Federalist #78

Alexander Hamilton considered the Judiciary the “least dangerous” branch of the proposed national government as it had “no influence over either the sword or the purse”
Supreme Court 2019-20
Politics, Principle, and Preference

Howard Tolley
Professor Emeritus,
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October 15, 2019 2nd Class
Impeachment

Chief Justice Presides in Senate Trial

Samuel Chase – Pres. Andrew Johnson

William Rehnquist – Bill Clinton

**Political Question** Doctrine

Issues the Constitution expressly assigns to the President and Congress are **nonjusticiiable**

**Standing** required for judicial review
Rulings that led to Impeachment

_U.S. v. Nixon_ 8-0

Independent counsel subpoena for tapes
Standing granted, direct appeal from trial court, internal executive branch issue deemed justiciable, President released Watergate tapes

_Clinton v Jones_ 8-0 Immunity,

Civil action by private citizen, S. Court orders deposition, but no trial while in office.
President’s Foreign Policy Powers

Court has given Executive Agreements with foreign powers the force of ratified treaties

1936 *Curtis Wright* decision declares President the “sole organ” of foreign policy with inherent plenary or prerogative power beyond express authority in the Constitution or granted by Congress.
Commander-in-Chief War Powers

Cicero: *Inter arma enim silent legēs*
In times of war, the law falls silent.

Napoleonic Wars: 1804 Marshall holds there no inherent power beyond those expressly granted by statute

1936 7-1 decision granting inherent plenary power with no need for Congressional authorization
Civil War

Lincoln suspends *Habeas Corpus*, a power granted to Congress in Article I

Court grants *habeas* review to Indiana publisher jailed for incendiary anti-union statements.

After Congress repeals the act granting jurisdiction, the Court dismissed the appeal.
Wartime Decisions

WW II Korematsu
  FDR Executive internment order upheld
Korean War (undeclared, UN Resolution)
  Truman blocked from seizing steel mills
  Jackson concurrence sets 3 part review test
  a. Constitution expressly allows -- deference
  b. Congress Silent -- possibly yes or no
  c. Congress clearly against -- disallow
Imperial Presidency?

Vietnam War

Gulf of Tonkin Resolution, no Declaration of War

Constitutionality non justiciable

*NY Times v Sullivan*

Press free to publish Pentagon Papers

War Powers Resolution

Global Commander-in-Chief

Regime Change and Humanitarian Intervention
War on Terror  2001-????

2001 Authorization to Use Military Force

*Doe v Bush*  2002  Appeals court finds challenge to Iraq war nonjusticiiable

Supreme Court rules in favor of procedural rights for Guantanamo detainees
Executive Orders

Lincoln’s 1863 Emancipation Proclamation

Obama 2019 Executive Order DACA

Trump Travel Ban on Muslims upheld 5-4 Roberts

Trump Reallocation $2.5 Billion of Pentagon Funds to build border wall

In unsigned opinion court approves use of funds, overruling lower court stay as litigation underway
Review 1st Session

1. What was the hometown of the lead plaintiff in the case the Supreme Court decided striking down a state law barring same sex marriage?

2. Name a Supreme Court Justice who came from Cincinnati.

1789-1865  Federalists v. Democrats
1865-1937  Republicans v. Democrats
Judicial Activism: Popular Definition

Media, Wikipedia, Elected Officials

Rulings based on personal preference rather than on existing law by either

a. Invalidating an unjust government act, or
b. abdicating the obligation to strike down an unjust act
Judicial Activism: Poli Sci Definition

Whether liberal or conservative, rulings that strike down acts of other branches of government, blocking a policy, requiring an alternative
a. Protecting fundamental rights
b. Preventing majority tyranny
Judicial Activism: A Sin?

Counter-majoritarian, court imposed limits to government regulations based on constitutional principles protecting

- Civil Liberties: a) *Brown v Board of Education* invalidating state laws mandating racially segregated schools, overruling *Plessy v. Ferguson*. b) *Roe v Wade*

- Economic Rights: a) *Citizen’s United*. invalidating federal campaign finance law limiting corporations. b) Invalidating union agency shop
Judicial Restraint: A Virtue?

Respect for and deference to precedent (*stare decisis*) and elected officials’ authority involving

a. Civil Liberties:
   i) *Trump v. Hawaii* upholding the ban on immigrants from Muslim countries,
   ii) Reaffirming *Roe v. Wade* precedent

b. Economic Rights: upholding the affordable care act individual mandate as a legitimate tax
## Policy Preference

<table>
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<tr>
<th>Issue</th>
<th>Liberal</th>
<th>Conservative</th>
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Politicians: Saints or Sinners?

Who gets what, when and how?

Art of the possible, civic duty, noble calling
or
Partisan struggle for power, might makes right

“No matter whether the constitution follows the flag or not, the Supreme Court follows the election returns”
Mr. Dooley  1901

Whose ox is being gored?
FDR 9 Appointees 1933-1945

7 Democrats
Hugo Black 24 years
William Douglas 36 years (Brandeis)
Robert Jackson 13 years Nuremburg
Independent Felix Frankfurter 23 years
Republican Harlan Stone Chief Justice 5 years
Democratic Control 1937 – 1969
Korematsu v. U.S. 1944 (6-3)

**Strict Scrutiny** Government’s burden to show

a. Compelling state interest, and

b. Least restrictive means

**Plaintiff usually wins, heightened protection for**

a. fundamental rights expressly mentioned (speech) or unwritten (liberty of contract)

b. Suspect classifications: discrete, disadvantaged racial or other group
Warren Court

Eisenhower appoints a Republican Chief Justice Republicans John Harlan, Charles Whitaker and Democrat William Brennan

Criminal Procedure Reform
Freedom of Expression and Press
Free Exercise, Separation Church and State
Civil Rights – School Segregation
Incorporation

Bill of Rights only applies to U.S.

1\textsuperscript{st} Amendment: Congress shall make no law

14\textsuperscript{th} Amendment requires states to guarantee due process and equal protection of law

Supreme Court used the 14\textsuperscript{th} Amend. to make one after another right binding on the states, plus fundamental rights not mentioned -- travel
Warren Court Liberal Activism

*Brown v. Board of Education, 1954 (9-0)*
*Gideon v. Wainwright, 1963 (9-0)*

Right to Counsel

*New York Times v. Sullivan, 1964 (9-0)*

Free Press

*Miranda v. Arizona, 1966 (5-4 decision)*

Warnings

*Loving v. Virginia, 1967 (9-0 decision)*  Marriage
End of the Warren Court 1969

Southern billboards calling for impeachment of Chief Justice Earl Warren and Justice William Douglas

1968 election of Republican Richard Nixon as President

Forced Resignation of Justice Abe Fortas

Two Nixon nominees rejected by Democratic Senate. Chief Justice Burger and Blackmun join
Appointment/Confirmation Process

Constitutional Requirements:
Qualifications – None, life tenure on good behavior
No pay cut
President Nominates -- Stakeholders/Advisors
   Attorney General, FBI
   American Bar Association
Interest Groups
   Federalist Society
   American Constitution Society
Contentious Confirmations

**Brandeis** 17th Amend. Democrat 47-22 (3 Rep.)
**Parker** Republican Hoover 39-41
**Fortas** Democrat LBJ Chief Justice Senate Filibuster
**Haynesworth+Carswell** Republicans 45 oppose
  Blackmun approved 94-0
**Bork** Republican 42-58 (2 Dem) Kennedy 97-0
**Thomas** Republican 52-48
**H. Meiers** Repubs force Bush to withdraw, Alito 58-42
**Garland** Democrat No Hearings 2016,
  Gorsuch: 2017 Nuclear Option Filibuster Rule change 54-45
**Kavanaugh** Republican 50-48
Burger Court 1969-1986

7 Appointed by 3 Republican Presidents, 2 by Democrats

**Liberals**
- William Brennan: Democrat appointed by Republican, Ike
- Thurgood Marshall: Democrat LBJ
- Harry Blackmun: Republican Nixon
- John Paul Stevens: Republican Ford

**Moderates**
- Lewis Powell: Republican Nixon
- Stewart/O’Connor: Republican Eisenhower, Reagan
- Byron White: Democrat Kennedy

**Conservatives:**
- Warren Burger: Republican Nixon
- William Rehnquist: Republican Nixon
Burger Court: Liberal Decisions

**Furman v Ga.** Strike state death penalty laws

**Roe v. Wade,** 1973 (7-2)

Blackmun, Trimester framework for abortion

**United States v. Nixon,** 1974 (8-0)

Burger President must give up Watergate tapes

**Regents of the University of California v. Bakke,** 1978 (5-4)

Powell allows affirmative action.
Intermediate Scrutiny: Women’s Rights

*Frontiero v. Richardson* 1973  (8-1)
Female Air Force lieutenant seeks dependent benefits for husband equal to those male officers receive for a female spouse. Rational Basis (4) + Strict Scrutiny (4)

*Craig v Boren* 1976  (6-3)
Drinking age: men 21, women 18
Brennan unable to get strict scrutiny for suspect class
New test requires “substantial” connection to a “significant interest”
Rehnquist Court 1986--2005

7 Republican and 2 Democratic Appointees

3 Liberals
Ruth Bader Ginsburg Democrat, Clinton
Stephen Breyer Democrat, Clinton
John Paul Stevens Republican, Ford

3 Moderate Republicans
O’Connor, Kennedy, Souter

3 Conservative Republicans
Rehnquist, Scalia, Thomas
Rehnquist Court 1986--2005

**Planned Parenthood v. Casey** 1992

- Plurality O’Connor, Kennedy + Souter
- Sustain but narrow *Roe v. Wade*

**Bush v. Gore, 2000 (5-4)**

- Bar challenge to Florida election returns

**Lawrence v. Texas, 2003 (6-3 decision)**

- Struck down state laws that prohibited sodomy between consenting adults. Kennedy
Roberts Court 2005—2018

4 Moderate/Liberal Democratic Appointees
Ginsberg, Breyer, Sotomayor, Kagan

1 Centrist Republican    Kennedy

4 Conservative Republican Appointees
Scalia, Thomas, Roberts, Alito
Liberal to Conservative 2005-2018

Ginsburg
Sotomayor
Kagan
Breyer

Kennedy

Roberts
Alito
Scalia
Thomas
Liberal Roberts Court Decisions

National Federation of Independent Business v. Sebelius, 2012 (5-4 decision)
Upheld the mandate that most Americans have health insurance. Roberts

United States v. Windsor, 2013 (5-4 decision)
Federal government must provide benefits to legally married same-sex couples. Kennedy

Obergefell v. Hodges, 2015 (5-4 decision)
Same-sex marriage is legalized across all 50 states.
Conservative Roberts Court Decisions

District of Columbia v. Heller, 2008 (5-4)
   Citizens have a right to possess firearms at home for self-defense. Scalia

Citizens United v. Federal Election Commission, 2010 (5-4)
   Corporations and unions can spend unlimited amounts in elections. Kennedy

Shelby County v. Holder, 2013 (5-4 decision)
   States and localities do not need federal approval to change voting laws. Roberts
Another Peter Principle

Some problems are so complex that you have to be highly intelligent and well informed just to be undecided about them

Laurence Peter