Constitutional Interpretation
Cases and Federalist Papers Outline

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Note: All page references are from:
Paulsen et al. *The Constitution of the United States, 2nd Ed.* St. Paul, MN: Foundation Press.

I. What is the Constitution?

Cases

Calder v. Bull (1798), pg. 1449

Summary: In 1795, the Connecticut legislature passed a law ordering a new trial in a state probate case, where the probate court for Hartford had decreed that the Calders were set to inherit the estate in question. Thereafter, a state trial court held a new hearing in the probate case and overturned the Hartford court's decision- the Bulls would inherit the estate instead of the Calders. After several appeals, the case makes it before the SCOTUS. They challenged the Connecticut legislature's law, arguing that it was an ex post facto law, which was banned under Article 1, Sec. 10 of the Constitution. The SCOTUS (with Associate Justice Chase writing for the majority) upheld the state court rulings in favor of the Bulls: The ex-post facto clause should only be read as applying to retroactive criminal laws. Further, the actions of the Connecticut legislature had not divested the Calders of any property, since their right to the property had not vested before the legislative action.

Other Notes:
Note that this case shows that judicial review of state laws was common before *Marbury*: Associate Justice Chase notes: "An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority" (pg. 1450)

The focus is on retroactive punishment by the legislature: Associate Justice Chase notes: "The plain and obvious intention of the prohibition is this: that the Legislature of the several states, shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having retrospective operation" (pg. 1451)

What laws are ex post facto laws according to Associate Justice Chase: 1) Any law that makes a prior innocent action criminal after the law's passage; 2) Any law that aggravates a crime, or increases punishment, after the act was committed; 3) Any law that changes the rules of evidence in order to convict the offender. (pg. 1451)

***Dred Scott v. Sandford* (1857), pg. 771**

Summary: The case involves the plaintiff, Dred Scott, a slave in Missouri, whose owner, Dr. Emerson, in 1834 took him to Illinois in Rock Island as a slave and held him there for two years, despite the fact that slavery was outlawed in Illinois. He then took Scott to Fort Snelling in Minnesota, where slavery was also banned under the Missouri Compromise of 1820 (which admitted Missouri as a slave state, Maine as a free state, and prohibited slavery in the remainder of the Louisiana Purchase north of the 36th parallel). The Missouri Supreme Court ruled that Scott's long stay in Illinois was not sufficient to confer upon him freedom, because under Missouri law he was still a slave. Scott's ownership was transferred to Dr. Emerson's brother, Mr. Sandford, a citizen of New York. Scott's lawyers sued in federal court under diversity jurisdiction, which under Article III of the Constitution allowed Federal Courts to hear cases brought by a citizen of one state against the citizen of another state. If Scott was not a citizen of Missouri because he was a slave, however, he would lack jurisdiction. Scott lost in federal court and appealed to the SCOTUS. Chief Justice Taney ruled: 1) no black person, whether slave or free, could constitutionally be a citizen of the United States and any US state, thus he lacked the "privileges and immunities" by the residents of US states and lacked jurisdiction to bring suit in federal court. 2) The Missouri Compromise was unconstitutional because the federal government had no legitimate constitutional power to limit the spread of slavery to new territories. 3) Taney invoked, for the first time, the due process clause substantively: slave owners had a right, under the Due Process Clause of the Fifth Amendment, to own slaves and carry their property into any federal territory, and government interference with this right breached a substantive right to property. The danger of this logic is that the ruling would require free states to recognize slavery within their borders. 4) Missouri law applied to Scott, and Illinois law could not be invoked to render Scott free in Missouri because it lacked "extraterritorial effect."

Other Notes:
Chief Justice Taney invokes the original understanding of founders to argue why black people cannot be citizens: "They are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them" (pg. 773)

The right to own slavery is seen by Chief Justice Taney as explicit in the constitution, and here is where he strikes down the Missouri Compromise (the first Federal Law to be struck down): "The right of property in a slave is distinctly and expressly affirmed in the constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every state that might desire it, for twenty years […] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that

neither Dred Scott himself, nor any of his family, were made free by being carried into this territory" (pg. 782)

On the lack of "extraterritorial effect" of Illinois's law: "As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois" (pg. 783)

***Lochner v. New York* (1905), pg. 1465**

Summary: In this era where the SCOTUS adopted an expansively substantive conception of the Due Process Clauses, the most infamous case is *Lochner*, which is widely (though not universally) considered to be the epitome of the wrong way to interpret the constitution. The State of New York had passed a law that limited the number of hours that shall constitute a legal day's work for bakeries so that they do not amount to more than 10 hours a day or 60 hours per week. The law was justified on public health grounds: bakeries were hot and dangerous places. The plaintiff in question had been found, under the New York law, as having illegally allowed his employees to work more than 60 hours a week at a bakery. The SCOTUS, under Associate Justice Peckham, struck down the New York law as unconstitutional. Invoking the Due Process Clause of the 14th amendment as a substantive clause, the SCOTUS found that the statute interferes with the right of contract between the employer and employees as protected under the Due Process clause of the 14th amendment. The case is emblematic of the so-called "*Lochner*-era," when the SCOTUS repeatedly vetoed state and federal government attempts to regulate the industrial economy.

Other Notes:
Associate Justice Peckham argued that the New York law had little to do with public health: "We think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." (pg. 1466)

Associate Justice Peckham then makes a 'slippery slope' argument: "No trade no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family" (pg. 1467)

***Griswold v. Connecticut* (1965), pg. 1478**

Summary: Appellant Griswold is the Executive Director of the Planned Parenthood League of Connecticut, where doctors gave information, instruction, and medical advice to married persons as to the means of preventing conception. They often prescribed contraceptive devices. But a Connecticut Statute provided that any person who uses, or who assists, abets, counsels, causes, hires, or commands the use, of contraceptives would be fined at least fifty dollars and/or imprisoned at between two months and a year. Griswold and a doctor were found guilty under

the statute and fined $100 each. The SCOTUS, under Associate Justice Douglas, struck down the Connecticut statute as unconstitutional, for violating a constitutional right to privacy for married couples. It famously argued that although the right to privacy is not explicit in the Constitution, the Bill of Rights provides "penumbras" that include a constitutional right to privacy.

Other Notes:

Associate Justice Douglas referring to rights "penumbras": "The foregoing cases suggest that specific guarantees under the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" (pg. 1480).

Associate Justice Douglas arguing why the Connecticut statute is unconstitutional: "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms […] Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship" (pg. 1481)

***Meyer v. Nebraska* (1923), E-reserve PDF**

Summary: In reviving the substantive conception of the Due Process Clause of the 14th amendment enshrined in *Lochner* in the *Griswold* case, the SCOTUS relied on, among other cases, *Meyer v. Nebraska*, a *Lochner*-era case that had not been overturned. The plaintiff, a school teacher, was tried and convicted in Nebraska for teaching German to a student whi had not yet passed the 8th grade. The schoolteacher violated a Nebraska statute passed in 1919 which stated that languages other than English can only be taught to children after they have passed the 8th grade. The law was defended by Nebraska as seeking to instill American values in children. The Supreme Court of Nebraska affirmed the conviction, and Meyer appealed to the SCOTUS. The SCOTUS, under Associate Justice McReynolds, struck down the Nebraska law as unconstitutional for violating the 14th Amendment Due Process Clause, which states that no state can deprive a person of liberty without due process of law. The teacher had a right to teach his student German, which could not reasonably produce harm, and the students' parents had a right to engage the teacher to instruct their children, under the 14th amendment.

Associate Justice McReynolds on the applicability of the Due Process Clause of the 14th amendment: "Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment" (pg. 3 of E-reserve PDF)

***Pierce v. Society of Sisters* (1925), pg. 1476**

Summary: This was the second case from the *Lochner*-era that the SCOTUS referenced in reviving the substantive conception of the Due Process Clause of the 14th amendment in their *Griswold* judgment. The Appellee was the Society of Sisters, an Oregon corporation organized in 1880 to care for and educate orphan youth. The Society of Sisters challenged an Oregon Act passed in 1922, which requires parents, guardians, or custodians of children to send the children to a public school between the ages of 8 and 16 years, and declares failure to do so a misdemeanor. The Act caused the withdrawal from the school of children who would otherwise attend, and the Society of Sisters' income was steadily falling. The SCOTUS, under Associate Justice McReynolds, struck down the Oregon law as unconstitutional, relying on *Meyer*, arguing that the act violates the rights of parents and guardians to direct the upbringing and education of children under their control, as protected in the Due Process Clause of the 14th amendment.

Other Notes:

Associate Justice McReynolds striking down the Oregon Act: "Under the doctrine of *Meyer* […], we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" (pg. 1477)

Federalist Papers

Federalist #45 (1788), James Madison (E-reserve)

The key question: Is federal power as enumerated in the constitution threatening to the states? Madison addresses this question first by underplaying the importance of state power: "Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands split, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?" He then argues that all the federal institutions- the Senate, elected by State legislatures – the House of Representatives, though elected by the people, will be influenced by state interests, the President cannot be elected without the intervention of State legislatures via the electoral college – are dependent on the states. Madison writes: "The principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them." He then argues that the federal government will be one of limited powers, "few and defined," whereas all other powers, "numerous and indefinite," will fall to the states. Most federal powers will be exercised "on external objects, as war, peace, negotiation, and foreign commerce; with which the last power of taxation will, for the most part, be connected." Most state powers will be exercised "in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Since times of peace are likely to be more common than times of war, "the State governments will here enjoy another advantage over the federal government." Madison concludes by stating that the Constitution, compared to the Articles of Confederation, "consists much less in the addition of

new powers to the Union, than in the invigoration of its original powers," with the exception of the power to regulate commerce, a power which, Madison notes, is one few oppose. Thus, "the proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them."

II. Who Has Authority to Interpret the Constitution?

Cases

***Marbury v. Madison* (1803), pg. 143**

Summary: In 1800, Thomas Jefferson narrowly wins the presidential election over John Adams. Immediately after the election, Adams and the lame-duck Congress pass the Judiciary Act of 1801, which replaced the antiquated system of having SCOTUS justices ride circuit, created a new system of circuit courts, and created "justices of the peace" for the District of Columbia- these were less judge-like and more like local government officials- part administrative and part judicial. The night before Jefferson took office on March 3, 1801, the Federalist Senate confirmed the appointments. Marshall, who was about to assume his position as SCOTUS Chief Justice, was still exercising his function as Secretary of State, charged with delivering the commissions of the new justices of the peace offices. William Marbury was one newly appointed justice of the peace, who never received his commission. Marshall was understaffed, and did not consider the delivery to be anything more than a formality. When Jefferson assumed office, he ordered newly appointed Secretary of State James Madison not to deliver the commissions, including the one for Marbury. Marbury sued in the SCOTUS under its original jurisdiction, which allows the SCOTUS to hear the first cases concerning ambassadors and other public ministers. He asked the SCOTUS to issue a writ of mandamus, a provision included in the Judiciary Act of 1789 that established the Federal Courts, which essentially was an order to ask Madison to appear before the SCOTUS to defend his non-delivery, and to then compel him to deliver the commission. The SCOTUS, under Chief Justice John Marshall, refused to issue the writ, because it argued that the power to issue a writ of mandamus is unconstitutional, for it extends the SCOTUS' original jurisdiction beyond its Article III powers. Thus, despite finding that Marbury had been legally appointed (the delivery of the commission was just a formality), that Marbury was entitled to a remedy to his injury, and that he had correctly interpreted the Judiciary Act of 1789, Marshall declared that the SCOTUS did not have the power to compel Madison to deliver the commission. In striking down that provision of the Judiciary Act of 1789, Marshall defended and ordained the power of judicial review of federal statutes. He argued that because the Constitution was the supreme law of the land, and SCOTUS justices had sworn an oath to uphold it, they must settle all conflicts between the Constitution and congressional legislation in favor of the former.

Other Notes:

The logic of John Marshall can be traced via the following quotes:

"That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington in the district of Columbia […] That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy" (pg. 147)

"This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired, Whether it can issue from this court." (pg. 149)

"The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised" (pg. 150)

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void" (pg. 151)

"It is emphatically the province and duty of the judicial department to say what the law is […] If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply" (pg. 151)

"The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the document under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges" (pg. 152).

"It is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? […] How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!" (pg. 153).

"Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument" (pg. 153).

Federalist Papers

Federalist #78 (1788), Alexander Hamilton (pg. 133)

Here, Hamilton considers the structure of the new federal judiciary, and defends the proposed configuration of judicial powers. He begins by stating that the establishment of federal judges is

an improvement over the Articles of Confederation: "In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out." He then defends the establishment of federal judicial power. Judges, Hamilton notes, will hold office during good behavior ("the standard of good behavior […] is certainly one of the most important modern improvements in the practice of government"). They will also clearly be the weakest of the three branches: "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse […] and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." This, according to Hamilton, "proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power." He then argues that the independence of courts is necessary if they are to effectively protect the constitution via judicial review. In fact, the protection of liberties "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." And, indeed, "the interpretation of the laws is the proper and peculiar province of the courts." He argues this does not imply judicial supremacy, but just the protection of the sovereignty of the people: "It only supposes that the power of the people is superior to both [the legislature and the judiciary]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." It is the constitution that is supreme: "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." Judges will also be constrained by precedent, "which serve to define and point out their duty in every particular case that comes before them…" Because the number of precedents will be large, adhering to them will be hard, and thus Hamilton argues that judges must be educated, possessing the "sufficient skill in the laws to qualify them for the stations of judges." Life tenure, rather than temporary office, according to Hamilton, will attract learned men to the judiciary: "the temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench…"

III. Distribution and Separation of Powers of the National Government

Cases

McCulloch v. Maryland (1819), pg. 193

Summary: The plainfiff, McCulloch, was challenging the constitutionality of a statute passed by the Maryland legislature which would tax the state branch of the Bank of the United States, and, in arguing in its defense, the defendant, Maryland, argued that the Congress does not have the power to create a national bank, and that, in any case, its taxing of the state branch of the bank is constitutional. In a foundational decision on national legislative powers, Chief Justice John Marshall declared the Congressional legislation establishing said bank to be constitutional, and Maryland's statute to be unconstitutional. Marshall first rebuts Maryland's contention that the

power of the constitution flows from the states, by arguing that the power of the constitution emanates from the people. And since the people, not the states, are sovereign, and have declared the constitution and congressional laws acted in pursuance thereof to be supreme via the supremacy clause (Article 5), any Congressional constitutional law is supreme over the states. He then rebuts Maryland's contention that, since the Congressional power to establish a national bank is not expressly stated in the constitution, Congress cannot incorporate such a bank. Marshall begins by stating that the Constitution contains implied powers for Congress, and he then finds that, through the Constitution's necessary and proper clause (Article 1, Sec. 8), the establishment of a national bank can be considered a necessary and proper means for Congress to achieve its express powers (to collect taxes, to borrow money, to regulate commerce, to conduct a war and support armies, etc.). He thus declares the Congressional law constitutional. He then moves to the question of whether Maryland can pass a law that can tax the state branch of the Bank of the United States. Marshall finds that in the power to tax is the power to destroy, and that the power to destroy can be directed against the power to create and to preserve. He finds that the people of a single state cannot use the taxation power to destroy against the supreme law of all the United States; not only because it would violate the supremacy clause (for an attempt to destroy Congressional legislation is the same as explicitly seeking to nullify the law, which a state cannot do vis-à-vis constitutional Congressional legislation), but because it would amount to the will of a state being imposed on that of the people of the United States. As a result, the Maryland statute cannot be constitutional.

Other Notes:

The debate over the constitutionality of the Bank eventually faded into history, and *McCulloch v. Maryland* is the main legacy of the fight, for here Marshall provided his most forceful pro-national power opinion. In the decision's wake, there was a large political backlash against the creation of the bank, and even calls to amend the SCOTUS' jurisdiction to render it unable to hear appeals from state supreme courts. Although a Bank was established, in 1832 the Bank sought a prolongation of its charter for another 20 years. Andrew Jackson, fiercely opposed to the Bank, vetoed the bill. Jackson eventually won the Bank war, killing the Bank for the next seventy years, and no institution remotely resembling the Bank of the United States was to be created until the passage of the Federal Reserve Act in 1913.

Chief Justice John Marshall makes his argument in the case as follows:

"No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if is to be so decided, by this tribunal alone can the decision be made." (pg. 193)

"The first question made in the case is, has Congress power to incorporate a Bank?" (pg. 193)

"The powers of the general government, it has been said, are delegated by the States […] But when, "in order to form a more perfect union," it was deemed necessary to change this alliance [confederation amongst states] into an effective government, possessing great and sovereign

powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all" (pgs. 194-195)

"the people have, in express terms, decided it, by saying "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and their officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land…" (pg. 195)

"Among the enumerated powers, we do not find that of establishing a bank or a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers […]" (pg. 196)

"In considering this question, then, we must never forget that it is a constitution we are expounding […] it may with great reason be contended, that a government, entrusted with such ample powers […] must also be entrusted with ample means for their execution." (pg. 196)

"they [Maryland] have found it necessary to contend, that this clause [the necessary and proper clause] was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation […] That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned. "(pg. 198)

"1st. The clause [necessary and proper clause] is placed among the powers of Congress, not among the limitation on those powers. 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government" (pg. 201).

"After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and part of the supreme law of the land" (pg. 203)

"we proceed to inquire- Whether the State of Maryland may, without violating the constitution, tax that branch?" (pg. 203)

"A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used." (pg. 204)

"The question is, in truth, a question of supremacy: and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land is empty and unmeaning declamation" (pg. 207).

"The difference is that which always exists, and always must exist, between the actions of the whole on a part, and the action of a part on the whole – between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is

not supreme […] this is a tax on the operation of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional…" (pg. 208).

***Slaughter-House Cases* (1873), pg. 1271**

Summary: These are a famous collection of cases in which the SCOTUS first interpreted the 14th amendment. The cases arose out of New Orleans butchers' attempts to resist the creation of the Crescent City Live-Stock and Slaughter-House Company, which was chartered by a Louisiana statute, which they argued creates a monopoly and also deprives a large class of citizens with their right to exercise their trade, and forces them to work for the monopoly against their will. Thus, the butchers allege that the Louisiana law violates the 14th amendment's privileges and immunities clause, by depriving them of their right, as US citizens, to exercise their trade, and violates also the equal protection clause of the 13th amendment, which outlaws involuntary servitude, since they are forced to now work for the monopoly. The Court, under Associate Justice Miller, upheld the Louisiana statute. The SCOTUS interpreted the privileges and immunities clause of the 14th amendment narrowly; the privileges and immunities not enumerated in the US constitution are still to be protected by the states, and since the exercise of trade is not expressly protected in the constitution, the clause is not applicable in the case at hand. It also interpreted the 13th amendment's equal protection clause fairly narrowly, stating that its intent was to promote equality under the law for blacks, and thus it does not extend to the butchers in New Orleans.

Other Notes:

All of the dissents to the majority opinion find that the Louisiana law did violate the privileges and immunities clause of the 14th amendment, and interpret the right to exercise one's trade freely to be a foundational constitutional right.

Associate Justice Miller makes his argument as follows:

"The court is thus called upon for the first time to give construction to these articles [Reconstruction amendments. We do not conceal for ourselves the great responsibility which this duty devolves upon us" (pg. 1273).

"Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article [privileges and immunities clause of 14th amendment] placed under special care of the Federal government…" (pg. 1279)

Regarding the equal protection clause of the 13th amendment: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race…" (pg. 1280)

***United States v. Lopez* (1995), pg. 617**

Summary: This was the first case, in nearly six decades to invalidate an act of Congess as being in excess of the commerce power. The act in question, the Gun-Free School Zones Act of 1990, makes it a federal offense to possess a firearm in a school zone. Lopez was a 12th grade student who brought a firearm to school in Texas, and was subsequently charged by federal agents for violating the Gun-Free School Zones Act. He was convicted, and appealed to the 5th circuit Federal Court of Appeals, which reversed his conviction. Chief Justice Rehnquist, speaking for the Court, found that the Act does not regulate a commercial activity and does not contain a requirement that the possession of a gun be connected in any way to interstate commerce, and thus confirmed the Court of Appeals holding.

Other Notes:

Chief Justice Rehnquist makes his case as follows:

He begins by recounting the history of the interpretation of the Commerce Clause: "For nearly a century thereafter [Marshall's 1824 ruling in *Gibbons v. Ogden*, where he first interpreted the commerce clause as "the power to regulate, that is, to prescribe the rule by which commerce is to be governed"], the Court's Commerce Clause decisions dealt but rarely with the extent of Congress's power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate Commerce […] [Post New-Deal] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce" (pgs. 618-619).

"The Act is not a regulation for the use of the channels of interstate commerce […] nor can [the Act] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce […] [The Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise […] [the Act] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce" (pgs. 620-621).

"[to construe the act as relating to interstate commerce] we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States […] This we are unwilling to do." (pgs. 623-624).

***National Federation of Independent Business (NFIB) v. Sebelius* (2012), pg. 683**

Summary: This case upheld in part and invalidated in part the Patient Protection and Affordable Care Act of 2010 ("Obamacare"), and required the interpretation of Congress' powers under the Commerce Clause, the Necessary and Proper Clause, the Taxing Clause, and the conditional spending power. The case concerned the constitutionality of the individual mandate (requiring individuals to purchase a health insurance policy providing minimum coverage) and the Medicaid expansion (which gives funds to states on the condition that they provide specified health care to all citizens whose income falls below a certain threshold). Chief Justice John Roberts found that the individual mandate cannot be justified under the commerce clause, because the mandate does not regulate pre-existing economic activity, but rather creates economic activity by compelling individual from purchasing a product, which is not a power Congress has – that is left to the states. Next, the act is not valid under the "Necessary and Proper" clause because that clause also applies to cases where the Congress was regulating pre-existing activity, not creating activity. Roberts does uphold the mandate based on the Congress' taxation powers: he argues that although framed as a "penalty," if something can be construed as having two meanings, one which would render the law constitutional and the other which would strike it down, the Court must interpret the term in such a way that it would uphold the law's constitutionality. He finally strikes down only the provision of the Health Care law that would threaten states with the withdrawal of other federal funds if they failed to expand Medicaid coverage to needy populations – the Congress can only incentivize, but not compel, the states, to expand Medicaid coverage. However, once this threat is removed, Roberts finds that the rest of the act can stand as constitutional.

Other Notes:

Justices Ginsburg, Sotomayor, Breyer, and Kagan would also uphold the law based on the Commerce Clause and the Necessary and Proper Clause. For Justices Kennedy, Scalia, Thomas, and Alito, both the individual mandate and the Medicaid Expansion would be unconstitutional, and they would have held both provisions so central to the act that they required the invalidation of the entire act.

Roberts makes his argument as follows:

"It is not our job to protect the people from the consequences of their political choices." (pg. 685)

"The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."" (pg. 690)

"The individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms […] The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power." (pg. 691)

"It is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." (pg. 692)

"The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read…" (pg. 692)

"Because the constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness…" (pg. 696)

"Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is penalize States that choose not to participate in that new program by taking away existing Medicaid funds […] The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act." (pg. 699)

United States v. Windsor **(2013), E-reserve**

Summary: Edith Windsor and Thea Clara Spyer were a same-sex couple that married in 2007 in Canada. They moved to New York, where Spyer died in 2009. Windsor was then unable to take the spousal deduction for federal estate taxes because, under Section 3 of the Defense of Marriage Act (DOMA), the IRS did not regard her marriage with Spyer as valid. Windsor sued in Federal Court, arguing that DOMA violated the due process clause of the 5th Amendment, which requires the federal government to adhere to, in most instances, the same standards as the states must under the equal protection clause of the 14th amendment. The Obama Administration refused to defend against her lawsuit, so the Bipartisan Legal Advisory Group (BLAG) of the US House of Representatives defended the federal law. Federal District Court found DOMA unconstitutional, and this was held also by the Court of Appeals for the 2nd Circuit. BLAG then appealed to the Supreme Court, which held in a 5-4 ruling authored by Associate Justice Kennedy that Section 3 of DOMA was unconstitutional, because it was an illegitimate means of demeaning same-sex couples. Kennedy found that the regulation of marriage is the purview of the states, and that DOMA sought to injure the very class of people New York was seeking to protect, and departed from the tradition of accepting and recognizing state definitions of marriage. It did so, says Kennedy, out of an improper animus or purpose.

Other Notes:

Justice Scalia, joined by Justice Thomas and in part by Chief Justice Roberts, stated that to defend marriage does not mean that DOMA is meant to demean same-sex couples, and as a result it does not violate the Fifth Amendment.

Associate Justice Kennedy made his argument as follows:

"DOMA seeks to injure the very class New York seeks to protect. By doing so it violate due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "Must at the very least mean that a bare congressional desire to harm a politically group cannot" justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, "discriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles" (pg. 2)

"By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law […] The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples" (pg. 3)

"The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages." (pgs. 3-4).

Federalist Papers

Federalist #10 (1787), James Madison (pg. 581)

Here, James Madison constructs the political theory of federalism, and argues that only a large federal republic will best control factions. He first defines a faction: "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." He notes that there are two ways to try to resolve the problem of factions: "the one, by removing its causes; the other, by controlling its effects." He argues strongly in favor of the latter, for to remove the liberty that allows factions to develop would "be worse than the disease." He notes that it is equally impossible to eliminate different interests altogether, for "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed." Indeed, it is the duty of government to protect such diversity of interests: "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to the uniformity of interests. The protection of these faculties is the first object of government." The key is to regulate these factions together: "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government." In other words, "the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects." One cannot depend on morality or religion to achieve these results: "we well know that neither moral nor religious motives can be relied on as an adequate control." Thus, the key lies in the way institutions are arranged, and the best way to achieve this is through a federal republic. And

the key lies in leveraging the size of the new United States. Madison begins by considering how representatives are chosen: "as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried…" Indeed, "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other." The federal constitution also serves to protect both local and national interests: "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." Federalism is the great protector: "The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States."

Federalist #39 (1788), James Madison (pg. 32)

In this piece, James Madison lays out some of the features of both a republican and a federal form of government. He first argues that only republicanism is appropriate for the United States, and he grounds it in American exceptionalism: "It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with the honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." He then defines the features of republican government: "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holing their offices during pleasure, for a limited period, or during good behavior […] it is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, an claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified…" Since the states, in their sovereign authority, will be the ratifiers of the Constitution, this will be a federal, not national, act: "Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a federal, and not a national Constitution…" But, in the end, the Constitution, once enacted, will be a mix of federal and national: "In requiring more than a majority, and particularly in computing the proportion by States, not by citizens, it departs from the national and advances towards the federal character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the federal and partakes of the national character."

IV. The Free Exercise of Religion

***Reynolds v. United States* (1878), E-reserve**

Summary: The plaintiff in error, George Reynolds, was a Mormon and resident of Utah that had been charged with bigamy, after he married a second time, believing to be his religious duty. Reynolds had violated a Congressional statute that punished bigamy with a $500 fine or with no more than five years of prison. The SCOTUS, under Chief Justice Waite, found the Congressional statute to be constitutional, and further the conviction of Reynolds was affirmed. Although the Constitution protects freedom of religious belief and opinion, argued Waite, it cannot protect all practices that are framed as religious, for to allow this would be the same as making the doctrines of religious belief superior to the laws of the land. The government had an interest in protecting marriage, which at its core is a civil contract.

Other Notes:

Chief Justice Waite made his argument as follows:

"Polygamy has always been odious among the northern and western nations of Europe […] In the face of all this evidence, it is impossible to believe that the constitution guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law." (pg. 4)

"In our opinion, the statute immediately under consideration is within the legislative power of Congress […] This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? […] To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (pg. 4)

***Minersville School District v. Gobitis* (1940), E-reserve**

Summary: The precedent of this case was overruled just three years later, in the 1943 *West Virginia v. Barnette* case. The precedent that was set here by Associate Justice Frankfurter was that the Free Exercise Clause of the 1st Amendment does not protect freedom from compelled expression on religious grounds. Lillian and William Gobitis were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of the recitation of the Pledge of Allegiance. As part of Jehovah's Witnesses, the two children had been

brought up to believe that such a gesture in respect for the flag was forbidden by command of scripture. Associate Justice Frankfurter focused on the fact that building national cohesion, through a symbol like the national flag, was an important – perhaps the most important – goal of the state (think of the context – war was on the horizon), and as long as freedom of belief or disbelief was being protected, the school district was not at fault. The most important value is to have a well-ordered, tranquil, and cohesive society- without which the free exercise of religion cannot occur.

Other Notes:

Associate Justice Frankfurter made his argument as follows:

"Situations like the present are phases of the profoundest problem confronting a democracy – the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment which must prevail." (pg. 4)

"The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is a symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that "the flag is the symbol of the nation's power – the emblem of freedom in its truest, best sense." (pg. 4)

"The influences which help towards a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate […] it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country" (pg. 5)

"A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected" (pg. 5)

West Virginia State Board of Education v. Barnette **(1943), pg. 1064**

Summary: This case overturned the *Gobidis* holding. Following *Gobidis,* the West Virginia legislature amended its statutes to require all school districts to teach courses in history, civics and the Constitution to foster Americanism and patriotism. In response, the State Board of

Education in 1942 ordered the salute of the flag to become a requirement. Failure to conform would be considered insubordination, dealt with via expulsion. The expellant is then considered "unlawfully absent," and can be proceeded against as delinquent, his parents/guardians liable to prosecution and, if convicted, to a $50 fine and up to 30 days in jail. The SCOTUS, under Associate Justice Jackson, overturned the *Gobitis* precedent, arguing that the Board of Education's resolution violated the Free Exercise Clause of the 1st Amendment. To compel a salute of the flag does not respect freedom of religious belief – it compels children to accept a particular belief, and since not saluting the flag does not inhibit others from doing so, there is no compelling reason why they should not act in accordance with their religious beliefs and be allowed to abstain. Justice Jackson seems to counter Frankfurter's calls for national unity by countering that national unity is best fulfilled by the staunch protection of individual liberty.

Other Notes:

Associate Justice Frankfurter, unsurprisingly, dissented, arguing that as a Jew, he knew a thing or two about persecution, and to uphold the West Virginia School Board's resolution would be no more than the recognize that it seeks to achieve a legitimate legislative end.

Associate Justice Jackson makes his argument as follows:

"[the] refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual" (pg. 1065).

"Here it is the State that employs a flag as a symbol of adherence to government presently organized. It requires the individual to communicate by word and sign his acceptance of he political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights. […] To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (pg. 1066).

"To enforce [individual] rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end […] As governmental pressure towards unity becomes stronger, so strife becomes more bitter as to whose unity it shall be […] Those who begin coercive elimination of dissent soon find themselves exterminating dissenter. Compulsory unification of opinion achieves only the unanimity of the graveyard." (pgs. 1067-1068).

"[We] apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization […] freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order" (pg. 1069).

***Wisconsin v. Yoder* (1972), pg. 1113**

Summary: The respondents were residents of Wisconsin and members of the Old Order Amish religion and the Conservative Amish Mennonite Church. They stopped attending public or private school upon completion of the 8th grade, violating Wisconsin's compulsory attendance law requiring children to attend public or private school until the age of 16 (the children were aged 14 and 15 when they stooped attending school). The respondents were charged and convicted for violating Wisconsin's compulsory attendance law, and charged $5 each. They expressed beliefs, which the State of Wisconsin stipulated as sincere, that their religious order considered attending high school to be contrary to the Amish way of life (which would endanger their own salvation). Chief Justice Burger struck down the state law as a violation of the Free Exercise Clause of the 1st Amendment. He found that, more than a philosophical objection to material and secular society, Amish beliefs are deeply religious, and thus the state of Wisconsin needed to demonstrate a compelling state interest in overriding the protections of the 1st Amendment. Because the Amish children received education at home that was adequate for the State's purposes, such a compelling state interest could not be demonstrated.

Other Notes:

Chief Justice Burger made his argument as follows:

"Amish objection to formal education beyond the eight grade is firmly grounded in these central religious concepts" (pg. 1113)

"In order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise clause…" (pg. 1114).

"The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise." (pg. 1115).

***Employment Division v. Smith* (1990), pg. 1116**

Summary: The case concerns the constitutionality (under the 1st Amendment's Free Exercise Clause) of an Oregon statute that includes religiously inspired peyote within its criminal prohibition of peyote, thereby permitting the State to deny unemployment benefits to people dismissed from their jobs because of the religiously inspired use of peyote. The respondents, Alfred Smith and Galen Black, were fired from their jobs with a private drug rehabilitation organization because they ingested peyote as part of a religious ceremony at a Native American Church. When they turned to the Employment Division for unemployment compensation, they were denied because they were found to have been discharged for work-related misconduct. The

Oregon Supreme Court found that the Oregon statute could not, under the Free Exercise Clause, deny unemployment benefits to respondents having engaged in this practice. The SCOTUS, with Associate Justice Scalia delivering the opinion of the court, reversed the Oregon Supreme Court's ruling and found the denial of unemployment benefits for individuals who were fired due to the religious use of peyote to be constitutional. Scalia argues that the Oregon statute's prohibition of this particular free exercise of religion was an incidental effect of a generally applicable and otherwise valid provision, and as a result it does not encroach on the 1st Amendment's Free Exercise Clause. To rule otherwise would open the floodgates of litigation via the Free Exercise Clause.

Other Notes:

Associate Justice O'Connor argued, concurring in the judgment but disagreeing strongly with its logic, that Justice Scalia had no reason to discard the "compelling state interest" test and to argue that all that mattered is that an encroachment of the Free Exercise Clause be the incidental result of a generally applicable law not targeting a specific religious practice. She argues that the State had a compelling state interest, and the same conclusion could be reached in that way, a way more consistent with past precedent. Associate Justices Blackmun, Brennan, and Marshall agreed with O'Connor's logic but, in their dissent, reached a different conclusion, namely that the Oregon statute did not meet the compelling state interest test.

Associate Justice Scalia makes his argument as follows:

"Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons […] Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now…" (pgs. 1117-1118).

"The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind… The First Amendment's protection of religious liberty does not require this." (pg. 1119).

Church of Lukumi Babalu Aye v. City of Hialeah **(1993), E-reserves**

Summary: The Petitioner is a Church established under the Santeria religion, which, among other things, practices animal sacrifice. The church obtained a lease from the Florida city of Hialeah to open a church and practice its religion, including sacrifice, openly. The city residents grew concerned with the practice. The city attorney then requested an opinion from the Florida State Attorney General seeking whether Florida Statute 828.12 (its animal cruelty laws), which subjected "whoever … unnecessarily or cruelly…kills any animal" to criminal prosecution, could cover religious animal sacrifice. The Attorney general argued in the affirmative – the

animal sacrifice was not "necessary." The city thus passed several ordinances prohibiting the practice, imposing up to a $500 fine and 60-day jail sentence on those who broke the ordinances. The Church went through the state court's appeals process, and the Court of Appeals for the Eleventh Circuit upheld the previous decisions: that the compelling governmental interests justified the prohibition of ritual sacrifice. The SCOTUS holding, written by Associate Justice Kennedy, reversed the Court of Appeals decision, finding that the practice was protected under the 1st Amendments Free Exercise Clause. Synthesizing the holdings in *Wisconsin v. Yoder and Employment Division v*. Smith, Associate Justice Kennedy found that a law must either provide a compelling state interest, or be neutral and of general applicability, in order to encroach on the free exercise of religion. Here, the city ordinances were not general or neutral – they were targeted at the Church, and they did not exhibit a compelling interest.

Other Notes:

Associate Justice Kennedy offered the following arguments in his holding:

"In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that [a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.]" (pg. 5)

"We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers], but not upon itself." […] This precise evil is what the requirement of general applicability is designed to prevent." (pg. 12)

"A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny […]Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling." (pg. 12)

***Christian Legal Society v. Martinez* (2010), E-reserves**

Summary: The case concerns the question of whether a public law school can condition its official recognition of a student group and attendant use of school funds and facilities on the organization's agreement to open eligibility for membership and leadership to all students. The petitioner, the Christian Legal Society (CLS), was a student group at UC-Hastings law school, which argued that this requirement, imposed by the law school, violated its First Amendment right to free speech, expressive association, and the Free Exercise Clause, by forcing the group to accept as members individuals who did not share its core beliefs about religion and sexual orientation. The SCOTUS confirmed the District Court and 9th Circuit Court of Appeals judgments that rejected the CLS' First Amendment challenge. Writing for the majority, Associate Justice Ginsburg concluded that the law school's all-comer policy was a reasonable

and view-point neutral condition for access to student organizations. The law school did not transgress because it did not prohibit the CLS' expressive activity, but merely enacted a general and neutral condition for selection of membership. It was the CLS, argued Ginsburg, that was seeking preferential treatment – it was not the law school that was targeting the student group. The group enjoys no constitutional right to state subvention of its selectivity.

Other Notes:

Justices Alito, Chief Justice Roberts, Justice Scalia, and Justice Thomas dissented, arguing that the majority opinion amounts to banning expression from institutions of higher learning if they offend prevailing standards of political correctness. Hastings' accept-all-comers policy, in this view, is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints "among" – not within – "registered student organizations." They also questioned whether the policy can be considered neutral.

Associate Justice Ginsburg made her argument as follows:

"CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it foregoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out." (pgs. 5-6)

"In sum, the several justifications Hastings assets in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes" (pg. 8)

"We next consider whether Hastings' all-comer policy is viewpoint neutral […] It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers […] An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral" (pgs. 8-9).

"Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims." (pg. 11)

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC **(2012), pg. 1129**

Summary: Many employment discrimination laws authorize wrongfully terminated employees to sue their employers for reinstatement and damages. The question presented here is whether the Establishment and Free Exercise Clauses of the 1st Amendment bar such an action when an employer is a religious group and the employee is one of the group's ministers. Here, Hosanna-Tabor is a church and school where Cheryl Perich taught and was a "commissioned minister." Perich took a medical leave of absence and upon her return, learned that a replacement teacher had been hired for the year. Perich threatened to sue, and was thus discharged by the Church for her insubordination and disruptive behavior and for severing her relationship with the Church by threatening to sue. Her title of "commissioned minister" was also revoked. She filed a charge

with the Equal Employment Opportunity Commission (EEOC) alleging her employment had been terminated in violation of the Americans with Disabilities Act (Perich suffered from narcolepsy). The EEOC brought suit against Hosanna-Tabor, and the Court of Appeals found that a ministerial exception barring certain employment discrimination claims against religious institutions did exist, but did not apply here because Perich did not qualify as a minister- she was really a teacher. The SCOTUS opinion, delivered by Chief Justice Roberts, reversed the Court of Appeals ruling, finding that Perich can indeed be considered a minister, and was thus covered by the ministerial exception.

Other Notes:

Chief Justice Roberts made his argument as follows:

"We agree that there is … a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church […]" (pg. 1131).

Roberts then distinguishes this case from *Employment Division v. Smith*: "It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." (pg. 1132)

"We are reluctant, however, to adopt a rigid formulation for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich…" (pg. 1132).

"The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way" (pg. 1133).

V. Democracy and Political Speech

***United States v. Carolene Products Co.* (1938), E-reserve**

Summary: This case was argued a year after the "switch in time that saved nine." A 1923 Statute forbade shipment in interstate commerce of skimmed milk compounded with fats or oils from products other than milk. A federal grand jury indicted the Carolene Products Co. for violating the act. The company objected to the indictment, and a trial judge found the act unconstitutional; the US subsequently appealed to the SCOTUS. The justices, who had renounced *Lochner*-era

anti-government regulation of interstate commerce doctrine, upheld the congressional statute. But more importantly, Associate Justice Stone's opinion planted the seeds for a new jurisprudence in footnote 4 of the opinion- a jurisprudence that would leave economic policymaking to Congress while not placing other civil liberties, especially those of minorities, at the mercy of representative majorities. His footnote is reproduced below.

Other Notes:

The famous "Footnote No. 4" is reproduced here:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth […] Nor need we inquire whether similar considerations enter into the review of statutes […] whether prejudice against discrete and insular minorities may be a special condition in such situations, which tends seriously to curtail the operation of those political processes normally to be relied on to protect minorities, and which may call for a correspondingly more searching judicial scrutiny" (pg. 5)

Associate Justice Stone made his argument as follows:

"Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare…" (pg. 3)

"regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators" (pg. 4)

"Here the demurrer challenges the validity of the statute […] the question is at lease debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As the decision was for Congress, neither the finding of a court arrived by weighing the evidence, nor the verdict of a jury can be substituted for it" (pg. 4)

Citizens United v. Federal Election Commission **(2010), pg. 999**

Summary: Citizens United is a nonprofit corporation. In 2008 it released a film titled *Hillary: The Movie*, critical of then presidential candidate Hillary Clinton. It wished to render the film available via video-on-demand, and Citizens United also made television ads promoting it. These actions were in violation of the 2002 Bipartisan Campaign Reform Act (McCain-Feingold Act/BCRA). Specifically, Section 203 of the Act banned electioneering communication, defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" made within 30 days of a primary or 60 days of a general election. Justice Kennedy, writing for the majority, struck down Section 203 of the Act as unconstitutional,

violating the 1st Amendment. Calling the provision an act of censorship, Stevens argues that sanctions against political speech are subject to strict scrutiny, and under this level of scrutiny the Act cannot stand. Political speech under the 1st Amendment applies not just to individuals, but to corporations as well. The court thus overturned its 1990 *Austin v. Michigan Chamber of Commerce* decision that had upheld restrictions on the independent funds of the Michigan Chamber of Commerce to support a candidate via a newspaper ad.

Other Notes:

Associate Justice Stevens wrote for the dissent (joined by Ginsburg, Breyer, and Sotomayor), and wrote that "Neither Citizens United's nor any other corporation's speech has been "banned." All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period" (pg. 1009). He adds that "Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races" (pg. 1009). He finally distinguishes between corporations and people, "Corporations […] are not themselves members of "We the People" by whom and for whom our constitution was established" (pg. 1014).

Associate Justice Stevens makes his argument as follows:

"Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." (pg. 1002)

"The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era – newspapers owned by individuals. At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge" (pg. 1005)

"When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves" (pg. 1005)

"The anticorruption interest is not sufficient to displace the speech here in question" (pg. 1005).

"As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment" (pg. 1006)

"Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design" (pg. 1007)

***Texas v. Johnson* (1989), pg. 907**

Summary: Geoffrey Lee Johnson was a Texas resident who burned the American flag as a means of political protest, in violation of Texas law. He was convicted, sentenced to one year in prison, and fined $2000. The case consisted of the question of whether or not his conviction is consistent with the 1st Amendment. The Texas Court of Criminal Appeals reversed the conviction, finding that it violated the 1st Amendment. Associate Justice Brennan, writing for the majority, agreed, finding that the conviction violated Johnson's 1st Amendment rights. Brennan first found that the burning of the flag was sufficiently imbued with elements of communication to implicate the 1st Amendment. The burning of the flag did not disturb the peace, nor did it reach the level of "fighting words" that may not be protected by the 1st Amendment. Brennan argued that while Texas had a compelling interest in promoting national unity, it could not do so by violating the 1st Amendment. Indeed, allowing the burning of the flag would strengthen the values of freedom and inclusiveness that the flag reflects.

Other Notes:

Chief Justice Rehnquist's dissent notes that the SCOTUS decision overturns the laws of 48 of the 50 states criminalizing the burning of the flag. He notes that "the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace" (pg. 914). He adds that "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others" (pg. 915). Justice Stevens also dissents, noting that "Respondent was prosecuted because of the method he chose to express dissatisfaction with those policies" (pg. 916), consequently he could still have maintained his free speech protections if he had chosen another method,

Associate Justice Brennan makes his argument as follows:

"The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent… In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" […] to implicate the First Amendment" (pg. 909).

"We have recognized that where "speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (pg. 909).

"However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag" (pg. 909).

"Nor does Johnson's expressive conduct fall within the small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" (pg. 910).

"If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an ideal simply because society finds the idea itself offensive or disagreeable" (pg. 911).

"It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation…" (pg. 913).

"We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength […] We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents" (pg. 913)

***Morse v. Frederick* (2007), E-reserves**

Summary: High School Principle Deborah Morse in Juneau Alaska suspended a student, Joseph Frederick, for unfurling a large banner during a school-supervised event to witness the Olympic Torch Relay en route to the Salt Lake City winter games that was taken to promote illegal drug use: "Bong Hits 4 Jesus." She further confiscated the banner. The principal's actions were consistent with Juneau School Board policy. Frederick appealed, but the district superintendent upheld the suspension. The Ninth Circuit Court held that the principal's actions violated the 1st Amendment, and thus Frederick could sue the principal for damages. Writing for the majority, Chief Justice John Roberts reversed the 9th circuit and found that the principal's actions did not violate the student's 1st amendment rights. Although students do not shed their constitutional rights to freedom of speech once they enter schools, their rights must be respected in lieu of the school environment, and thus schools may take steps to safeguard those entrusted to their care from speech that promotes illegal drug use. In other words, students in school are not entitled to the same extent of 1st amendment rights as adults in other settings.

Other Notes:

Justice Thomas' concurring opinion goes further, arguing that the First Amendment does not protect student speech in public school. Justice Stevens, joined by Souter and Ginsburg, dissented, arguing that the banner read "nonsense" and thus it does not expressly advocate conduct that is illegal and harmful to students, nor does it violate school rules. It is thus, in his view, protected under the 1st Amendment.

Chief Justice John Roberts made his argument as follows:

"Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" […] At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (pg. 3)

"At the outset, we reject Frederick's argument that this is not a school speech case – as has every other authority to address this question. The event occurred during normal school hours. It was sanctioned by Principal Morse…" (pg. 4)

"Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one" (pg. 4)

"The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may." (pg. 4)

"Morse had to decide to act – or not to act – on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers" (pg. 5)

***Snyder v. Phelps* (2010), E-reserves**

Summary: Members of the Westboro Baptist Church, located in Topeka Kansas, decided to picket the funeral of Marine Lance Corporal Matthew Snyder, which was held in his hometown of Westminster, Maryland. The Church's picket signs reflected its view that the US is tolerant of sin and that God kills American soldiers as punishment. They complied with authorities and remained at least 200 feet from the funeral procession. Snyder filed suit against the church; a jury found for Snyder and awarded him compensatory and punitive damages, and the US District Court for the District of Maryland under federal diversity jurisdiction, upheld the jury decision. The Court of Appeals for the 4th Circuit reversed, finding that the picket signs were protected under the 1st Amendment. The Supreme Court, with Chief Justice Roberts writing the majority opinion, upheld the Appeals Court ruling, finding that the Westboro Baptist Church's pickets were entitled to 1st Amendment protection. Specifically, because they related to issues of public, rather than private, concerns, they received heightened protection. Further, because the Church did not disrupt the funeral and complied with authorities, no tort liability could be held against the Church.

Other Notes:

Justice Alito dissented, arguing that "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case" (pg. 5).

Chief Justice Roberts made his argument as follows:

"Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern […] where matters are of purely private significance are at issue, First Amendment protections are often less rigorous […] The

"content" of Westboro's signs plainly relate to broad issues of interest to society at large" (pgs. 2-3).

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case" (pg. 4)

***New York Times v. Sullivan* (1964), pg. 853**

Summary: The case required resolving, for the first time, the question of whether the 1st Amendment protections on freedom of speech and press could limit a State official's power to sue for libel against critics of his conduct. Specifically, Sullivan was one of three elected Commissioners in Montgomery, AL, who sued the New York Times and four petitioners, black clergymen in Alabama, for libel based on a full-page advertisement the petitioners authored that was published in the New York Times. Although the advertisement did not mention Sullivan by name, it did refer to police brutality, and as a Commissioner charged with supervising police, Sullivan took the ad to implicate him directly. A jury awarded $500,000 in damages to Sullivan, and the Alabama Supreme Court affirmed, finding that the advertisement was not protected under the 1st Amendment. Associate Justice Brennan, delivering the Supreme Court majority opinion, reversed the Alabama Supreme Court's ruling, finding that its holding did not provide the safeguards for freedom of speech and the press required by the 1st and 14th amendment in a libel action brought by a public official against critics of his official conduct. It further struck down an Alabama law as unconstitutional which made a publication libelous per se if its words "tend to injure a person… in his reputation" or to bring him into "public contempt" (pg. 855).

Other Notes:

Associate Justice Brennan made his argument as follows:

"The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments" (pg. 856).

"The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its actual statements and by its alleged defamation of respondent […] If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate" (pg. 857).

"Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal law"" (pg. 858).

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (pg. 859).

"We consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands […] We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent" (pg. 859).

VI. Equal Protection

***Plessy v. Ferguson* (1896), pg. 1339**

Summary: This is one of the most despised Supreme Court decisions of all time, representing a betrayal of the Equal Protection Clause of the 14th amendment as intended by its framers and the SCOTUS' early interpretations of the amendment in the *Slaughterhouse* case. The case concerned the constitutionality of the 1890 Louisiana Separate Car Act, which required separate accommodations for blacks and whites on railroads. Homer Plessy, as part of the Committee of Citizens of New Orleans who disagreed with the law, participated in an orchestrated test case of the law. He boarded a "whites only car," and he was then taken off the train. The Supreme Court of Louisiana ruled against Plessy and upheld the constitutionality of the Act. The Supreme Court, under Associate Justice Brown, affirmed the Louisiana Supreme Court decision and the constitutionality of "separate but equal" laws. It argued that "separate but equal" laws were reasonable and do not imply the inferiority of one race to another, and thus are in accordance with the Equal Protection Clause of the 14th amendment. The SCOTUS is powerless, if social inequalities exist between the races, to do anything about it; all it could ensure is political and legal equality, which "separate but equal" laws accomplished.

Other Notes:

The lone dissenting Justice was Associate Justice Harlan. He argues that the judiciary and the legislature have not right or basis to regard to the race of citizens when their civil rights are concerned, and that it is clear that the Louisiana Act meant to exclude black people from white cars, and institutionalize discrimination. The US Constitution is color-blind, and clearly the majority decision is not so. He presciently says: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*." (pg. 1343).

The ruling was based much on current customs, namely "the established usages, customs, and traditions of the people… with a view to the promotion of their comfort, and the preservation of the public peace and good order" (pg. 1345)

Associate Justice Brown made his argument as follows:

"That [the Act] does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument." (pg. 1339)

"A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude" (pg. 1339).

"The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things is could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality…" (pg. 1340).

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question of whether the statute of Louisiana is a reasonable regulation […] we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable…" (pg. 1341)

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race choses to put that construction upon it" (pg. 1341)

"If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane" (pg. 1341).

Brown v. Board of Education I **(1955), pg. 1360**

Summary: Brown was one of a number of cases that the NAACP, under Thurgood Marshall, used to try to chip away at the "separate but equal" doctrine enshrined in *Plessy*. Speaking for a unanimous court, Chief Justice Warren did not quite overrule *Plessy,* but it made it pretty much irrelevant. It did not quite adopt the view of Justice Harlan's dissent in *Plessy*, namely of a colorblind constitution, but it declared "separate but equal" a violation of the Equal Protections Clause in the 14th Amendment in the context of public education. In its wake, courts struck down racial segregation in most other contexts, including transportation, golf courses, public places, and marriage (see *Loving v. Virginia*, legalizing interracial marriages*)*. *Brown* thus restored the constitutional guarantee of equal protection of the laws to the place it held following the promulgation of the Reconstruction amendments, as illustrated by the *Slaughterhouse* and *Strauder* cases, and closed the 50+ year reign of *Plessy.*

Brown is actually a composite case, a consideration of cases from Kansas, South Carolina, Virginia, and Delaware. The similarities of the questions implicated, namely the constitutionality of "separate but equal," justified their being considered together. Chief Justice Warren argued that the place of "separate but equal" in public education must be considered in the present

context, and that the clocks cannot be turned back to the time of *Plessy* or to 1868 when the 14th amendment was adopted. He argued that, in the present context and given increased research on how education affects children's development, "separate but equal" generates a feeling of inferiority in black students that can adversely impact their development. This is an objective fact, not a subjective construction imposed upon the law, as *Plessy* argued. "Separate educational facilities are inherently unequal" (pg. 1362).

Other Notes:

Note that the question of remedy was put off until a year later, in *Brown v. Board of Education II* (1955).

Chief Justice Earl Warren made his argument for the unanimous court as follows:

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws" (pg. 1361).

"Today, education is perhaps the most important function of state and local governments […] demonstrate our recognition of the importance of education to our democratic society […] It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment" (pg. 1361).

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does" (pg. 1362)

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hears and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group"" (pg. 1362)

"Any language in *Plessy v. Ferguson* contrary to this finding is rejected. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment" (pg. 1362).

***Bolling v. Sharpe* (1954), pg. 1363**

Summary: This case is a companion to down that considered the constitutionality of segregation in public schools in the District of Columbia, but not under the 14th Amendment's Equal Protection Clause, but under the 5th Amendment's Due Process Clause. This is because the 14th Amendment only applies to the States (the District of Columbia is not a state), so the petitioners relied on the 5th Amendment instead. Chief Justice Earl Warren, writing for a unanimous court, argued that it would be unthinkable for the standards that apply to the states do not also apply to the Federal Government, and thus racial segregation in public schools is an arbitrary deprivation of black people's liberty, protected under the Due Process Clause of the 5th Amendment. In such situations, the government has to show a compelling state interest in the deprivation of liberty, which it fails to show.

Other Notes:

Chief Justice Earl Warren made his argument as follows:

"The Fifth Amendment, which is applicable to the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws' is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process" (pg. 1363).

"Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect" (pg. 1363).

"Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause" (pg. 1364)

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution" (pg. 1364).

***Grutter v. Bollinger* (2003), pg. 1389**

Summary: This case challenged the constitutionality of the University of Michigan Law School's admission standards of providing candidates of racial minorities an unquantifiable bonus in order

to build a diverse entering class of students. The Supreme Court, under Associate Justice O'Connor, narrowly upheld (5-4) the Law School's "unquantified" and holistic bonus for minority candidates. Barbara Grutter was a white Michigan resident who applies to the Law School with a 3.8 GPA and a 161 LSAT score. She was waitlisted and subsequently rejected. She sued arguing that race was the predominant factor in law school admission, requesting compensatory and punitive damages, an order requiring her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. Federal District Court sided with Grutter, the Court of Appeals reversed the ruling, and the SCOTUS affirmed the Court of Appeals' decision. Associate Justice O'Connor began by reaffirming Associate Justice Powell's majority opinion in the *Bakke* case, which held that promoting diversity is a compelling interest in admission decisions. She held that student body diversity is a compelling state interest that can justify a holistic use of race in university admissions. It thus maintained the *Bakke* precedent that a quota or point system is unconstitutional. Curiously, O'Connor predicts that 25 years from the ruling, race-based preferences will no longer be required to satisfy the compelling state interest in having a diverse student body.

Other Notes:

Note that this was a companion case to *Gratz v. Bollinger*, which challenged the University of Michigan's undergraduate admission "point system," which awarded a bonus of 20 points (out of 100) to racial minority candidates. In that case, the policy was struck down by a 6-3 majority.

Dissents by Associate Justices Scalia and Thomas argued that race has no place, holistically or otherwise, in admission decisions. Scalia called the program a "sham," and Thomas called it discrimination. Chief Justice Rehnquist and Associate Justice Kennedy also dissented.

Associate Justice O'Connor makes her argument as follows:

"[T]oday we endorse Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions" (pg. 1392).

"When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied…" (pg. 1392)

"Today, we hold that the Law School has a compelling interest in attaining a diverse student body" (pg. 1392).

"To be narrowly tailored, a race-conscious admissions program cannot use a quota system… Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats […]We find that the Law Schools' admissions program bears the hallmarks of a narrowly tailored plan […] the Law School engages in a highly individualized, holistic review of each applicants file…" (pg. 1394)

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education… We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today…" (pg. 1395)

***United States v. Virginia [Military Institute]* (1996), pg. 1416**

Summary: Virginia Military Institute was a public, all-male military college in Virginia. The United States brought suit alleging that the Constitution's Equal Protection Clause in the 14th Amendment precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. The Fourth Circuit sided with the United States and offered to establish several remedies: admitting women to the VMI, establishing parallel institutions or programs, or privatizing the school. Virginia thus proposed a separate school for women, but one that did not offer the same curricular and pedagogical opportunities as the VMI. Associate Justice Ginsburg delivered the majority opinion, agreeing that the VMI's men-only admission policy violates the Equal Protection clause, and arguing that Virginia's plans of establishing a separate school did not alleviate the violation. Ginsburg then notes that gender-based government action is subject to strict scrutiny and must demonstrate an exceedingly persuasive justification. Ginsburg argues that the VMI's goal of producing citizen-soldiers, and its adversative method (inculcating physical and mental discipline via constant challenge), is not inherently unsuitable to some women. Inherent differences between men and women cannot be used to denigrate or limit the opportunities of one or the other. Virginia also failed to persuasively make the case that the male-only policy contributes to the diversity of educational opportunities in the state. Ginsburg concludes that Virginia failed to demonstrate an exceedingly persuasive justification for excluding all women from the citizen-soldier training of the VMI. And, given that the proposed all-women alternative does not provide an equal opportunity for women, such a remedy, as suggested by the Fourth Circuit, would not remedy the constitutional violation.

Other Notes:

Associate Justice Scalia's dissent argues that "To achieve that desired result, [the majority ruling] rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this court, and ignores the history of our people […] it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government." (pg. 1421).

Associate Justice Ginsburg makes her argument this way:

"Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action." (pg. 1418)

"Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection clause when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve,

participate in and contribute to society based on their individual talents and capacities." (pg. 1418)

"The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (pg. 1418)

""Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." (pg. 1419)

"In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity'." … However "liberally" this plan serves the Commonwealth's sons, I makes no provision whatever for her daughters. That is not equal protection." (pg. 1420)

"Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification'" […] that must be the solid base for any gender-defined classification" (pg. 1420).

"[the proposed all-women alternative institution] affords women no opportunity to experience the rigorous military training for which VMI is famed." (pg. 1421)

"It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future"" (pg. 1421).

Buck v. Bell **(1927), pg. 1428**

Summary: The case concerned whether a superintendant of a mental hospital could mandate the forced sterilization of mentally challenged patients after a careful review under the Fourteenth Amendment's Equal Protection Clause and Due Process Clause. Carrie Buck was a mentally challenged white woman, daughter of a mentally challenged woman, and the mother of an illegitimate mentally challenged child. All three were residing in a Virginia mental health facility. The facility's superintendent conducted an extensive review and then ordered Carrie Buck to be forcibly sterilized via a procedure known as "salpingectomy" – the cutting on the fallopian tubes. Associate Justice Holmes delivered the disturbing majority opinion. Holmes begins by nothing the extent of the superintendent's review, concluding from this that Carrie Buck's Due Process rights under the 14th amendment had been safeguarded. Thereafter, he argues that because the sterilization of Buck was meant to safeguard the public welfare, somehow it does not violate Buck's rights under the Equal Protection Clause. Holmes' ruling includes the now infamous statement: "Three generations of imbeciles are enough" (pg. 1430).

Other Notes:

Victoria Nourse has argued that the case has "the highest ratio of injustice per word ever signed on to by eight Supreme Court Justices, progressive and conservative alike." (pg. 1430).

Associate Justice Holmes makes his argument as follows:

"There can be no doubt that so far as procedure is considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law." (pg. 1429)

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped by incompetence." (pg. 1429)

"The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes […] Three generations of imbeciles are enough" (pg. 1430).

***Romer v. Evans* (1996), pg. 1432**

Summary: Follows a series of ordinances by Colorado cities enshrining protections on persons based on sexual orientation, in 1992 Colorado adopted a nationwide referendum, referred to as "Amendment 2," which amended the state constitution. Amendment 2 prohibited all legislative, executive, and judicial actions at any level of state or local government designed to protect homosexual persons. The State Supreme Court held that the Amendment was subject to strict scrutiny under the 14th Amendment's Equal Protection Clause, and that it violated said clause. The Supreme Court, under Associate Justice Kennedy writing for the majority, affirmed the State Supreme Court's ruling. Kennedy argues that Amendment 2 withdraws rights from a specific class of citizens that everyone else enjoys. Amendment 2 is both too narrow (in targeting a specific class of citizens) and too broad (in the extent of the rights it withdraws from them). Far from preventing the provision of "special rights" for gays and lesbians, the Amendment withdraws from them ordinary rights guaranteed to all Americans by the Equal Protection Clause. As a result, Amendment 2 fails the "rational basis" test (that a law should bear a rational relationship to a legitimate governmental purpose) for it could only have been adopted with animus- the intent to make homosexuals unequal to everyone else.

Other Notes:

Associate Justice Scalia delivered the dissent (with whom Associate Justice Thomas and Chief Justice Rehnquist joined). He argued that "[t]his court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" towards homosexuality is evil." (pg. 1437). He adds that "[t]he Colorado amendment does not, to speak entirely precisely, prohibit it giving favored status to people who are homosexuals; they can be favored for many reasons- for example,

because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct – that is, it prohibits favored status for homosexuality." (pg. 1439).

Associate Justice Kennedy makes his argument as follows:

"The amendment withdraws from homosexuals, but from no others, specific legal protection from the injuries caused be discrimination, and it forbids reinstatement of these laws and policies." (pg. 1433)

"Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. […] Not confined to the private sphere, Amendment 2 also operates to repeal or forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government" (pg. 1434).

"[W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability on those persons alone […] We find nothing special in the protections Amendment 2 withholds. These are protections takes for granted by most people either because they already have them or do not need them; these are protections against exclusion rom an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." (pg. 1435)

"[W]e will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." (pg. 1435)

"[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." (pg. 1436)

"We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause." (pg. 1437)

VII. Property and Contract

***Munn v. Illinois* (1877), E-reserve**

Summary: In 1870, Illinois adopted a new constitutional text which declared grain elevators (huge storage facilities for wheat and other grains) to be "public warehouses" and authorized the legislature to regulate business engaged in grain storage. In 1871, the Illinois legislature passed a regulatory act that required licenses to operate grain elevators and that fixed charges for storage. Munn and Scott was a firm that was fined $100 for violating the statute. The firm later went bankrupt for other misdealings. However, its successors sued claiming that the state had deprived them of property without due process as enshrined in the 14th Amendment. The Supreme Court, under Chief Justice Waite writing for the majority, upheld the Illinois statute. Waite argued that from the common law, there existed a principle that when private property is affected by a public interest, it ceases to be exclusively *juris privati*. Further, Supreme Court precedent indicated that statutes regulating the use or price of use of private property did not necessarily deprive an owner of his property without due process of law, if the property was subject to a public interest. Waite argues that there is little reason why grain elevators, which stand at the "gateway of commerce" do not implicate a public interest. As a result, the Illinois statute must be allowed to stand and does not violate the 14th Amendment's Due Process Clause.

Other Notes:

Associate Justice Field dissented from the ruling, arguing that "[t]he principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property" (pg. 4). He adds that "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature" (pg. 5). He concludes with the memorable phrase: "The decision of the court in this case gives unrestricted license to legislative will."

Chief Justice Waite made his argument as follows:

"[I]t is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law." (pg. 3).

"Looking … to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris private* only." (pg. 3)

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good." (pg. 3)

"Under such circumstances, it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-

coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error, do not. They stand… in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." (pg. 4).

"There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner" (pg. 4)

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts" (pg. 4)

***Nebbia v. New York* (1934), E-reserve**

Summary: The case concerned the constitutionality of a New York Statute, under the 14th amendment's equal protection and due process clauses, which established a Milk Control Board that fixed minimum and maximum retail prices for milk sold in retail stores. Nebbia, the proprietor of a grocery store in Rochester, was convicted for violating the Board's order. The Supreme Court, under Associate Justice Roberts who delivered the majority opinion, quickly dismissed the equal protection challenge to the statute, and focused on whether a violation of the Due Process clause had occurred. Roberts asserts that the legislature has the authority to regulate the economy to promote public welfare, and so long as the legislation has a reasonable relation to a proper legislative purpose, then the Due Process Clause is satisfied. Roberts concludes that the Milk Control Board's order meant to curb unrestrained and harmful competition by non-arbitrary or discriminatory measures, and it is not within the Court's competences to determine whether or not the rule is unwise. As a result, Roberts upholds the order to be in compliance with the 14th Amendment's Due Process and Equal Protection clauses.

Other Notes:

Associate Justice McReynolds dissented, arguing that "if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution." (pg. 4).

Note that *Nebbia* was one of a series of judgments that sought to lay *Lochner* to rest – to move substantive due process readings of the 14th amendment and defer to state legislative majorities.

Associate Justice Roberts made his argument as follows:

"But neither property rights not contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest." (pg. 3).

"[A] state is free to adopt whatever economic policy may reasonable be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such a policy, or, when it is declared by the legislature to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio" (pg. 3).

"[I]t is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal… Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question" (pg. 3).

Hawaii Housing Authority v. Midkiff **(1984), E-reserve**

Summary: The case concerns the constitutionality of the 1967 Land Reform act, passed by the Hawaii legislature, under the 14th Amendment's Due Process Clause and 5th Amendment's Public Use Clause. In Hawaii, 72 people owned more than 90 percent of the privately owned land, and most of them leased the land to those wishing to build their homes on it. The Act authorized the Hawaii Housing Authority to respond to demands by people leasing the land on which they lived to condemn the land occupied by single family homes, pay the land owner(s) a fair price negotiated by arbitration of negotiation, and to resell the land to the home owners at the purchase price, so long as no person could purchase more than a single lot. The legislature argued that the land oligopoly in the state was inflating real estate prices. Midkiff was the owner of a large plot of land being leased out, and he refused to negotiate the selling of the land to his lessees. He sued in District Court, where the statute was held to be constitutional; the Court of Appeals for the 9th Circuit reversed the District Court ruling. Speaking for the majority, Supreme Court Associate Justice O'Connor reversed the 9th Circuit ruling, holding that the Act was compliant with the 14th Amendment and 5th Amendment. The Court, wrote O'Connor, cannot substitute its judgment for that of the legislature as to what constitutes "public use" unless the legislature is acting clearly without reasonable foundation. The Act was not irrationally seeking to correct the land oligopoly problem in Hawaii- it was enacting a rational approach to identifying and correcting a market failure, and it is not in the purview of the Supreme Court to pass judgment on the efficacy or wisdom of the statute. O'Connor rejected the claim that just because property was being taken from private party and transferred to other private parties does not imply that there is no public purpose being satisfied.

Other Notes:

Note that the 14th Amendment does not contain an independent "public use" requirement; that requirement is made binding on the states by the incorporation of the 5th Amendment's Eminent Domain Clause through the 14th Amendment's Due Process Clause.

Associate Justice O'Connor made her argument as follows:

"The "public use" requirement is thus coterminous with the scope of a sovereign's police powers […] the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation" (pg. 2).

"[Where] the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause" (pg. 2).

"We cannot disapprove of Hawaii's exercise of this [police] power. Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices, the land market is malfunctioning […] This is a comprehensive and rational approach to identifying and correcting market failure." (pgs. 2-3).

"The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." (pg. 3).

"The Act advances its purposes without the State taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." (pg. 3)

"[I]f a legislature, state or federal, determines that there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." (pg. 3).

***Kelo v. New London* (1984), pg. 1250**

Summary: In 2000, the city of New London, CT approved an economic development plan to revitalize a part of town, the Fort Trumbull area. The respondent in the case was the New London Development Corporation (NLDC), a private nonprofit entity established several years before the case to assist the City. The NLDC developed a comprehensive plan, and the city council authorized it to purchase property or acquire property via exercising eminent domain. The NLDC failed to negotiate with the petitioner, Susette Kelo, and others, and thus initiated the condemnation proceedings that produced this case. The properties were not blighted- they were condemned because they were located in the Fort Trumbull development area. The Supreme Court, under Associate Justice Stevens who delivered the majority holding, upheld the constitutionality of the development program under the 14th Amendment's Due Process Clause in conjunction with the 5th Amendment's Eminent Domain Clause. He argued that the area was sufficiently economically distressed to justify the economic rejuvenation plan, satisfying the public use requirement of the 5th Amendment. While the development plan would not provide amenities literally open to the general public (some of the new residences would be private),

Stevens argues that the public use requirement should be defined very broadly. Legislatures must be afforded broad latitude in determining which public needs justify leveraging the takings power via eminent domain.

Other Notes:

Associate Justice O'Connor, joined by Chief Justice Rehnquist, Associate Justices Scalia and Thomas, argued that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public" (pg. 1254). O'Connor would argue that all economic development takings are unconstitutional, because the private benefit and incidental public benefit "are, by definition, merged and mutually reinforcing" (pg. 1255).

Associate Justice Stevens makes his argument as follows:

"Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example." (pg. 1252).

"[T]he City's development plan was not adopted "to benefit a particular class of identifiable individuals." On the other hand, this is not a case in which the City is planning to open the condemned land- at least not in its entirety- to use by the general public […] this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." (pg. 1252).

"For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power […] Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." (pg. 1253)

"Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment" (pg. 1253).

"This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative action to that question, we may not grant petitioners the relief that they seek" (pg. 1253).

***St. Joseph Abbey v. Castille* (5th Circuit) (2011), E-reserve**

Summary: St. Joseph Abbey, a Louisiana Abbey of the Benedictine Order of the Catholic Church, challenged as unconstitutional a regulation issued by the Louisiana State Board of Funeral Directors granting funeral homes the exclusive right to sell caskets. For decades, the Abbey would construct wooden caskets to bury its monks, and it also set up a service providing wooden caskets for others in the community at prices lower than those offered by funeral homes. The Abbey, however, does not provide funeral services. In 2007 the Board ordered the Abbey to cease selling caskets, and being unable to persuade the legislature to alter the regulation, the Abbey sued in district court. The Board argued that the rules insulating funeral directors from competition were rationally related to the State's legitimate interest in regulating the funeral profession, as well as public health, safety, and consumer welfare. Federal District Court found the State Board's regulation to be the last of its kind in the nation, and held that the regulation denies equal protection and due process under the 14th Amendment. The US Federal Court of Appeals for the 5th Circuit, under Circuit Judge Higginbotham, affirmed the District Court's judgment. With regards to consumer protection, he concludes that the exclusive right of sale does nothing to protect consumers, and places them at risk of inflated prices. Regarding public health, Higginbotham points out that Louisiana does not even require a person to be buried in a casket, so the claim is implausible. Regarding economic regulation, Higginbotham argues that the Board's rules amount to the taking of wealth from some and handing it to others – a form of economic protectionism of the "rulemakers' pockets", not the public welfare (pg. 9).

Other Notes:

Circuit Judge Higginbotham makes his argument as follows:

"That grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices" (pg. 8).

"Relatedly, we find that no rational relationship exist between public health and safety and restricting intrastate casket sales to funeral directors […] That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments" (pg. 8).

"The principle we protect from the hand of the State today protects an equally vital core principle- the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as "economic" protection of the rulemakers' pockets" (pg. 9).

"The funeral director have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none." (pg. 9).

VIII. Bodily Integrity, Sex, Marriage, and Abortion

***Jacobson v. Massachusetts* (1905), E-reserve**

Summary: The Massachusetts legislature had authorized localities to require vaccinations when such measures were deemed necessary to preserve public health. After an outbreak of smallpox, in 1902 Cambridge, MA ordered the compulsory vaccination of all its residents. Jacobson, a resident of the city, refused and was prosecuted. Jacobson argued that he and his son had experienced becoming seriously ill in response to a vaccine in the past, and that compelling him to receive it violated the spirit and preamble of the constitution. The trial court found him guilty, the state appellate courts affirmed the decision. Jacobson then appealed to the Supreme Court. The Supreme Court, under Associate Justice Harlan who delivered the majority opinion, upheld the Cambridge order, dismissing Jacobson's claims. Harlan first argued that the preamble is not a legally enforceable provision of the Constitution, and that while the spirit of the constitution protects individual liberty, it is not proper for the Court to strike down legislation seeking to promote the general welfare (in this case, public health) unless the legislation has no relation to this aim, or unless it so clearly violates the Constitution that judges must step in.

Other Notes:

Associate Justice Harlan made his argument as follows:

"Although the Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments…" (pg. 4).

"Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in Sturges v. Crowninshield [1819], "the spirit of an instrument, especially of a constitution, is to be respected no less than its letter, yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words..." (pg. 4).

"[I]t is equally true that in every well-ordered society… the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restrained, to be enforced by reasonable regulations, as the safety of the general public may demand" (pg. 4).

"If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution" (pg. 5).

"While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it

should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law" (pg. 5).

***Loving v. Virginia* (1967), pg. 1373**

Summary: The case extended the principle of *Brown* to marriage for the first time, legalizing interracial marriage. The Lovings were an interracial couple married legally in the District of Columbia who then set up their residence in Virginia. In 1958, the Lovings were indicted and prosecuted by the Circuit Court of Caroline county for violating Virginia's statutory ban on interracial marriages (15 other states had similar statutes in the books). The trial judge suspended the sentence so long as the Lovings relocated to the District of Columbia. The Lovings relocated then asked the trial judge to set aside the sentence on the grounds that the Virginia antimiscegenation statutes violated the Equal Protection and Due Process Clauses of the 14th Amendment. The trial judge refused; the Lovings appealed to the Supreme Court of Appeals of Virginia, which upheld the constitutionality of the statutes, and also affirmed the convictions of the Lovings. The Supreme Court, under Chief Justice Warren, argued that just because the penalties of interracial marriage bans are equally distributed on the parties does not mean that the statute automatically complies with the Equal Protection clause. Since the statutes use racial classifications, they are subject to the highest scrutiny by the Court. Warren concludes that the statutes do not have a legitimate overriding purpose – instead, they are motivated by invidious racial discrimination which seeks to maintain White Supremacy. The statutes also violate the Due Process Clause of the 14th Amendment, since they deprive its citizens of the freedom to marry without due process of law.

Other Notes:

Chief Justice Warren makes his argument as follows:

"Because we reject the notion that the mere "equal application" of a statute containing racial classification is enough o remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they should be upheld if there is any possible basis for concluding that they serve a rational purpose" (pg. 1375).

"At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny" […] and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." (pg. 1376).

"There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy […] There can be no

doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" (pg. 1376).

"These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom of marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men […] To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." (pg. 1377).

"Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State. These convictions must be reversed." (pg. 1377).

***Bowers v. Hardwick* (1986), pg. 1552**

Summary: This is the first case dealing with the question of whether sexual activity between people of the same sex is constitutionally protected by the Due Process clause of the 14th Amendment. The interpretative approach in this case is to not invoke the Due Process Clause substantively to recognize a new right. This case stands in contrast with *Lawrence v. Texas* (2003), which did the opposite. In 1982, Hardwick was charged with violating a Georgia statute criminalizing sodomy (defined as non-procreative sex between two persons of the same gender) by having consensual sex with another man in his own home. The District Attorney then decided to hold off on prosecuting while further evidence was gathered. In the meantime, Harwick brought suit in Federal District Court, challenging the constitutionality of the Georgia statute. The Court of Appeals found that homosexual sodomy is constitutionally protected by a right of privacy found in the 14th Amendment's Due Process clause. The Supreme Court, under Associate Justice White, reversed the Appeals Court ruling, holding that homosexual sodomy is not protected by the 14th Amendment. First, White argued that proscriptions against the conduct have ancient roots, so that laws against homosexual sodomy are embedded in American tradition. 24 states at the time of the holding had similar statutes in the books criminalizing sodomy, and in 1961 all 50 states had such statutes. White also argued that just because the act took place at home does not mean it is protected by the constitution; otherwise other crimes like adultery and incest would be free from prosecution just because of where they were committed. White also found that the attempt to protect what Georgia perceived to be public morality was a rational basis for the statute.

Other Notes:

Associate Justice Blackmun was joined by Justices Brennan, Marshall, and Stevens in his dissent. He argued that this case was about ""the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone"" (pg. 1555). Blackmun concluded that "The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to

recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others" (pg. 1556). Blackmun argues that the 4th Amendment, as applied to the States via the Due Process Clause of the 14th Amendment, recognizes a fundamental right of privacy of persons in their own homes. Finally, he adds that "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus" (pg. 1557).

Associate Justice White made his argument as follows:

"It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots […] Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause." (pg. 1554).

"And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road." (pg. 1554).

"The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis" (pg. 1554).

Lawrence v. Texas **(2003), pg. 1557**

Summary: This case went where *Bowers v. Harwick* did not by striking down a Texas anti-homosexual sodomy statute and recognizing a Constitutional protection of homosexual sodomy under the right of privacy protected by a substantive reading of the 14th Amendment's Due Process Clause (thereby overturning *Harwick*). The parallel between this case and *Loving v. Virginia* is fairly stark; in both cases, the state in question unsuccessfully justified their statute on religious-moral grounds and in the fact that the conduct in question was not approved of at the time of the 14th Amendment's passage. In Houston, the Harris County Police department was dispatched to the private residence of John Lawrence in response to a weapons disturbance; the police entered (their right to do so was not questioned) and found Lawrence having sex with another man. Both were arrested and charged before a Justice of the Peace for violating Texas' anti-sodomy statute. Each were fined $200. Writing for the majority, Associate Justice Kennedy argued that the 14th Amendment's Due Process Clause protects the rights of individuals to engage in private consensual sex, even with persons of the same sex, and States attempting to regulate such behavior commit a fundamental violation of individual liberty. He further argued that in American history, laws prohibiting sodomy were seldom targeted at homosexuals as such,

and were seldom enforced if the act took place in a private residence. Strikingly, Kennedy makes reference to foreign law: to the British Parliament decriminalizing sodomy in 1967; to a similar case before the European Court of Human Rights, where the Court held that the Irish anti-sodomy statute violates the European Convention on Human Rights. As such, Kennedy argued that there is little evidence that Western tradition accords with the criminalization of homosexual sodomy. Kennedy further argued that the number of US states still enforcing laws criminalizing sodomy had been reduced to 4. Anti-sodomy laws further denigrate homosexuals and invite further discrimination.

Other Notes:

Associate Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, delivered the dissent. He begins by noting that the Court's liberty-focused rational basis review "will have far-reaching implications beyond this case" (pg. 1565). He notes that the same logic applied to overrule *Bowers* could equally be used to overrule *Roe v. Wade.* He notes that there exists no general right to liberty under the 14th Amendment's Due Process Clause. He adds that "This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above mentioned laws can survive rational-basis review." (pg. 1568). He concludes that "persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else" (pg. 1569). His most prescient statement argues that the case opens the doors to same-sex marriage: "the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons enter." Do not believe it […] If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so" pg. 1570).

Associate Justice Kennedy makes his argument as follows:

"[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." (pg. 1560).

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres […] The stigma this criminal statute imposes, moreover, is not trivial" (pg. 1562).

"To the extent *Bowers* relied on values we share with wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has [not followed] *Bowers* … Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." (pg. 1562).

"*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." (pg. 1563).

"The case does involve two adopts who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government" (pg. 1563).

"Had those who drew and ratified the Due Process Clauses of the Fifth Amendment and Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They new times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom…" (pg. 1563).

***Roe v. Wade* (1973), pg. 1500**

Summary: Roe v. Wade represents another application of substantive due process (under the 14th Amendment's Due Process Clause). The statute in question was a Texas statute criminalizing abortion unless in cases where the abortion is motivated by the purpose of saving the life of the mother. Jane Roe (a pseudonym) initiated the case in Federal District Court in 1970 against the district attorney of Dallas, seeking a declaratory judgment that the Texas statute was unconstitutional under the 1st, 4th, 5th, 9th, and 14th Amendments. Roe was unmarried and pregnant and wished to terminate her pregnancy via abortion administered by a physician. The District Court found the statute violated the 9th Amendment. Delivering the Supreme Court's majority opinion, Associate Justice Blackmun struck down the Texas statute as an unconstitutional violation of a person's right of privacy found in the substantive Due Process Clause of the 14th Amendment. Blackmun argues that the Court has recognized a constitutional right to privacy in the Due Process Clause to cover behavior deemed "fundamental" or "implicit in the concept of ordered liberty." Blackmun finds that this right to privacy extends to a woman's decision over whether or not to terminate her pregnancy, and denying such rights could impose serious costs on the woman. Yet Blackmun finds that the right to an abortion is not unqualified, and that there exists an important state interest in regulating abortion. He adds that although the Constitution does not explicitly define legal personhood, all Constitutional rights have generally been seen as applying to persons who were already born, and subsequently there exist no constitutional rights for the unborn. Blackmun also provides examples of appropriate regulations for abortion (which can only be constitutionally enacted if they apply to the fetus after the first trimester).

Other Notes:

The dissent was delivered by Associate Justice White, and was joined by Justice Rehnquist. White states: "With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes" (pg. 1510). He adds that "[a]s an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this court. […] This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs…" (pg. 1510).

Associate Justice Blackmun made his argument as follows:

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, … the Court has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution […] These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." (pg. 1503).

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court Determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." (pg. 1503).

"We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation…" (pg. 1504).

"The Constitution does not define "person" in so many words [review of where the word "person" is used in the Constitution] But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application. All this […] persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn." (pg. 1505).

"With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester […] It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or

may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like. This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (pg. 1506).

***Planned Parenthood v. Casey* (1992), pg. 1516**

Summary: This case reaffirmed *Roe*'s establishment of a constitutional right to abortion (despite the fact that a majority of justices seemed to think that *Roe* was wrongly decided) during a time period when most constitutional scholars expected *Roe* to undergo a slow, *Lochner*-like decline. It strongly and elaborately embraced *stare decisis*, and in so doing provided perhaps the first full-blown theory of precedent in the Court's history. To signify its importance and elaborate nature, the majority holding was jointly delivered by Associate Justices O'Connor, Kennedy, and Souter. The case concerned the constitutionality of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989, which 1) required a woman seeking an abortion to provide her consent prior to the procedure; 2) the informed consent of parents/guardians if a minor was seeking the abortion; 3) required married women to sign a statement that their husbands had been notified; 4) exempts the foregoing requirements in case of a medical emergency. The Justices reaffirmed the right of a woman to choose to have an abortion before viability without State interference, as protected by the 14th Amendment's Due Process Clause; after fetal viability, the State retains the power to regulate or restrict abortion so long as exceptions are made concerning the woman's health; that the state retains legitimate interest from the outset of the pregnancy in protecting the woman's health and the life of the fetus. Despite much criticism of *Roe*, it has not proven "unworkable"; no new legal principles have weakened the doctrinal footing of *Roe*; and its medical and factual underpinning remains unchanged. Precedential force and reliance is particularly important in politically controversial cases, since efforts may be made to not comply; as such, deference to precedent in this case is particularly important. Yet the holding does note that the State can undertake efforts to inform the woman of alternatives and the philosophical debates regarding the decision to have an abortion before viability (thereby rejecting *Roe*'s trimester framework). States can regulate abortions before viability because they have an interest in potential life, and so long as they do not impose an "undue burden" on the woman. Finally, the Justices turn to the constitutionality of the Pennsylvania law: the Supreme Court upheld the Court of Appeals decision of ruling all Pennsylvania law components constitutional except for the requirement that married women sign a statement that they have notified their husbands and achieved their consent before undergoing the procedure.

Other Notes:

Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, delivered the first partial dissent. Rehnquist would uphold the Pennsylvania statute in its entirety and overrule *Roe* in a manner deemed to be consistent with *stare decisis*. Abortion is not a fundamental right, according to Rehquist, and the abortive decision, unlike other rights (to marry, to contraceptives) protected under the "right of privacy" do not involve the parallel destruction of life, rendering

abortion *sui generis*. He adds that "While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continued to exist, but only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality" (pg. 1536). Further, "there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered" (pg. 1537). He adds that even if people order their lives according to a precedential decision, if it is wrong (see *Plessy* and *Lochner*) the Court has rightfully not shied away from revising said precedent. With respect to the legitimacy of the Court needing to be protected in controversial cases, Rehnquist notes that "[t]his is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the original decision has died away" (pg. 1538). Rehnquist adds that it is often unclear which cases are intensely divisive and which are not, and that judges should not decide this subjective characterization. Further, the Court has a duty to ignore public opinion in cases coming before it. Political pressure can be perceived to have influenced the Court whether or not it upholds a controversial precedent, and indeed "the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition" (pg. 1539).

Associate Justice Scalia, with whom Chief Justice Rehnquist and Justices White and Thomas joined, delivered the second partial dissent. Pronouncing that "[t]he Imperial Judiciary lives," he adds that the Court's interpretation of *stare decisis* is new, boiling down to "keep-what-you-want-and-throw-away-the-rest" (pg. 1539). He notes that "[a]mong the five justices who purportedly adhere to *Roe*, at most three agree upon the principle that constitutes adherence […] two of the three, in order thus to remain steadfast, had to abandon previously stated positions" (pg. 1539). He adds that "I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced – against overruling, no less – by the substantial and continuing public opposition the decision has generated" (pg. 1539). He concludes that "[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining" (pg. 1540).

Associate Justices O'Connor, Kennedy, and Souter made their argument as follows:

"Some of us find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." (pg. 1518).

"[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis.*" (pg. 1519).

"The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been

unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty…" (pg. 1521).

"The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a produce of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands […] Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation […] But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure […] So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question…" (pg. 1523).

"Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless, it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of the woman seeking an abortion are valid if they do not constitute an undue burden" (pg. 1527).

"The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions [of the Pennsylvania law] except for the husband notification requirement. We agree generally with this conclusion […]" (pg. 1528).

"We see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health" (pg. 1529).

"In light of the construction give the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk" (pg. 1531).

"The informed consent requirement is not an undue burden on that right [to terminate a pregnancy free of interference by the State]" (pg. 1532).

"[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion […] The unfortunate yet persisting conditions we document above will mean that a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid" (pg. 1533).

"We… reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided tat there is an adequate judicial bypass procedure" (pg. 1533).

"The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that that requirement serves no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice" (pg. 1534).