Profile of Late 20th Century Courts

Fuller Court- 1888-1910
Property and Liberty

Plessy v Ferguson, 1896
Plessy’s Decision

Legislation is powerless to eradicate racial instincts or to establish an equality based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly [163 U.S. 552] or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

John Harlan’s dissent

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

Hughes’ Court 1930-1941

Evolution and Revolution

Sitting l. to r.: McReynolds, Holmes, Hughes, Van Devanter, Brandeis.
Standing l. to r.: Stone, Sutherland, Butler, Roberts.
FDR and the Court Packing Plan

- FDR’s response to the Great Depression was the growth of the federal government that would regulate business, labor laws, child labor, minimum wage, and job programs.
- Court rules that the New Deal programs violates the 10th Amendment.

The Plan

- Case loads begin to decrease and FDR cited that the justices were getting too old and needed help.
- For every justice over 70, FDR will appoint an extra justice.
- This would increase court by six justices.
Plan Backfires

- Congress, people, and the media do not support the plan. Court was the symbol of national stability.
- FDR changes strategy and accuses court of being a policy maker.

Switch in Time, Saves Nine

- After the critical election of ’36 Roberts and Hughes change votes and support the Deal programs of the Wagner Act, NLRB v Jones-Laughlin Steel, and Social Security. Van Devanter retires from the bench.

FDR’s Appointments

- Hugo Black, 1937
- Stanley Reed, 1938
- Felix Frankfurter, 1939
- William O. Douglas, 1939
- Frank Murphy, 1940
- Harlan Stone, 1941
- James Byrnes, 1941 (resigned 1942)
- Robert Jackson, 1941
- Wiley Rutledge, 1943
Other Important Case

- Incorporates Freedom of the Press, Near v Minnesota, 1931
- Incorporates Assembly, DeJonge v Oregon, 1937
- Incorporates Free Exercise, Cantwell v Connecticut, 1940
- Scottsboro 9 Norris v Alabama, 1935
  - Af-Am cannot be excluded from jury
  - Must have a lawyer in death penalty cases

Impact of the Hughes Court

- Considered the first modern court because of its deference toward economic legislation and the vigorous guardianship of personal liberties
- Incorporates press, assembly, free exercise
- Right to attorney in death penalty cases

Footnote 4
US v Carolene Products 1938

- Footnote Four outlines a higher level of judicial scrutiny for legislation that met certain conditions:
  1. On its face violates a provision of the Constitution (facial challenge).
  2. Attempts to distort or rig the political process.
  3. Discriminates against minorities, particularly those who lack sufficient numbers or power to seek redress through the political process.
- This higher level of scrutiny, now called "strict scrutiny", was first applied in Justice Black's opinion in Korematsu v. U.S. (1944).
- Footnote Four established the rational basis test for economic legislation, an extremely low standard of judicial review.
Stone Court 1941-1946
Transition and Transformation

- Sitting l. to r.: Reed, Roberts, Stone, Black, Frankfurter.
- Standing l. to r.: Byrnes, Douglas, Murphy, Jackson.

One Court Presided Over by Two Chief Justices

- 12 appointments by FDR and Truman will not create an ideological monolith.
- Frequent appointments and interpersonal personalities made the court unstable and factious.
- Yet, the court’s stand on speech, religion, equal protection, federalism and separation of powers provided continuity in the 15 years.

Personalities

- Felix Frankfurter- hectoring, petty, arrogant
- William O. Douglas- brilliant, abrasive
- Hugo Black- courtly, but embraced original intent
- Robert Jackson- greatest wordsmith, resist judicial activism
- Frank Murphy and Wiley Rutledge- passionate of civil liberties and racial equality; their deaths in 1949 would move court to the right.
Important Cases

- Chaplinsky v New Hampshire, 1942: Obscenity, profanity, libel, and fighting words not protected speech
- Flag cases: Barnette would end official persecution of Jehovah’s Witnesses and lay the groundwork for 60’s and 70’s cases of Sherbert and Yoder.
- Wall of separation: Everson v NJ Bd of Ed, 1947 Nationalize establishment clause
- WW II and Civil Liberties

Japanese Internment

- Hirabayashi v US, 1943 Curfew 9-0
- Korematsu v US, 1944 Internment 6-3
- On the same day, court decided
- Ex parte Endo, 1944 Unchallenged loyalty could not hold 9-0

Flag Cases

Minersville ISD v Gobitis, 1941
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.

Minersville ISD v Gobitis, 1940

WVA Board of Ed v Barnette, 1943

Justice Jackson argued that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

WVA Bd of Ed v Barnette
Impact of the Stone and Vinson (46-53) Courts

- WW II and Cold War, the court would favor restricting speech in favor of greater security, as well as, other measures (Rosenberg’s treason)
- Truman’s four appointment will provide a more conservative atmosphere on the Court
- Civil Rights- ends white primaries and struck down separate law schools for blacks (Sweatt v Painter)
- Lays the ground work for Brown and civil rights issues
- Incorporates Establish Clause- Everson v Board of Ed. Adopts “wall of separation”

Warren Court 1953-1969

Two Warren Courts

- 1953-1962- Brown v Topeka Bd of Ed, and national security cases, and political reaction to court’s decision, procedural fairness in governmental process
- 1962-1969- Firmly in the hands of the liberals and centered on individual freedoms
- 18 justices served during this 16 year period
Eisenhower’s Appointments

- Earl Warren - Rewarded by Eisenhower for his help in winning the Republican nomination
- William Brennan (another mistake) chosen to bench to help attract northeastern Catholics in Eisenhower’s reelection
- JFK’s appointment of White and Goldberg would create a majority voting block of liberals

“Worse Damn Mistake I Ever Made”

Warren Court moves to the left:
- Brown v Board of Education
- Baker v Carr: One man, one vote
- Rights of the Accused Extended:
  1. Gideon v Wainwright
  2. Miranda v Arizona
  3. Mapp v Ohio

Effects of Brown and Gideon
“The Southern Manifesto”

“"We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people." Signed by every Southern Senator and Congressman except Rayburn and LBJ.

From Congressional Record, 84th Congress, Second Session. Vol. 102, part 4 (March 12, 1956).

Gideon v Wainwright

"[t]he criminal is to go free because the constable has blundered." . . . In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration-the imperative of judicial integrity." . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government, more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Mapp v Ohio, 1961

Exclusionary Rule

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Miranda v Arizona, 1966

MIRANDA WARNING
1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY MAY BE USED AGAINST YOU.
3. YOU HAVE THE RIGHT TO BECOME A LAWYER AND HAVE MY PRESENCE WITH YOU WHILE YOU ARE BEING QUESTIONED.
4. IF YOU WISH TO TALK TO A LAWYER, HE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING IF YOU ASK.
5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

YOUR RIGHTS HAVE BEEN EXPLAINED TO YOU: ARE YOU WILLING TO TALK YOUR RENT?

—Chief Justice Earl Warren, speaking for the majority.

First Amendment challenges
- New York Times v Sullivan—libel “with malice”
- Obscenity—no redeeming social value “I know it when I see it.” Justice Potter Stewart
- Engle v Vitale—no state sponsored prayer
- Abington ISD v Schempp—no opening of school day with Bible reading

Impact of Warren Court
- Growing enemies of the Court’s movement to the left. Conservative religious groups angered over refusing to allow school prayer and rise in crime was tied to the court’s revolution in criminal procedures
- Southern strategy of Goldwater (64) and Nixon (68) would be to pull southern conservatives out of Democratic party by blaming the Warren Court for America’s problems
- Griswold v Connecticut, 1965 would lay foundation for Roe v Wade
Ideology of late Warren Court in 1967

Ideology Liberal to Conservative
Douglas, Warren (R), Fortas, Brennan (R), Marshall, Black, White, Stewart (R), Harlan (R)

Burger Court, 1969-1986

- Sitting l. to r.: Harlan, Black, Burger, Douglas, Brennan.
- Standing l. to r.: Marshall, Stewart, White, Blackmun

The Burger Court 1969-1986

- Began to narrow the rights of the accused that were won in the Warren Court.
- Most noted for Roe v Wade and US v Nixon
- Extended rights for women
"The Nixon Court"
- Assassination of Robert Kennedy leads Warren to believe that Nixon would win and gives Pres. Johnson his resignation, but Johnson fails to get Fortas confirmed as Chief Justice.
- Nixon campaigns that his nominee would be harsh on criminals and a strict constructionist. Nixon not able to get 2 Southerners approved to replace Fortas and selects Blackmun (moves left).
- Black and Harlan (Warren dissenters) retirees and Nixon selects Powell and Rehnquist which will not tilt the court.
- White and Stewart will be the swing votes.

Impact of Burger Court
- A court in transition, but not a conservative revolution that some had hoped.
- More one vote victories than any previous court.
- Struggled to roll back rights of the accused, but continued with remedy for de jure segregation, affirmative action, abortion, brief ban on death penalty.
- Modified Mapp with "honest mistake exception".

Rehnquist Court, 1986-2005

Standing l. to r.: O'Connor, Blackmun, Rehnquist, Stevens, Scalia.
Seated l. to r.: Thomas, Kennedy, Souter, Ginsburg.
Radical Revision of Constitutional Law
- Rising conservative movement of the 1990s will tilt the court to the right
- Civil rights - affirmative action violates equal protection - Constitution is color-blind; Texas v Lawrence, ADA disabilities, allows greater restrictions on abortion Casey v Planned Parenthood
- Crime and punishment - a mixed record
- Legislative authority rolled back - Commerce Power US v Morrison and In
- Federalism - US v Lopez - Gun free schools (commerce)
- Voting Rights racial gerrymandering; Bush v Gore

Radical Revision of Constitutional Law
- Chipped away at liberal decisions, such as, abortion rights and affirmative action.
- Overturned cases which extended the Congress’ commerce power
- Decline in number of cases

Political Ideology on the Court
On the Right
Moderates
On the Left

Supreme Court justices are as independent as hogs on ice. You can’t herd them.
Other Important decisions

Texas v Johnson
Smith v Oregon
US v Virginia (VMI)

Impact of Rehnquist Court

- Strict Construction - Rehnquist, Scalia, Thomas (Sometimes Kennedy and O’Connor)
- Loose Construction - Brennan, Marshall
- 1992-2002 Court overturns more Congressional statutes than any other court with the exception of the 17 years of Burger’s court (Court activism)
- Rolling back the commerce clause and supporting states’ rights

The Roberts’ Court 2005-

Sitting, l. to r.: Kennedy, Stevens, Roberts, Scalia, Souter.
Standing l. to r.: Breyer, Thomas, Ginsburg, Alito
Roberts’ Court ??

- Would like for the Court to hear more cases.
- Consensus builder- wants court to speak with one voice
- Retirement of O’Connor may shift court to the Right with the appointment of Alito.
- Previous 5-4 decisions in jeopardy?

Issues for a New Century

- Military tribunals- Hamdan v Rumsfeld, 2006
- Ranks in history with the case restraining Truman from seizing the steel mills during Korea, or the case forcing Nixon to turn over the tapes, in asserting from the court that separation of powers is a fundamental principle of our Constitution, important to the founders, and that separation of powers means that the executive branch is not allowed to engage in unilateral assertions of power without authorization by Congress.

Issues for a New Century

- PATRIOT Act
- Foreign Intelligence Surveillance Act, or FISA, will oversee eavesdropping on telephone calls and e-mails to and from the United States when "there is probable cause to believe" that one of the parties is a member of al-Qaeda or an associated terrorist group.
Issues for a New Century

- Evolving Fourth Amendment
- New Challenges to PATRIOT Act
- Predicting cases

Resources

- Lessons for important cases: Mapp, Gideon, Brown, Emanmolse, Miranda, McCulloch, Texas v Johnson, Roe v Wade, US v Nixon can be found at http://www.landmarkcases.org/index.html
- Flag cases-Lesson http://www.getty.edu/education/for_teachers/curricula/dorothea_lange/lange_lesson04.html
- Photos of court Supreme Court Historical Society