Pennsylvania law that had required married women to receive their husbands' consent before obtaining an abortion.

The court in *Casey*, like the court in *Roe*, tried to strike something of a compromise. Under both cases, states do not have complete authority to regulate abortion procedures. However, under both cases, the Supreme Court will uphold statutory restrictions that do not overly burden the right to abortion.

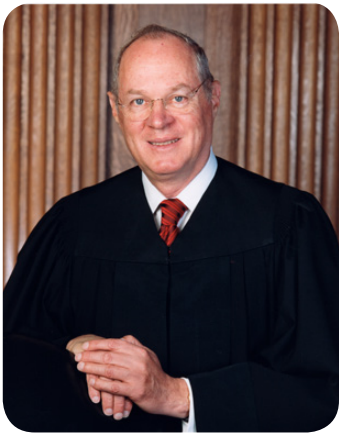
Of course, this type of middle-ground position satisfied almost no one. Pro-life groups were outraged that the Supreme Court protected the right to abortion so that states could not outlaw abortions altogether. Pro-choice groups were not happy that the Supreme Court upheld some regulations that made it more difficult to get abortions, such as the 24-hour waiting period.

## *LAWRENCE V. TEXAS*

Abortion is probably the most controversial area of substantive due process doctrine, but it is not the only one. Some of the most important gay-rights cases in recent years have also implicated the doctrine.

The 2003 case of *Lawrence v. Texas* involved a Texas law that criminalized same-sex sodomy—that is, homosexual anal or oral sex. In 1986, the Supreme Court had upheld a similar Georgia law in a case called *Bowers v. Hardwick*. In a 5-4 decision, the court in *Bowers* had decided that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. The Supreme Court noted that far from being a traditional liberty, same-sex sodomy has historically been prohibited.

Seventeen years later, the same issue returned to the court in *Lawrence*. The law of substantive due process had changed little in the intervening years, but the country had changed a lot. Whereas many Americans were deeply uncomfortable with homosexuality in 1986, by 2003, many realized that they had gay friends or family. Though some Americans still believed in the rule from *Bowers*, by 2003, the idea of making gay sex a crime seemed antiquated to many.



Relying again on the liberty component of the Fourteenth Amendment's Due Process Clause, the Supreme Court overruled *Bowers* and emphasized from the start that the court in that case had framed the issue too narrowly. Whereas *Bowers* had defined the issue as the right to engage in homosexual sodomy, Justice Anthony Kennedy's majority opinion in *Lawrence* said that the case was about liberty from unwanted governmental intrusion into the private home.

Additionally, the court emphasized the harmful effects of the Texas law. The law branded homosexuals as presumptive criminals, making it much more difficult for them to be treated like other members of society. A conviction for violating the sodomy statute would restrict a person's ability to enter into a variety of professions, such as medicine, athletic training, and interior design.

The *Lawrence* court also disputed the *Bowers* court's view that the country had historically criminalized gay sodomy. Justice Kennedy pointed out that early anti-sodomy laws were not directed specifically at homosexual conduct but at all non-procreative sex. Laws targeting same-sex couples specifically did not develop until the last third of the 20th century. Moreover, sodomy laws were generally not enforced against consenting adults acting in private.

Even if the nation had criminalized gay sodomy in the past, Kennedy seemed to indicate that this ought not matter so much, because times have changed. American culture—and other cultures elsewhere in the world—have become aware that liberty should include substantial protection of adults' private, consensual sexual behavior. In other words, the court seemed to be indicating that changed values should inform the content of the Constitution.

In addition to these arguments rooted in notions of liberty, the court also drew on the language of equality. Laws targeting homosexual sodomy—but not heterosexual sodomy—were "born of animosity" toward homosexuals and therefore are "an invitation to subject homosexual persons to discrimination both in the public and the private sphere." Equal protection law frowns upon such animus.

Though the majority opinion in *Lawrence* was primarily rooted in notions of liberty and the language of substantive due process, the opinion is perhaps best understood as being a hybrid decision, blending together liberty and equality norms. Cases do not always fit neatly into preexisting doctrinal categories.

## SAME-SEX MARRIAGE

In the early 1970s, a pair of male gay student activists at the University of Minnesota applied for a marriage license in Minneapolis. The clerk denied the request on the grounds that Minnesota law limited marriage to opposite-sex couples. In the litigation that ensued, the Minnesota Supreme Court rejected the argument that this limitation was unconstitutional.

The case, *Baker v. Nelson*, then went to the US Supreme Court, which in 1972 dismissed the appeal "for want of a substantial federal question." The court's dismissal indicated pretty clearly that the Justices considered frivolous the argument that the US Constitution protected the right to same-sex marriage.

By the early 21st century, however, public opinion on same-sex marriage was rapidly shifting, just as it had shifted on gay sexuality. In 2003, the same year the Supreme Court decided *Lawrence v. Texas*, Massachusetts's highest state court ruled that a Massachusetts law limiting marriage to opposite-sex couples violated the Massachusetts Constitution. Same-sex marriages in Massachusetts began the following year.

Other states soon followed Massachusetts. By the time the issue reached the US Supreme Court in 2015 in *Obergefell v. Hodges*, about 70% of the states had legal same-sex marriage. In many of these states, federal or state courts invalidated existing same-sex marriage bans. However, some other states adopted same-sex marriage by statute or voter initiative, and public opinion polls showed support for gay marriage rising quickly.

Against this background, the Supreme Court ruled by a 5-4 vote in *Obergefell* that same-sex marriage bans are unconstitutional. States, therefore, must permit same-sex couples to marry. Justice Kennedy wrote the majority opinion (as he did in *Lawrence*), and he focused in large part on the importance of marriage in our society. The right to personal choice regarding marriage, he said, is inherent in the concept of individual autonomy.

Like *Lawrence*, *Obergefell* relied primarily on the language of liberty, but it also worked in a fair amount of equality language. The problem with same-sex marriage bans is not only that they deny an important liberty, but that they discriminate against a class of people without good enough reason. Indeed, the states had failed to proffer a persuasive reason in favor of same-sex marriage bans.

## Suggested Reading

- Carpenter, *Flagrant Conduct*.
- Ely, "The Wages of Crying Wolf."
- Finley, "The Story of *Roe v. Wade*."
- Obergefell v. Hodges.

## Questions to Consider

- Is Justice Scalia's dissenting opinion in *Lawrence v. Texas* convincing that the logical end of the opinion is that states may not criminalize prostitution, bestiality, bigamy, or incest? Why or why not?

- *Casey v. Planned Parenthood of Pennsylvania* relied on the force of judicial precedent as the primary reason to uphold *Roe v. Wade*, but *Lawrence v. Texas* explicitly overruled *Bowers v. Hardwick*. Is there a theory of stare decisis (judicial precedent) that might reconcile these outcomes?

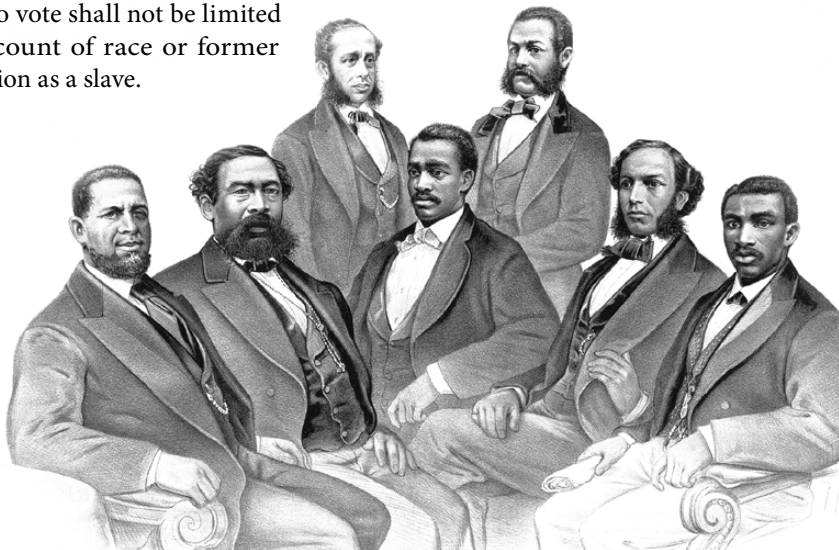
- How can we explain the evolution between *Baker v. Nelson* and *Obergefell v. Hodges*? Did the Constitution change meaning between 1972 and 2015? Was one decision correct and the other one wrong? Is it possible that both decisions are correct, and that the Constitution, properly understood, implicitly incorporates changing social norms into its meaning?

# EQUAL PROTECTION AND CIVIL RIGHTS

The Fourteenth Amendment—ratified shortly after the Civil War in 1868—forbids any state from depriving a person within its jurisdiction of the "equal protection of the laws." For nearly a century, however, the Equal Protection Clause fell miserably short of its lofty goals. This lecture looks at the Equal Protection Clause's history through the lens of Supreme Court cases.

## BACKGROUND

During the postwar period in the South known as Reconstruction, African Americans still faced terrible racism throughout the country. As the 1870s progressed, white Southern Democrats began finding ways to systematically exclude African Americans from elections, even though the Fifteenth Amendment stipulates that the right to vote shall not be limited on account of race or former condition as a slave.



Simultaneously, the Ku Klux Klan and other white-supremacist groups emerged to try to reestablish white control over the former slaves. The Klan used brutal violence to try to impose racial subordination on black people, murdering many, especially those who had achieved a measure of political or economic success.

The federal government, which had tried to enforce Reconstruction during its early years, began turning a blind eye to white southerners' abuses. The Supreme Court, too, did little to help African Americans against the terrible human rights abuses they were suffering. For example, in the 1883 *Civil Rights Cases*, the Supreme Court invalidated a congressional statutory provision that had forbidden places of public accommodation, such as hotels, theaters, and railroads, from denying services to African Americans.

Congress had passed the law partially pursuant to its authority to enforce the Fourteenth Amendment, but the court held that because the Equal Protection Clause only forbade states from denying persons the equal protection of the law, it did not support a statute that forbade private entities from discriminating on the basis of race.

The *Civil Rights Cases* were part of a larger judicial pattern that interpreted the Reconstruction amendments—and the law more generally—against African Americans. Perhaps the most famous example is the 1896 case *Plessy v. Ferguson*. The Supreme Court there sustained a Louisiana law that required "separate but equal" accommodations for black and white passengers on railroads.

By the 1940s, the court's comfort with racial discrimination and segregation was beginning to crack—but only beginning. Racism was still widespread in the United States and extended to groups other than African Americans.

### *KOREMATSU V. UNITED STATES*

In one of the most infamous episodes in American history, the US military during World War II designed and enforced an order excluding all persons of Japanese ancestry from designated West Coast areas. Fred Korematsu was convicted of violating this military order and appealed the decision. Korematsu lived near San Francisco and wanted to remain in the Bay Area with his girlfriend, who was not of Japanese descent. In 1944, in *Korematsu v. United States*, the Supreme Court upheld Korematsu's conviction and the constitutionality of the exclusion order.

## AFTER WORLD WAR II

By the end of World War II, the country was finally becoming a different place, and except for in the Deep South, open racism was no longer as acceptable as it had been. Against this backdrop, the National Association for the Advancement of Colored People, or NAACP, brought a series of cases to try to make southern states live up to the requirement of separate but equal in various spheres, such as graduate school education.

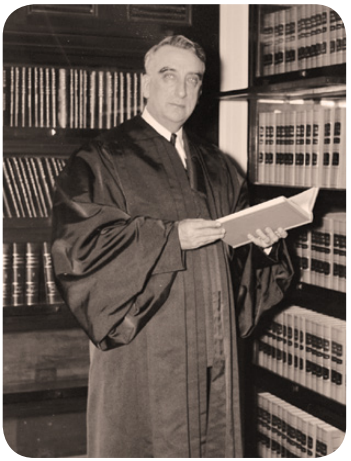
Instead of challenging *Plessy*'s rule of separate but equal directly, these cases demonstrated that institutions created specifically for African Americans were not equal. They succeeded. In *Sweatt v. Painter*, for example, the Supreme Court declared unconstitutional the University of Texas Law School's policy of excluding blacks. Texas had defended its policy on the theory that it provided another state law school for African Americans.

The Supreme Court rejected this argument. The recently established black law school lacked the prestige, history, resources, faculty, and alumni base of the University of Texas Law School. Because it was unequal, Texas had to admit qualified African Americans to the state's flagship law school.

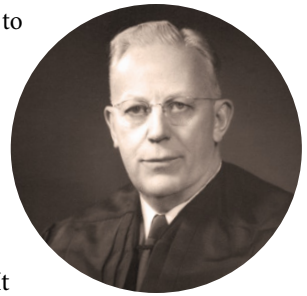
## *BROWN V. BOARD OF EDUCATION*

In the early 1950s, civil rights attorneys attacked the constitutionality of segregation in K–12 public schools, and they decided to use the opportunity to challenge the legitimacy of *Plessy*'s separate-but-equal rule itself. They brought cases in Kansas, South Carolina, Virginia, and Delaware challenging those states' school segregation.

The Supreme Court consolidated the cases into perhaps the most famous case of the 20th century: *Brown v. Board of Education*. The Supreme Court struck down the segregated school systems and ruled that separate is inherently unequal.



When *Brown* was first argued before the Supreme Court in 1952, the justices were deeply divided on the case. Unable to resolve the case, the court set the case for re-argument the following term. In the intervening months, fate intervened: Chief Justice Fred Vinson died of a heart attack. President Eisenhower nominated Earl Warren, the former Republican governor of California, to replace Vinson as chief justice.



Warren would prove instrumental not just in voting to invalidate school segregation, but also in lobbying his colleagues to join the opinion. For an issue as profound and divisive as school segregation, Warren recognized that the court would be much stronger if it spoke with a single voice.

When the court finally handed down its decision in *Brown* in 1954, the opinion was unanimous. It was surprisingly light, however, on legal analysis. The opinion, written by Warren, opened by explaining that the history of the Fourteenth Amendment is inconclusive on the question of whether the Equal Protection Clause permits segregation in public schools.

The court turned to the effects of segregation on public education. Education, it found, is perhaps the most important function of state and local government. It is the foundation of citizenship. School segregation has terrible consequences for African American children. In support of this analysis, the Supreme Court relied on psychological research on the effects of racism on the development of children.

The most likely explanation for why the court said relatively little on the case is that the contents of Warren's opinion were all the nine Justices could agree on, and Warren did not want to risk saying more for fear of fracturing the court's unanimity. The decision also avoided language strongly condemning the terrible injustice of segregation. It is likely that Warren and the other justices were concerned that many whites in the South would respond to the decision with hostility, and hoped that a softer touch might produce compliance.

## *BROWN V. BOARD OF EDUCATION II*

Another curious aspect of *Brown* is that the court's opinion specified no remedy; it did not explain how or when jurisdictions should fix the constitutional problem. This was undoubtedly because the justices themselves were divided.

The court therefore punted on this problem in *Brown* itself, but in the next year, 1955, the issue returned to them in a case that since has been known as *Brown v. Board of Education II*. Still unsure quite how to tackle the problem, the Justices ended up ordering the lower court to fashion remedies with "all deliberate speed."

The vagueness of that phrase seems to reflect the justices' recognition that whether they required southern schools to desegregate immediately or at their own pace, the court would look impotent if its order were disobeyed. Instead, it issued an order vague enough that nobody quite knew what it was saying.

If the court hoped somehow to mollify the South with its rulings in *Brown* and *Brown II*, it failed. Ninety-six southern congressmen signed resolutions condemning the decisions. Southern states claimed they were sovereign and could block desegregation orders. Georgia went so far as to announce that it would close any school that attempted to desegregate.

In 1957, President Eisenhower called out federal troops in Arkansas to try to help enforce desegregation orders that state and local officials were defying. Even so, many southern schools remained segregated as much as a decade later.

## CONTINUING ISSUES

The problem of how to integrate American public schools would continue to haunt the court. Part of the challenge was that many American cities were racially segregated by neighborhood, even in many parts of the North, and public schools typically served their local neighborhoods. This meant that even if previously all-white schools technically opened their doors to African American students, the schools would remain de facto segregated, because their neighborhoods contained no African Americans.

One remedy fashioned by some lower courts was bussing. By requiring that cities bus some white kids out of some white neighborhoods to black schools, and some black kids out of some black neighborhoods to white schools, the courts could achieve some measure of racial integration. These lower-court busing orders sometimes made their way up to the Supreme Court, and the decisions included a hodgepodge of different views from the court.

Yet another complication was that the *Brown* decision itself was unclear: Did *Brown* require desegregation or integration? If it merely required desegregation, then a jurisdiction might be in compliance if it officially opened all its schools to children of all races, even if in practice most of its formerly white schools continue to educate only white children. Alternatively, if *Brown* required integration, then nominal desegregation would not be enough.

## CONCLUSION

*Brown v. Board of Education* is one of the rare Supreme Court constitutional decisions on an important issue that most Americans today agree is correct. However, some scholars contend that *Brown* failed to deliver what it promised. In a famous book called *The Hollow Hope*, Professor Gerald Rosenberg argues that people overstate the judiciary's ability to promote social progress. *Brown* is his prime evidence.

Indeed, many historians agree that real racial progress only began in earnest a decade after *Brown*, following Congress's passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. One provision of the Civil Rights Act addressed school desegregation. Other provisions also helped to protect against racial discrimination in spheres like public accommodations and employment.

All criticisms of *Brown* aside, it is important not to undervalue the decision's contributions too much. In spite of *Brown*'s minimal effects in the first decade after the decision was handed down, it had a significant symbolic effect that laid the groundwork for future advances. *Brown* sent the message to Americans that racism was harmful and that segregation violated the Constitution. It was largely applauded in the North and may have played a role in helping make civil rights a viable issue in northern politics.

Significantly, *Brown* may also have been perceived by African Americans as a signal that times were changing and that courts were ready to start protecting their rights. A year after *Brown*, Rosa Parks refused to yield her seat on a bus to a white person. Her arrest led to bus boycotts. A young preacher named Martin Luther King Jr. spoke out and attracted national attention. Nonviolent demonstrations protesting the horrors of Jim Crow followed for many years in the South.

Violent attacks on these civil rights protesters helped turn the rest of the country's attention to the issue, which in turn helped gather political momentum for the 1964 Civil Rights Act. It is hard to know exactly how much *Brown* contributed to these events, but the court's decision certainly played some role, as did a series of subsequent Supreme Court rulings holding that segregated bus systems, beaches, parks, golf courses, and bathhouses were also unconstitutional.

Today, *Brown* is so canonical that a nominee for a federal judgeship would very likely doom his or her candidacy by asserting that *Brown* was wrong and *Plessy* was right. In fact, when President Reagan nominated Justice William Rehnquist to the position of chief justice in 1986, Rehnquist's views on the decision became a source of trouble for him.

Rehnquist had served as a law clerk to Justice Robert Jackson when the court decided *Brown*, and had written a now-infamous memo suggesting that the court follow the rule of *Plessy*. Rehnquist ultimately was confirmed as chief justice, but the national controversy sparked by his 30-year-old memo is a measure of *Brown*'s enduring symbolic power.

## Suggested Reading

- Brown v. Board of Education I.
- Brown v. Board of Education II.
- Greene, "The Anti-Canon."
- Klarman, *Brown v. Board of Education and the Civil Rights Movement.*

## Questions to Consider

- Scholars are divided about how much impact *Brown v. Board of Education* really had in effecting real change and racial progress in the United States. What role do courts play in bringing about social change? What role should they play?

- *Korematsu* is widely reviled as an anti-canonical case and an example of racist stereotypes trumping sound reasoning. Some commentators, however, have argued that the country could make the same mistakes again in wartime and that, for better or worse, the military needs wide leeway to protect the national security. Was *Korematsu* wrong? If so, how might we be able to guard against the same kind of errors in future crises?

Lecture 9

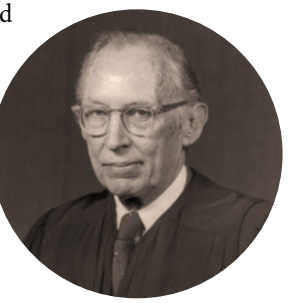
# THE AFFIRMATIVE ACTION CONUNDRUM

Revered though the Supreme Court's 1954 decision in *Brown v. Board of Education* has become, the court has continued to struggle with questions of race and equal protection. In particular, the court wrestles with affirmative action—that is, with the constitutionality of public institutions giving preferences on the basis of race. This is usually given to racial groups that have been subject to historical discrimination and that remain underrepresented in institutions of higher education and certain kinds of employment.

## *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*

The constitutionality of affirmative action is especially interesting and contested in the context of admissions to selective public universities. The first Supreme Court case addressing these issues was *Regents of the University of California v. Bakke* in 1978. Out of a class of 100 students, the University of California Davis School of Medicine set aside 16 slots for certain racial minorities.

A white student denied admission to the medical school sued, asserting that the admission program violated the Equal Protection Clause of the Fourteenth Amendment. The issue fractured the Supreme Court badly. The justices wrote six different opinions, but none commanded a majority. Justice Lewis Powell wrote the opinion that announced the judgment of the court, and it is Powell's opinion that continues to receive attention to this day.



The first question for the court was what level of scrutiny to apply to the university's admissions policy. The least-stringent form of scrutiny is rational basis review. When the court reviews a governmental practice under rational basis review, the court will uphold the challenged practice unless it is irrational, which gives the benefit of the doubt to the government.

The court's default assumption in equal protection cases is that it should apply rational basis review. However, the court has indicated that some kinds of government classifications are inherently suspect, such as policies classifying people on the basis of race or sex. For example, classifications on the basis of race trigger strict scrutiny, the most rigid form of heightened scrutiny. Under strict scrutiny, the court reviews policies extremely carefully.

Strict scrutiny involves a two-part test. To pass it, the government must first persuade the court that its policy furthers a compelling governmental interest. Second, the government must establish that the policy is necessary to the achievement of that governmental interest.

An initial question in *Bakke* was whether the medical school's admissions policy should trigger strict scrutiny or some less stringent form of review. In his opinion, Powell announced that strict scrutiny applies for all racial classifications, including affirmative action policies. Four of the other justices—William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun—would have applied intermediate scrutiny, which falls somewhere between strict scrutiny and rational basis review.

## POWELL'S CONCLUSION

Having decided that affirmative action programs triggered strict scrutiny, Powell found that the admissions policy failed the test. To reach this conclusion, he first reviewed the state's purported interests behind the affirmative action policy.

One potential state interest cited by the university was in improving the delivery of health care to underserved communities. Justice Powell rejected this argument because there was no evidence in the record indicating that the medical school's affirmative action program actually promoted that goal.

Another asserted interest was in eliminating or at least ameliorating the harmful effects of discrimination. To the extent that African Americans and other racial minorities have been subject to widespread and longstanding discrimination, affirmative action programs are one small way of trying to lessen those harms. Justice Powell rejected that interest in this context.

There was one more interest to consider: the university's interest in having a diverse student body. Powell was more sympathetic to this interest, which he deemed "clearly" to be constitutionally permissible. A university, he indicated, should have the academic freedom to make its own judgments about the selection of its student body. Moreover, doctors serve a diverse population, so it makes sense that medical schools would want a diverse student body.

The state's interest in a diverse student body satisfied the first part of the strict scrutiny test—that the state policy advance a compelling governmental interest. However, strict scrutiny also requires that the policy in question be necessary to the achievement of that interest. Here, the policy failed, according to Powell.

To help explain why Davis's quota system was not necessary to achieve racial diversity, Justice Powell contrasted it with Harvard College's admissions program. Harvard also had an affirmative action policy. However, Harvard did not specify the number of racial minorities the college needed to admit.

Instead, when the Harvard admissions committee reviewed the large middle group of admissible applicants who were capable of doing good course work, an applicant's race might tip the balance in the admission decision, just as other criteria, such as geographic origin, could. Whereas the Harvard plan treated each applicant as an individual—considering an applicant's entire package, including race—the Davis plan did not. Powell's opinion in *Bakke* was the court's most important statement on affirmative action in higher education for over a generation.

## *GRUTTER V. BOLLINGER* AND *GRATZ V. BOLLINGER*

The next time the court confronted the issue was in 2003, when it decided two separate cases about different affirmative action programs at the University of Michigan. The case *Grutter v. Bollinger* addressed the University of Michigan Law School's admissions policy. The companion case, *Gratz v. Bollinger*, involved the admissions policy of the University of Michigan College of Literature, Science, and the Arts.

The court ended up upholding the law school's affirmative action program and striking down the college's. In so doing, the court, following Powell's opinion in *Bakke*, indicated that affirmative action programs can be constitutional, but only if they are carefully designed.

## THE DETAILS OF *GRUTTER*

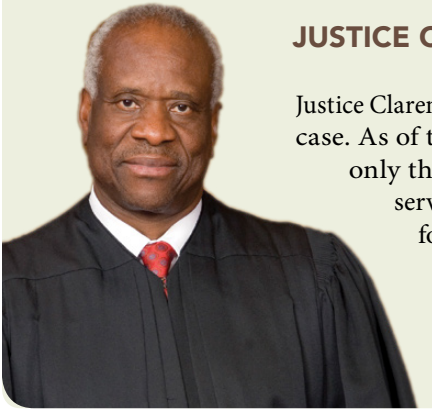
In the *Grutter* case, the University of Michigan Law School's admissions policy bore some strong resemblances to the Harvard plan that Justice Powell had praised in *Bakke*. Specifically, the plan was not a quota system that targeted a particular number of racial minorities to admit. Rather, the school looked at each applicant's entire file and considered racial diversity as a plus that would aid an applicant's admissions chances.

The school aimed for a critical mass of racial minority groups so that class members from that group would not feel isolated, but, unlike the program in *Bakke*, the law school did not have a predetermined number of slots for racial minorities.

In determining whether this policy violated the Fourteenth Amendment's Equal Protection Clause, the court started, once again, with the level of scrutiny. The court announced that affirmative action triggers strict scrutiny, just like other kinds of racial discrimination. The state, thus, needed to show that the policy was necessary to achieve a compelling governmental interest.

The *Grutter* court found, as Justice Powell had found in *Bakke*, that student body diversity is a compelling state interest. Having determined that the law school's policy furthered a compelling interest, the court went on to ask whether the policy was necessary to the achievement of that interest.

Citing Powell in *Bakke*, the court praised the law school for its individualized application process that considered race in a flexible, nonmechanical way. The court found such individualized review constitutionally acceptable because it helped ensure that race or ethnicity was not the defining feature of any given application. In total, four justices joined Justice Sandra Day O'Connor's majority, upholding the law school admissions plan by a narrow 5-4 vote.



## JUSTICE CLARENCE THOMAS

Justice Clarence Thomas dissented in the *Bakke* case. As of this course's release, Thomas is only the second African American to serve on the US Supreme Court, and for his entire tenure, he has been the court's lone black member. He is a staunch opponent of affirmative action.

## THE DETAILS OF *GRATZ*

In *Gratz v. Bollinger*, the justices voted 6-3 to strike down the college's admissions program. The college's program differed in important respects from the law school's. The college relied on a point system. To gain admission, an applicant needed to receive 100 points total. Applicants received various numbers of points for different accomplishments. Racial minorities from particular groups automatically received 20 points. By contrast, residents of Michigan received 10 points and children of alumni received 4 points.

In the eyes of the court, this plan was not individualized enough to withstand constitutional scrutiny. Whereas the law school's plan had required that each applicant be considered as an individual, the college's was more mechanical, simply adding up points.

Moreover, the court seemed to think that the college afforded too much weight to race. For example, while applicants received 20 points for racial minority status, they received only 5 points for being talented artists.

Notice the breakdown of the justices in these two cases. Three justices would have upheld both programs (Stevens, Souter, and Ginsburg). Four would have struck down both (Chief Justice Rehnquist and Scalia, Kennedy, and Thomas).

Only two—O'Connor and Breyer—thought that the differences between the programs merited a different outcome, but it was the views of those two that tipped the balance in each case.

## *FISHER V. UNIVERSITY OF TEXAS*

The issue of affirmative action returned to the court after *Grutter* and *Gratz*, but the results do not provide much additional guidance. The case *Fisher v. University of Texas* involved the admissions program at the University of Texas in Austin. The University of Texas initially adopted a plan under which in-state students in the top 10% of their high school class automatically gained admission to the University of Texas at Austin.

After the *Grutter* decision upheld affirmative action, however, the University of Texas decided it wanted to try to add more diversity than it was getting through its 10% plan. It retained the plan and admitted roughly three-quarters of its incoming first-year students through it. For the remaining slots, the university adopted an affirmative action plan similar to the one the Supreme Court upheld in the *Grutter* case.

Under this plan, the university gave preferential treatment to certain racial minorities, but it considered each application separately, so that race was one of many considered factors. Texas argued that that approach helps it achieve more diversity in specific programs and classes.

Abigail Fisher was a white student who applied for admission to the University of Texas. She was not in the top 10% of her high school class, so she sought to gain entrance for those other slots through the university's holistic, full-file review. She was denied admission and sued, alleging that the university's consideration of race disadvantaged her and other Caucasian students.

Fisher's case actually went up to the Supreme Court on two separate occasions. In 2013, the court sent the case back to the lower courts with instructions to make sure strict scrutiny was applied more rigorously. In due time, the case returned again to the US Supreme Court, and in 2016 the court decided it.

This time around, the court, by a 4-3 vote, upheld the university's admission plan. (Only seven justices participated in the case. Justice Antonin Scalia had recently died, and Justice Elena Kagan recused herself because she had worked on the case while she was serving as solicitor general of the United States prior to her appointment to the court.)

In this iteration of the case, known as *Fisher II*, the court once again accepted that diversity was a compelling interest. The court also accepted that the admissions program was narrowly tailored.

In dissent, Justice Alito argued that the university failed to articulate with any clarity what benefits it hoped to achieve from greater diversity, and that while the policy aided certain racial minorities, it hurt others. Asians, for example, were generally disadvantaged by the policy, because the university considered them overrepresented based on state demographics. Additionally, Alito contended that race actually played a bigger role in admissions than the university claimed.

## CONCLUSION

The *Fisher II* case signaled that affirmative action plans that are carefully designed to review each individual applicant holistically are constitutional, at least for the time being. However, affirmative action is one of those issues on which a change in the court's membership could tilt the outcome in the other direction. In the meantime, the court signaled that universities should constantly reassess how they achieve diversity by engaging "in constant deliberation and continued reflection regarding its admissions policies."

One of the difficult things about affirmative action is that, as with many constitutional issues, there are persuasive arguments on both sides of the debate. There is much to be said for Justice O'Connor's view that diversity in education helps people better understand the experiences of other groups, which in turn helps them provide more value to their future workplaces.

However, Justice Clarence Thomas also has a powerful point that affirmative action can stigmatize and harm the very people it seeks to benefit, and that many racial minorities have succeeded in this country without it.

The justices' different views of affirmative action reflect not only different interpretations of the Fourteenth Amendment, but also different visions of *Brown v. Board of Education*. To some justices, *Brown* promised color blindness. Affirmative action offends this principle because the government is using race as a factor in sorting people when it makes admissions decisions

To other justices, *Brown* forbids a caste system under which the government treats some people as second-class citizens. Along these lines, affirmative action programs, which try to bring together people of different races, are entirely different from racial segregation, which sought to keep them apart.

### Suggested Reading

- Berger, "Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making."
- Grutter v. Bollinger.
- George, "*Gratz* and *Grutter*."
- Karlan, "What Can *Brown* Do for You?"

## Questions to Consider

- In affirmative action cases involving university admission plans, the Supreme Court has focused on the benefits of diversity and indicated discomfort with other potential interests, such as remedying the effects of past discrimination. What, if any, are acceptable governmental interests in favor of affirmative action?

- Justice Thomas speaks powerfully about the stigma that results from affirmative action programs. Regardless of one's ultimate position on the issue, this is an important argument to consider in weighing whether affirmative action is good policy. In what ways, though, is it a constitutional argument? What are the constitutional arguments for and against the relevance of stigma to the question of whether affirmative action programs are constitutional?

- In the context of higher education, the Supreme Court has most often accepted diversity as a governmental interest compelling enough to justify properly designed affirmative action programs. Why is diversity so compelling a governmental interest? Is a diverse student body a necessary component of sound education? Why or how might diversity improve the quality of education?

Lecture 10

# SEX DISCRIMINATION AND WOMEN'S RIGHTS

The US Constitution is the only major Western constitution that does not include a provision explicitly declaring that the sexes have equal rights under the law. For example, the Equal Protection Clause of the Fourteenth Amendment says nothing about sex discrimination. This lecture looks at several cases in which equal protection has been at issue in the Supreme Court.

## THE FOURTEENTH AMENDMENT

Women's suffrage groups, which had joined abolitionists in fighting for the downfall of slavery, tried to add the right to vote for women into the Constitution, but the Fourteenth Amendment's text plainly makes no mention of that right. Indeed, the amendment was long interpreted to have no applicability to the topic of sex discrimination.

Take, for example, the late-19th-century case of Myra Bradwell. Bradwell sought a license to practice law, and the Illinois Supreme Court denied it on the sole ground that she was a woman. Bradwell's case went up to the US Supreme Court in 1872, where, in *Bradwell v. State of Illinois*, all but one justice voted against her.

The justices did not even consider the applicability of the Equal Protection Clause, focusing instead on the question of whether the right to practice in the courts of a state was a privilege or immunity of US citizenship protected under the Fourteenth Amendment. They held that it was not. The next year, 1874, the Supreme Court ruled unanimously in *Minor v. Happersett* that women have no constitutional right to vote.

The women's movement next sought enfranchisement through constitutional amendment. This effort took decades, but in 1920, the court's decision in *Minor v. Happersett* was superseded by the ratification of the Nineteenth Amendment, which reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

## AN ONGOING STRUGGLE

The franchise was a significant victory for the women's rights movement, but it did not by any means provide women with overnight genuine equality, either in US culture or in the courts. As late as 1961, in *Hoyt v. Florida*, the court upheld a Florida law that included women on jury lists only if they registered a desire to be included with the clerk of the court. Over 40 years after women obtained the right to vote, the court held that "woman is still regarded as the center of home and family life."

In spite of the slow pace of change in laws affecting the rights of women, the underlying social movement for women's rights continued to advance. Social attitudes towards sex equality changed dramatically in the final decades of the 20th century, and eventually, so did the Supreme Court's approach to questions of sex discrimination.

### THE EQUAL RIGHTS AMENDMENT

In the early 1970s, both houses of Congress proposed the Equal Rights Amendment, which would have added explicit protection against sex discrimination. However, the effort fell just short.

An important doctrinal question in these cases was what level of scrutiny to apply where governmental sex discrimination is alleged. The court typically applies rational basis review to most governmental classifications when they are challenged. This means that government need only have a rational reason for implementing the policy in question for the court to uphold the policy.

Although the court historically approached sex discrimination cases with great deference to the government, by the early 1970s, litigants were calling for the court to deem sex a "suspect classification" that, like race, triggered heightened scrutiny. Initially, the court refused to do so, instead continuing to apply the rational basis review that it traditionally had.

## *REED V. REED*

However, there are good reasons to think that the court's application of rational basis review became less deferential in sex discrimination cases during this period. Take, for example, the court's 1971 decision in *Reed v. Reed*, which cited the Equal Protection Clause in invalidating an Idaho law preferring men over women as estate administrators.

*Reed v. Reed* was clearly a victory for women's groups: It was the first time that the Supreme Court held that a classification on the basis of sex violated the Equal Protection Clause. However, the court still had declined to adopt explicitly heightened scrutiny for sex discrimination cases. Over the next few years, some justices argued that courts should apply strict scrutiny in cases of sex discrimination.

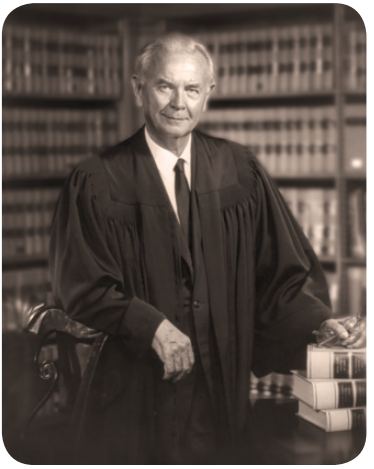
However, while the court did strike down governmental classifications on the basis of sex, the justices disagreed on the rationale. One such case involved a challenge to a federal law that afforded men in the armed forces an automatic dependency allowance for their wives, but required servicewomen to prove that their husbands were dependent. Four justices would have applied strict scrutiny.

While three other justices agreed the law was unconstitutional, they voted to strike down the law on the same kind of ostensibly rational basis review that they had used in *Reed v. Reed*. The court, therefore, invalidated the federal law, but no rationale commanded a majority of the justices.

## *CRAIG V. BOREN*

In *Craig v. Boren* in 1976, the court faced the question again, but this time the case had an interesting twist. At issue was an Oklahoma statute that prohibited sale of 3.2% beer to males under the age of 21 and to females under the age of 18.

The law, then, disadvantaged young men who wanted to drink 3.2% beer, as they had to wait until they were 21 to buy it, whereas young women could drink it when they were 18. Women's rights groups recognized that the case could be helpful for their cause, because judges, most of whom were still men in the mid-1970s, might intuitively better understand a sex-discrimination case where the policy harmed men.



Writing for the court, Justice William Brennan applied what amounts to intermediate scrutiny to classifications on the basis of sex. Interestingly, Justice Brennan did not admit that the court was changing its approach. To sum up *Boren*'s findings, the government interest still must be important, but not as important as for strict scrutiny.

The policy must be tied pretty closely to achieving that interest, but it does not need to be the only way the government can possibly achieve it. Eventually, the court found that the Oklahoma law was not substantially related to the governmental interest and struck it down.

In his dissent, Justice William Rehnquist objected to the court's application of heightened scrutiny. Men, he pointed out, have hardly been subject to historical discrimination deserving of special judicial protection.

## *UNITED STATES V. VIRGINIA*

The court's scrutiny of government classifications based on sex reached another important turning point in 1996, in *United States v. Virginia*. That case involved the Virginia Military Institute, or VMI. VMI is a state-run military school that specializes in what it calls the adversative method, which seeks to instill physical and mental discipline in its cadets and impart to them a strong moral code to become citizen soldiers. At the time, VMI was only open to men.

The lawsuit against VMI alleged that the school's all-male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Virginia defended the policy on the grounds that it served two very important state purposes.

First, it argued that VMI's single-sex educational model helped provide diverse educational options in Virginia. Quite simply, there are not other schools like VMI, so in keeping VMI all male, the school was offering something unique. Second, and relatedly, the school argued that its famed adversative method was unsuitable for women.

Writing for the court, Justice Ruth Bader Ginsburg said that to prevail, VMI had to show an "exceedingly persuasive justification" for its action. This language appears to ratchet up intermediate scrutiny without exactly saying so.

Ginsburg was not persuaded by Virginia's arguments in defense of its policy. She rejected its first argument that VMI was established or maintained with a view to diversifying the state's educational options. She did not believe that diversity of public educational options was the state's primary motive in creating or preserving an all-male school.

As for VMI's second argument—that the adversative method is unsuitable for women— Ginsburg conceded that the method, which is comparable in intensity to Marine boot camp, is unsuitable for most women. But, she added, it is probably unsuitable for most men, too. The key point is that the state may not use generalizations about the sexes' different characteristics to deny a particular educational opportunity to women who want it.

Justice Ginsburg also addressed another idea put forward by Virginia. The lower court had found that Virginia violated the Equal Protection Clause by excluding women. To remedy that violation, Virginia had proposed setting up a separate VMI-like program for women on a different campus. This creation would be an all-female school called Virginia Women's Institute for Leadership, or VWIL.

The Supreme Court rejected this proposal, finding that VWIL would be an inadequate substitute for the VMI experience. VMI's rigorous military training is famous, the court held. VWIL would likely have a different method and a different culture, and, thus, would deny women the true VMI experience. Perhaps even more importantly, any newly created school would lack VMI's prestige, so it would not offer the same kind of post-graduation opportunities as VMI.

None of this meant that VMI had to accept every woman who applied. To gain admission, women needed to be qualified. Rather, the point was that VMI could not deny admission to a qualified applicant simply because she was a woman.

The vote in VMI was surprisingly one-sided. Only Justice Antonin Scalia dissented. (Justice Clarence Thomas recused himself because his son was enrolled at VMI at the time.)

## SCALIA'S OBJECTION

For his part, Justice Scalia objected to the standard the court applied. For one, he pointed out that Justice Ginsburg's inquiry into whether Virginia could identify an "exceedingly persuasive justification" in defense of VMI's all-male admissions policy was inconsistent with the usual language of intermediate scrutiny.

Scalia further objected that sex discrimination ought not trigger heightened scrutiny at all. Judicial review of governmental practices is, he argued, undemocratic; unelected judges are invalidating policies adopted by democratically accountable officials. In Scalia's eyes, the way to effect social change is not through the courts but through the political process.

## CONCLUSION

The story of the Equal Protection Clause and sex discrimination is a long, winding one. Even after women gained the right to vote by constitutional amendment in 1920, it still took decades for courts to begin insisting upon other kinds of equality. But there are ways in which we still have further to go.

Women have made great strides, but they still lag behind men in many important respects, such as corporate leadership positions, political positions, and pay. Many commentators lament the country's ultimate failure to ratify the formal Equal Rights Amendment as both a cause and symbol of women's inability to win true equality in our society.

However, it would be a mistake not to acknowledge that important strides have been made. Indeed, some of the court decisions discussed in this lecture may help explain in part why the Equal Rights Amendment failed. Once the Supreme Court decided to review sex discrimination claims under a more stringent form of judicial review, it seemed less urgent to get a new constitutional amendment guaranteeing equal rights.

Wherever you come down on that question, it is important to recognize that the successes of the women's rights movement have hardly been limited to the courts. Perhaps most obviously, society in many respects recognizes that women should have equal rights and opportunities as men.

Sometimes, though, change does not occur, or as quickly as many would like. A core question raised by constitutional litigation is what courts should do when people feel that change is not occurring quickly enough—that is, when legislatures have not protected groups in need. As the disagreement in the VMI case between Justice Ginsburg and Justice Scalia demonstrates, there is no consensus on how to resolve that question in our constitutional system.

## Suggested Reading

- Siegel, "She the People."
- Strauss, "The Irrelevance of Constitutional Amendments."
- United States v. Virginia.

## Questions to Consider

- Should courts apply heightened scrutiny to governmental classifications on the basis of sex? Why or why not?
- Many commentators have noted that though the Equal Rights Amendment was not ratified, the norms embodied in that proposed amendment ultimately triumphed in our country's legal and cultural norms. Assuming that this story is, more or less, factually accurate, what does it tell us about the nature of constitutional change?

Lecture 11

# THE NATURE OF THE JUDICIAL POWER

We are used to thinking of courts resolving the important legal questions of our day. This series of lectures on constitutional law has focused largely on court decisions. However, it is also important to understand that sometimes courts do not decide issues. This lecture considers reasons why courts quite often choose not to decide a case on its merits.

## JUSTICIABILITY DOCTRINES

Of particular interest are justiciability doctrines, which are court-made doctrines under which courts have imposed limitations on their own power to decide cases. In effect, when a court resolves a case on justiciability grounds, it is saying that it thinks the issue in question cannot or should not be decided by the judiciary. This leaves the matter to be resolved elsewhere in our system, such as in the legislative or executive branches.

Of the various justiciability doctrines, standing is probably the most important. Standing is an elusive legal concept, but it basically refers to the court's determination of whether a particular person or institution is the proper party to present a particular issue to a court for resolution.

The standing requirement is rooted in the provisions of Article III of the Constitution, which stipulate that the judicial power of the federal courts shall extend to various kinds of enumerated "cases" and "controversies." From this language, courts have derived the principle that they must not issue "advisory opinions." In other words, federal courts may not weigh in on abstract legal questions that people want answered.

While it may be more efficient if courts could issue advisory opinions, there are good reasons not to engage in them. Perhaps the most persuasive and important is that judges do better deciding cases when they are presented with real cases with concrete facts than when offering opinions on abstract legal questions. In other words, the case or controversy requirement allows judges to see how laws actually affect people in real situations.

### SUING THE IRS

In the 1970s, a group of African American parents sued the Internal Revenue Service. The parents' children all attended public schools, which, despite the court's decision two decades earlier in *Brown v. Board of Education*, remained largely or partially segregated on the basis of race. The parents asserted that the IRS had failed to fulfill its own policy of denying tax-exempt status to racially discriminatory private schools.

Instead, the court found that the parents lacked standing to bring the case in the first place. In other words, the case was not justiciable, meaning that the court could not decide the issues raised by the parents.

## STANDING DOCTRINE IN PRACTICE

A primary purpose of the standing doctrine is to ensure that the parties who come before courts are actually affected by the case's issue. To have standing, a party must satisfy three elements: injury, causation, and redressability. In other words, a party must show that she is personally injured, that her injury is caused by the practice or policy she is challenging, and that a favorable judicial decision could cure or redress her injury.

If a party is unable to satisfy each of these three elements, the court will dismiss the case for lack of standing. For example, in the case of *Allen v. Wright*, the court found that the plaintiffs could not trace their injury to the government's conduct. Its dismissal hinged on the causation prong of standing doctrine.

## THE INJURY PRONG

To satisfy the injury prong of standing, a plaintiff must show that he has personally suffered or will imminently suffer some concrete and real injury. In *Lujan v. Defenders of Wildlife* in 1992, the challengers attacked a rule promulgated by the US secretary of the interior interpreting a provision of the Endangered Species Act. The Endangered Species Act is a federal statute that seeks to protect endangered animal species against human threats to their continued existence.

One provision of that law required that each federal agency consult with the secretary of interior to ensure that any action that that agency funds, authorizes, or undertakes will not threaten endangered species. When the Endangered Species Act became law, the secretary of the interior initially applied this requirement to actions by federal agencies both domestically and internationally. Soon, however, it reexamined its position and began to apply this agency consultation requirement only to an agency's domestic projects.

In response to the changed position, certain US organizations committed to wildlife conservation brought a legal action against the secretary of interior, seeking a ruling that the secretary is required to apply the rule internationally. To demonstrate their standing, members of these conservation organizations explained that they had traveled overseas to observe animals in their native habitat in the past and hoped to do so again in the future.

The plaintiffs claimed they were injured because the secretary of interior's decision not to require inter-agency consultation made it more likely that those species would be harmed, which, in turn, made it less likely that the plaintiffs would be able to observe those animals in the wild in the future.

The Supreme Court, in an opinion by Justice Antonin Scalia, held that the plaintiffs did not have standing. For one, the plaintiffs had not provided sufficient evidence that they had suffered an injury. Scalia conceded that the desire to observe an animal species is a cognizable interest for standing purposes. The fact that the plaintiffs had visited the areas in question in the past proved nothing, and their statements that they intended to return in the future were, as Scalia put it, "simply not enough."

## THE REDRESSABLITY PRONG

The third prong of the standing test is redressability. Here, too, the plaintiffs in the *Lujan* case fell short. Redressability means that the plaintiff's injury can actually be remedied by a favorable court ruling. As Justice Scalia pointed out, that was not the case. Recall that the agencies funding the overseas projects that allegedly threatened endangered animals were not parties to the litigation.

Rather, the plaintiffs had sued the secretary of the Department of Interior, who had merely said that those agencies did not need to consult with him before acting overseas. At most, the court could require the secretary to revise his regulation and require agencies to consult with him before undertaking foreign projects. Importantly, this requirement would not cure the plaintiffs' alleged injury unless the funding agencies were actually bound by the secretary's regulation.

As Scalia pointed out, this was far from clear. The secretary of interior lacked the authority to cut off agency funding for agency projects, either domestic or international, and therefore could not force them to change their plans.

Just as importantly, US agencies typically supply only a fraction of the funding for foreign-aid projects. The plaintiffs in these cases produced no evidence to suggest that the withdrawal of US funding would have resulted in the suspension or alteration of those projects so as to better protect endangered species.

## SOVEREIGN IMMUNITY

Sovereign immunity is a policy that means that usually, a person cannot sue the government, which used to be represented by the figure of a sovereign such as a monarch, for money damages—even if the government has violated that person's rights.

Essentially, the argument is that government simply could not function if people could sue it every time they believed that its countless acts caused them harm. The government can choose to waive its immunity, but in many cases it has not.

Congress can pass a law stripping a state's sovereign immunity in particular cases, but in the late 1990s, the Supreme Court sharply cut back on Congress's authority to do that. The result is that in many cases, even if the government has violated an individual's right in a significant way, the individual cannot recover money damages in court.

A very important exception to the doctrine of state sovereign immunity is in most actions for injunctive relief. State sovereign immunity, which the Eleventh Amendment of the Constitution recognizes, applies to lawsuits for money damages.

In other words, state sovereign immunity will often make it impossible for a person to recover money compensating him for a wrong done to him by state government. However, if the government is committing an ongoing violation, one can sue to get injunctive relief, meaning an order from a court requiring the government to stop violating your rights.

A distinct but related doctrine is official immunity, which prevents an injured person from suing a governmental official for money damages. There are different levels of immunity depending on the kind of governmental official involved.

## DEFERRING COURTS

The doctrines of standing, sovereign immunity, and official immunity shield the government from many lawsuits. However, even when a plaintiff suing the government clears those legal hurdles, there is always still a good chance that his lawsuit will be unsuccessful because the court will defer to the governmental branch at issue.

It may be reasonable for the court to avoid stepping on the government's toes, but the results of these practices can sometimes seem grossly unjust. One infamous example is the Supreme Court's 1944 decision in *Korematsu v. United States*.

In the case, the Supreme Court explained that the military possesses information and expertise about the nation's security that courts lack, and judges should not interfere with the military's efforts to protect the nation during wartime. History has judged the court's decision in *Korematsu* harshly. Nevertheless, in the years since, courts again and again rely on similar conceptions of deference to rule for the government and sidestep a plaintiff's legal claims.

## A DIFFICULT TASK

Collectively, the doctrines and practices discussed in this lecture—justiciability doctrines like standing, sovereign immunity and official immunity, and deference determinations—make it hard for people to protect their rights in court against governmental officials. It is not impossible; civil rights plaintiffs can and do sometimes win. But the deck is stacked against them, especially when the agency at issue, like the military, performs sensitive functions.

For these and related reasons, Professor Adrian Vermeule from Harvard Law School has used the phrases "legal grey holes" and "legal black holes." By these, Vermeule means areas in which the government operates with little or no judicial supervision. In practice, it will be very difficult or completely impossible to vindicate a legal challenge in these areas if the government violates your rights.

## CONCLUSION

Foremost among the justifications for these doctrines and practices is that courts have limited democratic authority. Federal judges are unelected, and, once confirmed, they can serve for the rest of their lives, assuming good behavior. Members of Congress, on the other hand, are elected. It seems undemocratic for a handful of unelected judges to invalidate the actions of a body elected by the people.

Of course, there are costs to judicial restraint. Terrible civil rights violations may go unremedied in certain cases, like *Korematsu*. On a systemic level, some governmental actors may act with less concern for the law than they should.

Critics of the court's approaches in these cases also contend that it has applied those doctrines so haphazardly that it appears to be making up its rationales opportunistically in order to avoid deciding the merits of difficult or controversial cases, or simply to avoid ruling against the government. This criticism might be especially true of standing doctrine, which is so erratic as to be almost incoherent.

An interesting perspective on these issues came from John Roberts during his confirmation hearings after President George W. Bush had nominated him to the position of chief justice. Roberts likened the judge's role to that of an umpire in a baseball game. The umpire merely calls balls and strikes. Similarly, the judge merely applies the law to the facts. The judge, like the umpire, plays a bit part in a much larger game and should not overstep his bounds.

In one sense, the practices discussed in this lecture fit with Roberts's vision of a limited judiciary. Courts should not go beyond their narrow role of interpreting the law. When courts do not have authority over a case, they should not decide it. When it is a close call, courts should not step on the toes of elected officials.

In another sense, these practices reflect how hard it is for courts to just call balls and strikes. Some cases are easy in that the law clearly applies a particular way to the facts at hand. But many cases are hard, especially those that get to the Supreme Court. Most lawyers and law professors recognize that the job of applying law to fact is sometimes not as straightforward or binary as the balls-and-strikes metaphor would suggest.

Chief Justice Roberts surely knows this. His comments at his confirmation hearings, then, likely reflect not naïve views about the nature of judicial decision making but rather a public-relations statement on behalf of the federal judiciary.

### Suggested Reading

- Lujan v. Defenders of Wildlife.
- Rosenberg, *The Hollow Hope*.

### Questions to Consider

- One of the elements of standing doctrine is that the defendant's behavior has caused the plaintiff's injury. How much causation should be required?
- Is Chief Justice Roberts' balls-and-strikes metaphor a helpful way of thinking about the judicial role? Why or why not? If you find it unhelpful, why do you think he used that metaphor? What are the advantages and disadvantages of talking about the judiciary in those terms?

# THE POLITICS OF CONSTITUTIONAL LAW

It is human nature that, in the absence of other reliable guideposts, the Supreme Court justices' individual perspectives on such diverse areas as history, language, culture, faith, and politics will color the way they approach a question at hand. Political-science research demonstrates quite convincingly that, with some exceptions, the justices on the Supreme Court tend to vote in line with the preferences of the party of the president who appointed them.

It's probably oversimplified to assume, as some people do, that judges are merely politicians in robes. However, it is also surely naïve to believe that judges are wholly immune from political influences. The truth, as is often the case, likely lies somewhere in the middle.

## JUDICIAL NOMINEES

The role of politics in constitutional law is most evident in the confirmation battles over judicial nominees, particularly nominees to the Supreme Court, where the stakes are the highest. Given that judges tend to vote with their political tribe—at least in close cases about which reasonable people can differ—each president tries to pick judges whose votes will likely conform with the president's political beliefs.

To win confirmation, a president's judicial nominee must make it through the Senate Judiciary Committee and then receive a majority of the full Senate vote. Because Article III of the Constitution promises that federal judges may keep their jobs "during good Behaviour," a successful judicial appointment is usually a job for life. It is not uncommon for Supreme Court justices to stay on the high court for two or even three decades, long after their appointing president has left the White House.

Given these high stakes, it is inevitable that the confirmation process will be highly political, and it has become more political in recent years. The politics of the judicial confirmation process were on full display in 2016 after the sudden death of Justice Antonin Scalia.

At the time of Justice Scalia's death, the Supreme Court was ideologically very closely divided. Four justices were usually (but not always) reliable conservative votes: Chief Justice John Roberts and the justices Scalia, Clarence Thomas, and Samuel Alito. All four were Republican appointees.

### JUSTICE ANTONIN SCALIA

Justice Scalia had been an almost larger-than-life figure on the Supreme Court. He was a provocative, outspoken advocate for originalism in constitutional interpretation and for some conservative causes.

Four justices were usually (but not always) reliable liberal votes: Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. All four were Democratic appointees. That left one—Justice Anthony Kennedy, a 1980s Ronald Reagan appointee—as the court's swing vote in many a case.

## AFTER SCALIA

Justice Scalia died early in 2016, the last year of Barack Obama's presidency. Observers realized that if President Obama, a Democrat, were to appoint Scalia's successor, the balance of the court could shift substantially to the left.

Republican politicians signaled immediately that they would not confirm anyone President Obama nominated. The Republicans controlled the Senate in 2016, so they had the power to reject anyone put forward. Senate Majority Leader Mitch McConnell went even further, indicating that the Senate would not even hold hearings or a vote on any Obama Supreme Court nominee.

McConnell's public argument was that with a presidential election about nine months away, the American people should decide. Everybody knew the real reason, though, was that the ideological balance of the nation's most important court was at stake.

## GARLAND'S NOMINATION

Faced with a Senate that was promising obstructionism, President Obama decided to nominate about the least-controversial candidate imaginable. He selected Chief Judge Merrick Garland from the US Court of Appeals for the DC Circuit. Even in a crowded field of exemplary candidates, Garland stood out as a highly qualified, fair-minded judge. President Obama no doubt selected Garland precisely because he wanted a consensus candidate that both Republicans and Democrats would support.

True to their early promise, however, Senate Republicans refused to give Garland either a hearing or a vote. Democrats cried foul. The Republicans' behavior broke with longstanding practice of giving some deference to the president's Supreme Court nominee.

Some Democrats contended that Senate Republicans were acting unconstitutionally. The argument, in effect, was that the Constitution grants the president the authority to appoint federal judges, and the Senate was denying the president his constitutional prerogative.

Democrats' constitutional protestations mostly fell on deaf ears. The Constitution entrusts the Senate with providing "advice and consent" for the president's federal judicial nominees. Though the Senate is often more respectful of the president's selection than it was to Garland, the Constitution effectively delegates the confirmation process to the Senate.

## POLITICS AND CONSTITUTIONAL LAW

Where the law leaves a matter in the discretion of a political body, one cannot use courts to try to change that body's process and decision. If the Democrats were going to get Garland through, they would have to do it using politics, not law.

There seemed to be some reason to think that the Democrats would succeed in their efforts. At the time, the Republicans' strategy seemed risky. Hillary Clinton was the Democratic Party's candidate for president, and she seemed likely to defeat the Republicans' upstart candidate, real estate mogul and reality TV star Donald Trump.

However, Trump won the presidency and, with it, the chance to select Scalia's replacement. Moreover, Republicans held onto their control of the Senate, so President Trump had his pick of conservatives. He ended up selecting Judge Neil Gorsuch from the US Court of Appeals for the Tenth Circuit.

Like Chief Judge Garland, Judge Gorsuch enjoyed a sterling reputation as a highly regarded judge with an impressive pedigree and legal mind. However, there can be no dispute that President Trump also chose him because of his reputation as an ideological conservative.

Such confirmation battles episodes show that constitutional law and politics are inextricably linked. The justices themselves may usually try to apply the law neutrally and impartially, but their own background views matter, sometimes a great deal. Understanding this very well, presidents and senators support the appointment of justices whom they believe will vote in ways that tend to support their own political viewpoints.

## THE CONSTITUTION AND POLITICS

As the nation looks for solutions to its political divides, a logical question is whether the Constitution, which lays the ground rules for our political system, deserves some of the blame for the problems. Naturally, liberals and conservatives tend to lament different aspects of our constitutional law.

Some conservatives want to amend the Constitution to provide further protection for religion, or to remove *Roe v. Wade*'s protection of abortion rights. Perhaps conservatives' most fundamental laments, though, are that the scope of the federal government has grown far beyond the framers' original intentions, and that federal spending and debt have gotten out of control.

For their part, many liberals might favor their own constitutional revisions. Many of these pertain to voting and the political process, such as outlawing partisan gerrymandering, protecting the right to vote, and limiting corporations' ability to influence elections through campaign contributions and electioneering communications.

Other liberal objections implicate the structure of government more generally. The makeup of the Senate, some point out, is profoundly undemocratic, giving each state two senators regardless of population size.

Liberals (and some conservatives) have similar complaints about the constitutionally mandated Electoral College process for electing the president. Under Article II of the Constitution, the president is elected not by a national popular vote, but through elections in each state. Each state is given a certain number of Electoral College votes equal to the size of its congressional delegation.

As critics have observed, this system gives disproportionate weight to states with low populations, since they have Senate membership disproportionate to their size. Whether or not one likes this arrangement, it is also undemocratic, as it gives people in some states greater voting power than people in others.

This system also has other consequences. For example, the vast majority of states have a winner-take-all system, so that a candidate who only narrowly wins a majority in a state still gets all of that state's Electoral College votes. As a result, candidates tend to focus their campaigning on key states.

Another effect of the system is that it can result in candidates winning the presidency despite having lost the popular vote. For example, George W. Bush in 2000 and Donald Trump in 2016 both lost the popular vote but won the presidency because they won more Electoral College votes. The partisan rancor over these outcomes was intense and lasting.

## CHANGING THE CONSTITUTION

If the Constitution is contributing to the nation's political dysfunction, should it be changed? Article V of the Constitution provides two ways of proposing a constitutional amendment. The first requires a two-thirds vote by each house of Congress. The second requires two-thirds of state legislatures to request that Congress call for a convention, which would then debate and propose constitutional amendments. In either case, a proposed constitutional amendment would need to be ratified by three-quarters of the states.

All the amendments to the US Constitution that have been made to date have gone through the first process. However, a movement is now underway to call a constitutional convention using the second process, with the goals of limiting the scope of federal power and requiring a balanced budget.

However a constitutional convention may play out, it is clear that it would be an intensely political process. While it might improve on the existing Constitution, it also could make things worse.

For all its problems, the United States is comparatively very prosperous and stable. Its Constitution is also the world's oldest written constitution still in use today. That longevity serves the country well because it helps ensure that people respect the document. Americans accept the constraints the Constitution imposes on their leaders and the rights the Constitution grants.

Were the document to change dramatically, people might view the new version differently, and commitment to the rule of law might suffer. In particular, a convention's losers might deem the end result illegitimate if they thought that folks on the other side had gamed the process in their own favor.

## CONCLUSION

Constitutional law and politics are inseparable. This is not to say that there is no such thing as constitutional law, or that constitutional interpretation is just thinly veiled political policymaking. There is constitutional law.

It exists in the text of the document, such as the requirement that the president be at least 35 years old. It exists in the decisions of the US Supreme Court, which comprise precedents that are binding on lower federal courts and state courts. It exists in the practices of governmental officials, who take an oath to abide by the Constitution and usually believe themselves to be the Constitution's faithful stewards.

These elements, however, cannot be understood in a political vacuum. The Constitution helps define how American politics operate, and those politics in turn shape the content of constitutional law, such as through the judicial confirmation process.

The Constitution is far from perfect, and, as the framers recognized, it never was. There is much to criticize about the Constitution of 1787—most obviously, its despicable proslavery provisions. However, there is also something to admire about many framers' willingness to compromise their ideals so that they could create a new governmental order that was a big improvement on what had come before it.

At various points in its history, the country lost this ability to compromise, including in its debates about the meaning of the Constitution. Hopefully, present and future Americans, like the country's founders, will try to listen to each other's views about how to build a more perfect union.

## Suggested Reading

- Berger, "The Rhetoric of Constitutional Absolutism."
- Kahan, "The Supreme Court, 2010 Term—Foreword."
- Levinson, *Our Undemocratic Constitution*.

## Questions to Consider

- The Constitution is sometimes referred to as the nation's civic religion, and some consider it heresy to criticize the Constitution. What are the advantages and disadvantages of such constitutional piety?
- Was the Senate's refusal to give a hearing or vote to Chief Judge Merrick Garland justified or unjustified? Why? What neutral principles might you apply to this problem? Would your thoughts change if a Democratic Senate refused to give a hearing or vote to a Republican Supreme Court nominee?

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