

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

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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 nonjusticiable

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 lēgēs*

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 nonjusticiable**

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

Issue	Liberal	Conservative
Civil Liberties	Limited Government Activism	Government Regulation Restraint
Economic Rights	Government Regulation Restraint	Limited Government Activism

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.

1st Amendment: Congress shall make no law

**14th Amendment requires states to guarantee
due process and
equal protection of law**

**Supreme Court used the 14th 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