

The United States Supreme Court: Some History and Current Issues
Notes for the CCC Class, January 2011
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On January 16, 23, and 30 I made presentations to the class under these titles:

- The US Supreme Court: History and Current Issues.
- The Supreme Court Case of Christian Legal Society v Martinez.
- The Federal District Court Case of Perry v Schwarzenegger.

Selected References

1. Richard Beeman, **The Penguin Guide to the United States Constitution: A Fully Annotated Declaration of Independence, U.S. Constitution and Amendments, and Selections from *The Federalist Papers***, Penguin Books, 2010. *****
2. Biskupic, Joan, **American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia**, Farrar, Straus and Giroux, 2009. *****
3. Stephen Breyer, **Making Our Democracy Work: A Judge's View**, Alfred A. Knopf, 2010. *****
4. James MacGregor Burns, **Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court**, Penguin Books, 2009. ****
5. Jeffrey Rosen, **The Supreme Court: The Personalities and Rivalries that Defined America**, Holt Paperbacks, 2007. ****
6. John Paul Stevens, **On the Death Sentence**, an essay, pp. 8-14 in the New York Review of Books, December 23, 2010. ***
7. Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court**, Anchor Books, 2008. ****

Other Sources of Interest

1. Biskupic, Joan, **Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice**, HarperCollins Publishers, 2005.
2. Ellison, Marvin M., **Same-Sex Marriage? A Christian Ethical Analysis**, Pilgrim Press, 2004.
3. Joyce Murdoch and Deb Price, **Courting Justice: Gay Men and Lesbians v. the Supreme Court**, Basic Books, 2001.

Selected Federal Court Opinions

One may find court opinions, concurring opinions, and dissents on the internet. For helpful background information on a case together with the opinions and dissents, one may go, for example, to the New York Times website; or to Wikipedia; or to Google for a wide variety of information. Some that we may discuss are as follows:

- July 3, 1984. *Roberts v. United States Jaycees*. A 7-0 decision with opinion by Justice Brennan. ***
- June 30, 1986. *Bowers v. Hardwick*. A 5-4 decision with opinion by Justice White (joined by Burger, Powell, Rehnquist, and O'Connor), separate concurring opinions by Justice Burger and Justice Powell, dissenting opinion by Blackmun (joined by Brennan, Marshall, and Stevens), and another dissenting opinion by Justice Stevens (joined by Brennan and Marshall). *****
- June 19, 1995. *Hurley v. Irish-American GLB Group of Boston*. A unanimous decision, opinion by Justice Souter. ***
- May 20, 1996. *Romer v. Evans*. A 5-4 decision. Opinion by Justice Kennedy (joined by Stevens, O'Connor, Souter, Ginsburg, and Breyer); dissent by Justice Scalia (joined by Rehnquist and Thomas). *****
- June 26, 2003. *Lawrence v. Texas*. A 6-3 decision that reversed *Bowers v. Hardwick*. Opinion by Justice Kennedy (joined by Stevens, Souter, Ginsburg, and Breyer), concurrence by Justice O'Connor in the judgment of the court only, a dissenting opinion by Scalia (joined by Rehnquist and Thomas), and a separate dissenting opinion by Justice Thomas. *****
- June 28, 2000. *Boy Scouts of America v. James Dale*. A 5-4 decision with opinion by Chief Justice Rehnquist (joined by O'Connor, Scalia, Kennedy, and Thomas), dissenting opinion by Justice Stevens (joined by Souter, Ginsburg, and Breyer), and another dissenting opinion by Justice Souter (joined by Ginsburg and Breyer). ****
- June 28, 2010. *Christian Legal Society v. Martinez*. A 5-4 decision with an opinion by Justice Ginsburg, concurring opinions by Justice Stevens and Kennedy, dissenting opinion by Justice Alito. ****
- September 9, 2010. *Log Cabin Republicans v. USA and Robert M. Gates*. US District Court, Central District of California. Opinion by US District Judge Virginia A. Phillips. ***
- August 4, 2010: *Kristin M. Perry, Sandra B. Stier, Paul T. Katami and Jeffrey J. Zarrillo v. Arnold Schwarzenegger, Edmond G. Brown, Jr., and others*. Opinion by US District Chief Judge Vaughn R. Walker. *****

A Supreme Court Quiz

1. In the past year (09-10), which Justice asked the greatest number of questions in the hearings of the Supreme Court? --the least number?

2. What Chief Justice of the Supreme Court was from Louisiana?
3. Name three Chief Justices of the Supreme Court and the Presidents who appointed them.
4. Name the former Secretary of War who was nominated to the Supreme Court and died four days after he was confirmed by the Senate.
5. Name the current Justices of the Supreme Court.
6. What is the religious make-up of the current Supreme Court?
7. In what 5-4 opinion in 2005 did both Ruth Bader Ginsburg and Antonin Scalia vote on the same side?
8. Which President made the most appointments to the Supreme Court?
9. Which President made the second most appointments to the Supreme Court?
10. What one-term President appointed six justices?
11. What one-term President appointed no justices?
12. How many justices were there when the Supreme Court was first established?
13. Marbury v. Madison was the first case that established the idea of judicial review, which meant what?
14. In Worcester v. Georgia, 1831, the Supreme Court ruled 5-1 that the arrest and conviction of the missionary Samuel A. Worcester by the state of Georgia was in violation of the law of the land. How did that case turn out?
15. What was the second case in which the Supreme Court exercised judicial review, and how did that work out?
16. What speech by a presidential candidate was essentially devoted to the exhaustive refutation of a Supreme Court opinion?
17. Name one high federal official who advised FDR against the detention of Japanese citizens in California after Pearl Harbor.
18. What footnote is the best known, most controversial footnote in constitutional law?
19. In 1993 Congress unanimously passed the Religious Freedom Restoration Act. This law reversed what Supreme Court decision?
20. During the presidency of George W. Bush, four cases regarding the handling of "enemy combatants," three of them held at Guantanamo, were considered by the Supreme Court. In how many of the cases was the President's position upheld?

Answers:

1. Sonya Sotomayor; Clarence Thomas. In previous years, the answers would have been: Antonin Scalia; Clarence Thomas. Justice Thomas never asks a question.
2. Edward D. White.
3. The Chief Justices of the Supreme Court and the Presidents who appointed them:

a. John Jay (NY), 1789-1795	Washington
b. John Rutledge (SC), 1795	Washington
c. Oliver Ellsworth (CT), 1796-1800	Washington
d. John Marshall (VA), 1801-1835	John Adams
e. Roger B. Taney (MD), 1836-1864	Jackson
f. Salmon P. Chase (OH), 1864-1873	Lincoln

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| g. Morrison R. Waite (OH), 1874-1888 | Grant |
| h. Melville W. Fuller (IL), 1888-1910 | Cleveland |
| i. Edward D. White (LA), 1910-1921 | Taft |
| j. William Howard Taft (OH), 1921-1930 | Harding |
| k. Charles Evans Hughes (NH), 1930-1941 | Hoover |
| l. Harlan Fiske Stone (NY), 1941-1946 | FDR |
| m. Fred M. Vinson (KY), 1946-1953 | Truman |
| n. Earl Warren (CA), 1953-1969 | Eisenhower |
| o. Warren Burger (MN), 1969-1986 | Nixon |
| p. William Rehnquist (AZ), 1986-2005 | Reagan |
| q. John G. Roberts (MD), 2005- | G. W. Bush |
4. Edwin M. Stanton, nominated in 1969 by President Grant and confirmed by the Senate just before Christmas.
 5. The current U.S. Supreme Court Justices and the Presidents who appointed them:

a. Elena Kagan (NY), 2010	Obama
b. Sonya Sotomayor (NY), 2009	Obama
c. Samuel A. Alito, Jr. (NJ), 2006	G. W. Bush
d. John G. Roberts (MD), 2005	G. W. Bush
e. Stephen G. Breyer (MA), 1994	Clinton
f. Ruth Bader Ginsburg (NY), 1993	Clinton
g. Clarence Thomas (GA), 1991	G.H.W. Bush
h. Anthony M. Kennedy (CA), 1988	Reagan
i. Antonin Scalia (NY), 1986	Reagan
 6. Six Catholics, three Jews
 7. The court ruled 5-4 on May 16, 2005, in *Granolm v. Heald*, that states (Michigan and New York in this case) cannot permit in-state wineries to sell wine directly to in-state consumers while prohibiting out-of-state producers from doing the same thing. In doing so the court upheld a ruling by the Sixth Circuit Court of Appeals while reversing one by the Second Circuit Court of appeals. The majority (Scalia, Souter, Ginsburg, Breyer, and Kennedy) were called “the rosy-cheeked caucus.”
 8. George Washington made eleven.
 9. FDR made nine.
 10. William Howard Taft
 11. Jimmy Carter
 12. Six
 13. In *Marbury v. Madison*, the Supreme Court ruled an act of Congress unconstitutional.
 14. Georgia’s action was against the law of the land because it violated the treaty between the United States and the Cherokee nation; Georgians could not enter the Cherokee lands without their consent, and Georgia could not apply its state law there. The 1832 decision, written by Chief Justice Marshall, said that Georgia had seized Worcester and carried him away while he was under the guardianship of treaties of the United States and was “under the sanction of the chief magistrate of the union.” President Jackson did not get this hint. When the Court issued an order requiring Georgia to release Worcester, Georgia resisted, and President Jackson declined to enforce the order. But then a few months later, South Carolina

published its “Nullification Ordinance.” THEN President Jackson got it. He secured enactment by Congress of the Force Bill, granting the President the legal authority to use federal troops to enforce federal law. South Carolina saw the light and repealed the Ordinance. Jackson soon hinted at the use of troops to enforce the Court’s decision in Georgia. The governor offered Worcester a pardon; he accepted it and was released from prison. Alas, that’s not the end of the story. In 1835 Jackson sent troops into Georgia to evict the Cherokees.

15. The Dred Scott case, 50 years after Marbury v. Madison. Chief Justice Roger Taney thought the decision would clear up the issue of slavery. The ruling was reversed by the court of Mars.
16. Abraham Lincoln’s Cooper’s Union Address in 1860.
17. J. Edgar Hoover.
18. Footnote four to Justice Harlan F. Stone’s opinion in U.S. v. Carolene Products Co., 1938. It reads as follows: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a 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. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”
19. The Act reversed a 5-4 decision, led by Justice Scalia, in the case of Employment Division vs. Smith (the peyote case).
20. None of them.

What’s Your Opinion?

- **June 17, 1963: Sherbert v. Verner.** Adell Sherbert worked as a textile mill operator in South Carolina. When her employer switched from a five-day to a six-day workweek including Saturdays. A Seventh-Day Adventist, she refused to work Saturdays and was fired. Unable to find any other work, she applied for unemployment compensation, which was denied. Was she entitled to unemployment compensation?
- **December 8, 1981: Widmar v. Vincent.** The University of Missouri at Kansas City generally made its facilities available for use by registered student organizations. One such RSO, which had previously received permission to hold its meetings in University rooms, was told it could no longer do so because of a UMKC regulation

prohibiting the use of University buildings or grounds “for purposes of religious worship or religious teaching.” Was this RSO entitled to meet in University rooms?

- **July 3, 1984: Roberts v. U.S. Jaycees.** The Minnesota Human Rights Act was applied to compel the Minnesota Jaycees to admit women. The Jaycees argued that this violated their First Amendment rights. Could Minnesota properly require them to admit women?
- **April 17, 1990: Employment Division v. Smith.** Alfred Smith and Glen Black had ingested peyote as part of their religious ceremonies as members of the Native American Church. They were fired from the drug rehabilitation clinic where they worked; possession of peyote was a crime under Oregon law. They were denied unemployment compensation; was this constitutional?
- **June 7, 1993: Lamb’s Chapel v. Center Moriches School District.** New York state law authorized public school boards to set rules for the use of school property outside of school hours. The Lamb’s Chapel, an evangelical church, sought to show a film of family lectures by James Dobson on school property. The local board refused on the grounds that the film appeared to be church related. Was Lamb’s Chapel entitled to show the film on school property?
- **June 19, 1995: Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.** The city of Boston authorized the South Boston Allied War Veterans Council, a private group, to organize and conduct the St. Patrick’s Day Parade. The Council turned down an application from the Irish-American gay group to march in the parade. Was the Council entitled to exclude the gay group from the parade?
- **June 29, 1995: Rosenberger v. University of Virginia.** A student activities fee, administered by a fund administrator, supported registered student organizations at UVA in their activities, except for religious, philanthropic, political, and certain other kinds of activity. The student organization Wide Awake sought to publish a magazine of “philosophical and religious expression,” and the first issue included articles about racism, crisis pregnancy, homosexuality, prayer, C.S. Lewis, and eating disorders. The fund administrators denied the \$6000 requested to pay for printing the magazine to avoid violating the Establishment Clause of the U.S. Constitution. Was Wide Awake entitled to financial support from the student activities fee?
- **June 28, 2000: Boy Scouts of America v. Dale.** James Dale, an Assistant Scoutmaster, was expelled by the Boy Scouts after officials read an interview in which Dale was quoted as stating that he was gay. Under the New Jersey public accommodations law, the Boy Scouts were forced to reinstate him. Were the Boy Scouts entitled to expel Dale?

Answers: The Supreme Court’s answer in each case was Yes. In *Employment Division v. Smith*, the Yes decision was, after an act of Congress and subsequent Court decisions, reversed.

On June 20, 2011, the United States Supreme Court granted employers some long-awaited relief by substantially raising the bar for plaintiffs (and their lawyers) seeking to certify large employment dis. In a strongly worded opinion, Justice Scalia, writing for the 5-4 majority, disagreed that the Dukes plaintiffs' evidence was sufficient to support class certification because it did not meet plaintiffs' burden of satisfying Rule 23 of the Federal Rules of Civil Procedure requirements for certification. The Supreme Court has two fundamental functions. On the one hand, it must interpret and expound all congressional enactments brought before it in proper cases; in this respect its role parallels that of the state courts of final resort in making the decisive interpretation of state law. On the other hand, the Supreme Court has power (superseding that of all other courts) to examine federal and state statutes and executive actions to determine whether they conform to the U.S. Constitution. When the court rules against the constitutionality of a statute or an executive action, its decision can b