I. Review of 1st Class

White Supremacy in 17th Century Science, Religion and Law
US Declaration vs Constitution US Birth date: 1619 or 1776?
Pre Civil War White Supremacist Justices Marshall + Taney. *Dred Scott*,
Amendments 13th- 15th written to abolish White Supremacy + Incorporate Rights
Supreme Court evisceration of Amendments and Civil Rights Laws
Civil Rights Cases, private, not state action. *Plessy v Ferguson*
Rights denied to native Americans and non-white immigrants.

Class Notes Posted for Course 1223 at https://www.uc.edu/about/continuing-ed/olli/resources/handouts.html

Audio of Supreme Court Oral Arguments

1. Supreme Court website archives for prior years as well as the 2020-21 term. Audio only with no identifier of who is speaking. Separate transcript with text. https://www.supremecourt.gov/oral_arguments/argument_audio/2020
2. Oyez.com provides a display of the text you can read while listening as well as a highlighted photo of any Justice while they are speaking. Search by Case Name
3. On day of argument: C-SPAN will livestream the audio of all of the teleconference oral arguments on television, online at C-SPAN.org, and on the free C-SPAN Radio app. *Torres v. Madrid*. Wednesday Oct. 14 10 am. African American woman shot by police.
4. Analysis + Statistics. At scotusblog.com

**John Marshall Harlan** Associate Justice 1877 – 1911.
Born into a prominent, slave-holding family in Frankfort, Kentucky. Fought for the union in Civil War. Great dissenter appointed by Republican President Buchanan. Dissent In *Plessy v Ferguson*. "Our Constitution is color-blind.” First Supreme Court justice to advocate the 14th Amendment incorporation of the Bill of Rights as requiring states to guarantee civil liberties. Majority opinion in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (1897) incorporates property rights. The Republic according to John Marshall Harlan. By Linda Przybyszewski. Grandson John Marshall Harlan II (1899–1971) served on the Supreme Court from 1955 to 1971

II. The Pre New Deal Fuller, White, and Taft Courts. 1900-1930

A. Judiciary Committee Hearings + Senate Confirmation

1. 17th Amendment ratified in 1912 provides for direct election of Senators by voters rather than by state legislatures as provided in Article I.
2. Democratic President Wilson 1916 nomination of Louis Brandeis first ever Judiciary Committee hearings which he did not attend and 4 month delay in confirmation vote,
47-22. Kentucky’s James McReynolds immediately confirmed in 1914 on the day appointed, anti-semitic refusal to speak to Brandeis for three years as well as Cardozo.

3. Republican President Herbert Hoover’s 1930 nomination of John Parker of North Carolina lost 39-41 after opposition from organized labor and NAACP

B. New Regard for Equal Rights

1. Voter suppression by Southern Democrats
   a. 1915 Grandfather clause. Oklahoma Constitution requires voters to pass a literacy test if their grandfather had voted. 8-0 finds 15th Amendment violation. Guin v. U.S. New state law successfully maintained disenfranchisement of black voters.
   b. Holmes for a unanimous court in 1927 finds Texas white primary a 14th Amendment violation. New state law successfully maintained disenfranchisement of black voters until 1944 8-1 decision finds white primary violates 15th Amendment.
   c. Poll Tax. Upheld by the Supreme Court in 1937 and 1951 until abolished by 24th Amendment.
   d. Literacy Test. Required in half the states, upheld by the Court in 1959, banned by 1965 Voting Rights Act

2. School Segregation. NAACP Legal Defense Fund attack on Plessy
   a. Hughes 6-2 holds Missouri violated 14th Amendment by denying law school admission to a black applicant. State responds by creating separate black law school. Gaines
   b. 1950 unanimous court finds in favor of Thurgood Marshall for NAACP that Texas law school for blacks named after him unequal to U. Of Texas law school. Sweatt v. Painter
   c. 1950 unanimous decision requiring equal treatment of black grad student forced to sit outside classroom door, dine at separate table, self segregate in library. McLaurin v. Okla.

C. Chief Justice William Howard Taft 1921-1930.
   1. Lum v. Rice (1927). Issue: Whether a U.S. citizen of Chinese ancestry, was denied equal protection of the law by exclusion from a white neighborhood school in Mississippi and assignment to a school that received “only children of the brown, yellow or black races.” Taft for a unanimous court upholds the state’s right to segregate based on Stare decisis following the Plessy, separate but equal precedent “assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.
   2. Ozawa v. United States (1922) Sutherland for unanimous court. Immigrants from Japan are not white for purposes on naturalization under 1906 law limiting US citizenship to whites and African-Americans.
   3. United States v. Thind (1923). Sutherland for unanimous court. Indian Americans are not white for purposes on naturalization. While Indians were classified as Caucasians by anthropologists, people of Indian descent were not white by common American definition, and thus not eligible to citizenship. The decision began the process of retroactively stripping Indians of citizenship and land rights. The ruling also placated the
Asiatic Exclusion League outrage at the Turban Tide. Twelve years later, Thind was granted citizenship because he was a U.S. Army veteran, the U.S. discontinued the denaturalization process, and lower courts split on whether South Asians were white. 1980 census included first listing for South Asian identification.


4. Powell v. Alabama 1932 The Scottsboro boys. Sutherland 7-2 reverses the conviction and death penalty sentences of nine black men denied lawyers in prosecution for rape of two white girls. Holds the 6th Amendment right to counsel binding on states only in capital cases. Years later accusers recant and state issues pardons.

III. The Switch in Time that Saved Nine
A. 1932 -1937 Political Realignment
   1. FDR defeats Hoover and Democrats take both houses of Congress to launch New Deal economic remedies for the great depression found unconstitutional by the Supreme Court’s conservative majority.
   2. 4 Horsemen (Sutherland, Van Devanter, Butler, MacReynolds) joined by Chief Justice Hughes and Roberts vs. 3 Musketeers (Brandeis, Cardozo, Stone)
   3. Legal Rationale limiting government’s regulatory powers.
      a. Property rights expressly guaranteed by 5th Amendment against US and incorporated via the 14th Amendment as binding on the states
      b. The right of contract though not expressly guaranteed so fundamental a liberty that must be inviolable and added as a matter of substantive “due process”
   4. Critique of Judicial Activism:
      Illegitimate, counter majoritarian rulings by unelected Judges with life tenure that strike down laws adopted by elected officials in other branches of government, blocking a policy and mandating an alternative based on judges’ policy preference. Representative democracy depends on Judicial Restraint.
B. Conservative and liberal values/policy preferences

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C. End of the “Second American Republic.” (1868-1937)
1. Roosevelt court packing effort repudiated by leaders on both parties.
2. In 1937 Hughes and Roberts join 5-4 decisions upholding constitutionality of Congressional power to regulate corporations and the economy. *Wickard v Filburn* 1942 Dayton OH farmer prohibited from growing wheat for family consumption. Unanimous
3. The Supreme Court rulings that uphold enhanced national power to regulate private economic activity establish reversible precedent without more enduring Constitutional amendments to resolve the post civil war dispute over corporate rights.
4. In just four years between 1937 and 1941 FDR fills eight Supreme Court vacancies with pro New Deal Democratic justices promising Judicial restraint and elevates a ninth, Republican Harlan Stone, to become Chief Justice.

IV. Infamous WW II Racist Decisions
A. Japanese Internment in WW II
2. *Korematsu v. U.S. 1944*. Former KKK member Alabama’s Hugo Black 6-3 majority upholds detention applying a two part *strict scrutiny* test of a “suspect classification” based on race and national origin. Reasons first
   a. that U.S. had a compelling interest during wartime emergency and
   b. that relocation was the least restrictive means.
   Three dissenters decry unconstitutional violation of equal protection.
3. Restitution 40 years later — 1988 Civil Liberties Act provided 82,219 former camp inmates (or, in the case of a death, their heirs) received reparations. Acting Solicitor General in 2011 files Justice Department Admission of error "suppressed critical
“evidence” in both cases. Convictions overturned in lower courts. Chief Justice Roberts in Trump v Hawaii 2018 Muslim travel ban case repudiates 1940s decision as overruled in court of history.

V. The Warren Court 1953-1969
A. Composition. Never more than 3 Republicans, by 1969 Warren the only Republican
3. Truman appointed 4 Democrats: Chief Justice Vinson, Burton, Clark and Minton
5. JFK. Democrats Byron White and Arthur Goldberg
6. LBJ. Democrats Abe Fortas + Thurgood Marshall, first African American Justice

B. Brown v Board of Education. 1954.
1. Thurgood Marshall’s NAACP LDF strategic appeal 14th Amendment equal protection from 4 states with segregated schools consolidated with an independent 5th Amendments due process appeal from Washington DC.
2. Vinson Court divided in 1953 and ordered re-argument on issues framed by Frankfurter. In 1954 Warren successfully achieved unanimity for an opinion overturning *Plessy* by holding that separate facilities are inherently unequal citing social science research demonstrating negative impact on children’s self esteem. In DC case, court holds that 5th Amendment due process guarantee binding on U.S. includes the same 14th Amendment “equal protection” guarantee binding on states.
3. Conservatives decry reliance on sociology and psychology rather than law; black separatists reject finding that separate minority institutions invariably inferior.

C. With All Deliberate Speed.
1. After argument a year later to address implementation and remedial desegregation measures, court directs action “with all deliberate speed” in *Brown II*, 1955.
2. 1956, 19 Senators and 77 members of the House of Representatives signed the "Southern Manifesto," a resolution condemning *Brown* as a "a clear abuse of judicial power" and encouraged states to resist implementing its mandates. Later calls to impeach Warren.
3. In 1957 Little Rock Arkansas school Board admitted nine blacks, but Gov. Faubus ordered National Guard to maintain order by preventing their entry. President Eisenhower dispatched the 101st Airborne to enforce the *Brown* decision.
Marshalls intervened when James Meredith sought to enter the University of Mississippi. In 1963, President John F. Kennedy federalized National Guard troops and deployed them to the University of Alabama to force its desegregation.

4. Virginia school district that was one of the five systems directly subject to the court’s ruling in *Brown* responded by closing all of its public schools so white children could attend segregated private academies.

5. In case after case a shrinking majority of the Justices struck down Southern efforts to perpetuate school segregation leading to disputed court mandates for costly busing of minority students beyond neighborhood schools.

6. The court found some Northern school districts had deliberately constructed schools in segregated residential neighborhoods and made pupil assignments amounting to *de jure* segregation by law in violation of the Equal Protection clause. Cross district busing disputed.

D. Civil Rights Protests


E. Supreme Court

1. 1960 *Boynton v. Virginia* 7-2 Black declared the segregation of interstate transportation facilities unconstitutional.
2. 1966 *Brown v. La.* 5-4 reverse conviction for Library sit in.

F. Congressional Response

1. 1964 Civil Rights Act, ends Jim Crow in restaurants, hotels, transportation. *Heart of Atlanta Motel v. US*, challenge to the constitutionality of 1964 Civil Rights Act. The Supreme Court unanimously held that the the Constitution’s Commerce Clause empowered Congress to regulate private economic activity.
2. 1965 Voting Rights Act impacts North + South, ends literacy tests, requires ballots in multiple languages, pre-clearance review by US of changes impacting minority voting rights.
3. 1968 Fair Housing Act

G. Due Process, whether black or white, in Arrest, Interrogation, Trial and Punishment

1. Pre-Warren: Selective incorporation of Bill of Rights. *Palko* 1937, Cardozo’s short list does not include 5th Amendment guarantee against double jeopardy in state court.
2. 1960s explosion of criminal defendant’s rights in state courts through selective incorporation of most 4th, 5th and 6th Amendment guarantees via the 14th Amendment due process clause.
a. *Gideon.* Black transform his 1940s dissent in a majority opinion establishing 6th/14th Amendment right to counsel not only in death penalty cases but in all state criminal trials. Black favored total incorporation of the entire Bill of Rights.

b. *Miranda v. Arizona* 1966 Warren 5-4 overturns conviction based on confession of kidnapping and rape as 5th/14th Amendment violation of guarantee against self incrimination for failure to advise the accused of rights prior to interrogation. As Chief Justice Warren invalidated investigatory procedures he had employed as a California prosecutor.

3. *Terry v Ohio.* 1967, 8-1. White Cleveland police officer took interest in three black men, suspected they were “casing” a store to rob, stopped and frisked them, obtained a conviction for carrying a concealed weapon. Warren for 8 Justices, including Thurgood Marshall, found reasonable to protect officer’s safety a frisk without more probable cause that did not violate the 4th/14th guarantee against unreasonable search and seizure. Douglas dissent. Critics decry giving police broad discretion leading to frequent stops and pat downs in minority communities.

VI. **Finale:** Burger, Rehnquist, Roberts Republican Courts 1969 - 2020 in third class.