

INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW  
MYTH-POWER-VALUE

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"THE LAW IS WHAT THE SUPREME COURT SAYS IT IS"  
"WHAT'S THE LAW AMONG FRIENDS?"

WEEK I:

I. BECOME ACQUAINTED WITH THE RESOURCES: FONDREN, GOVERNMENT DOCUMENTS;  
"FINDLAW;" SUPREME COURT WEBSITE, U.S, REPORTS

II. BRIEFING A CASE

- A. FACTS
- B. SECTION OF THE CONSTITUTION
- C. MAJORITY OPINION
- D. DISSENT
- E. POLITICAL CONTEXT
- F. RIGHT OR WRONG (YOUR OPINION)?

III. FAMILIARIZE YOURSELF WITH RICE-RELATED CASES

- A. SCHACHT V. UNITED STATES 398 U.S. 58 (1970)
- B. U.S. V. YOUNGBLOOD FIFTH CIRCUIT 1997
- C. \_\_\_\_\_ V. GONZALES (SUGGEST GUANTANAMO-RELATED CASE)

IV. FAMILIARIZE YOURSELF WITH ARTICLE III OF THE CONSTITUTION  
AND THE CONCEPTS OF STANDING, RIPENESS, AND JURISDICTION

NOTE: STANDING IN NEWDOW; JURISDICTION PROPOSAL TO REMOVE MARRIAGE  
DEFINITION FROM COURTS: BALANCING INTERESTS: NATIONAL SECURITY AND  
CONTROL OF TERRORISM V FAIR TRIAL/ CHILD PROTECTION V. FREE SPEECH  
CP. ASHCROFT V. ACLU "CHILLING EFFECT"

V. BE AWARE OF HOW THE SUPREME COURT AFFECTS YOU AS A RICE STUDENT/  
"REASONABLE RULES AND REGULATIONS" GRANTED BY STATE IN CHARTERING  
A PRIVATE EDUCATIONAL INSTITUTION

RECOMMEND: MASON AND STEPHENSON, AMERICAN CONSTITUTIONAL LAW  
PRENTICE-HALL (ANY FAIRLY RECENT EDITION) GOOD FOR INTRODUCTORY ESSAYS

\*\*\*\*\*THE INSTRUCTOR WILL BE GLAD TO ASSIST STUDENTS WITH SPECIAL  
CHALLENGES IN MAKING ARRANGEMENTS WITH REGARD TO ANY ASPECT OF  
THE CLASS (SEATING, NOTES, EXAMS).

NOTE: ADDITIONAL CASES REGARDING "DRESS CODES" "STRIP SEARCHES" "DEMONSTRATIONS"

MOST RECENT SITUATION WHICH HAS INTERESTED THE ACLU HAS BEEN AT ATLANTIC COMMUNITY SCHOOL DISTRICT. A CLASSMATE ALLEGED THE THEFT OF \$100.00. CP, CASE DEALING WITH 13 YEAR OLD: REDDING V. SAFFORD UNITED SCHOOL DISTRICT 567 U.S. (2009) THE SEARCH WAS ALLEGEDLY FOR EXTRA STRENGTH IBOPRUFEN, BUT CP. PER CONTRA MORSE V. FREDERICK 561 U.S. 393 (2007) THE "BONG HITS 4 JESUS" CASE GIVING THE SCHOOL DISCIPLINARY LATITUDE; CP. AGAIN TO TINKER V. BOARD AND CASES IN WHICH THE COURT SUSTAINED IN-SCHOOL PROTEST OF THE VIETNAM WAR.

RELEVANT TO THE ISSUE OF "AFFIRMATIVE ACTION AND DIVERSITY IN COLLEGE ADMISSIONS: CF. GRATZ V. BOLLINGER 539 U.S. 244 (2003) INFLUENCING RICE'S UNDERGRADUATE ADMISSIONS POLICIES AND GRUTTER V. BOLLINGER 539 U.S. 306 (2003) ON LAW SCHOOL ADMISSIONS, BOTH REPLACING EARLIER FIFTH CIRCUIT OPINIONS.

NOTE: ADDITIONAL READINGS ON INTERESTING CONSTITUTIONAL TOPICS:

DERSHOWITZ, ALAN M. PREEMPTION NEW YORK: W.W. NORTON 2007 (POLITICAL ACTION IN THE MIDDLE EAST

FAIGMAN, DAVID LAURENCE, LABORATORY OF JUSTICE NEW YORK: HENRY HOLT 1998. (HOW THE SUPREME COURT EVALUATES AND APPLIES SCIENTIFIC EVIDENCE IN MAKING DECISIONS)

KORS, ALAN CHARLES AND SILVERGLATE, HARVEY A, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES NEW YORK: FREE PRESS 1998

MINUTAGLIO, BILL, THE PRESIDENT'S COUNSELOR, "THE RISE TO POWER OF ALBERTO GONZALES," RAYO (2006)

ADAMS, RANDALL WITH WILLIAM AND MARILYN MORRIS HOFFER, ADAMS V. TEXAS NEW YORK: ST. MARTIN'S (1992) CF. "THE THIN BLUE LINE," MOVIE BASED ON THE BOOK. "ACTUAL INNOCENCE" IS NOT A DEFENSE IN TEXAS FOR RELEASE FROM PRISON SINCE THE ILLUSION IS MAINTAINED THAT A JURY CANNOT ERR ON THIS POINT.

\*\* ALTHOUGH MOST OF THE RECOMMENDED LEADINGS ARE NON-FICTION, LEGAL ISSUES ARE FREQUENTLY RAISED IN LITERATURE, "ANTIGONE," "THE MERCHANT OF VENICE," LES MISERABLES, HARPER LEE'S TO KILL A MOCKINGBIRD, NOT TO MENTION THE INTERMINABLE LITIGATION IN DICKENS' BLEAK HOUSE WITH JARNDYCE V. JARNDYCE. MOVIES SUCH AS "INHERIT THE WIND," "RASHOMON," AND "JUDGMENT AT NUREMBERG" OFFER INSIGHTS INTO THE LAW AND HUMAN NATURE. THE STUDENT OF CONSTITUTIONAL LAW CAN HARDLY GO WRONG WITH WORKS BY JOHN GRISHAM, SCOTT TUROW, OR GARY SPENCE. THERE ARE ALSO A LARGE NUMBER OF BIOGRAPHIES AND COMMENTARIES BY CONTEMPORARY LAWYERS SUCH AS LEON JAWORSKI.

WEEK I-II SUPPLEMENT

BE FAMILIAR WITH THE JUSTICES CURRENTLY ON THE SUPREME COURT AS WELL AS THE CURRENT AND RECENT DOCKET.

DESTEFANO V. RICCI (WIKIPEDIA) 555 US \_\_\_\_ (2009)

NEW HAVEN FIREFIGHTERS AFFIRMATIVE ACTION SUIT. COURT DECLARED THAT DIFFERENTIAL TREATMENT VIOLATED TITLE VII AND THEREBY CONSTITUTED REVERSE DISCRIMINATION.

SULLIVAN V. FLORIDA

IN 2005 THE COURT HELD THAT CAPITAL PUNISHMENT FOR JUVENILES VIOLATES THE EIGHTH AMENDMENT, BUT DOES LIFE WITHOUT PAROLE?

CF. "DOES NAPOLEON BEAZLEY DESERVE TO DIE?" TEXAS MONTHLY APRIL 2007 AND THE FOLLOW-UP "NAPOLEON'S LAST STAND"

JONES V. HARRIS ASSOCIATION

DEALS WITH EXECUTIVE COMPENSATION; CF. "PREVIEW OF SUPREME COURT CASES"

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT CASE

DEALS WITH VOTING DISTRICTS AND THE "PRE-CLEARANCE" REQUIREMENT. GINSBURG FELT THAT IT WAS ONE OF THE MOST IMPORTANT CASES OF 2009. NOTE: THOMAS DISSENT.

TEXAS OBSERVER ARTICLE MAY 2009

BRISCOE V. VIRGINIA

CRIMINAL PROCEDURE/"FAIR TRIAL" AND THE PROBLEM OF DIRECT CONFRONTATION AND CROSS-EXAMINATION IN COURT

AMERICAN NEEDLE V. NFL

"RULE OF REASON/" TEAM FRANCHISE PRODUCTS AND THE SHERMAN ANTI-TRUST ACT

BERHUIS, WARDEN V. SMITH

CRIMINAL PROCEDURE/RACIAL COMPOSITION OF JURIES; CF. DUREN V. MISSOURI; IF A COMMUNITY HAS A MINORITY POPULATION OF 7.28% BUT ONLY 6% OF THAT MINORITY ARE SELECTED FOR A JURY, IS THE EFFECT UNDULY DISCRIMINATORY.

WATCH THESE CASES THROUGHOUT THE SEMESTER AND LOOK FOR JANUARY 2010 ADDITIONS. ALSO WATCH THE POLITICS OF JUDICIAL CONFIRMATION HEARINGS.

ONE OF THE MOST IMPORTANT PENDING DECISIONS: CITIZENS UNITED V. FEDERAL ELECTION COMMISSION (REARGUED SEPTEMBER 2009) CAMPAIGN FINANCE/ IS "HILLARY:THE MOVIE" ELECTION COMMUNICATION OR DOCUMENTARY?

NOTE: AMERICANS ARE A LITIGIOUS PEOPLE. ENCOURAGED BOTH BY TELEVISION AND TRADITION, THERE IS AN URGE "TO HAVE ONE'S DAY IN COURT." ALMOST ANY SITUATION MAY RAISE CONSTITUTIONAL ISSUES, E.G., A STUDENT MAY SUE FOR UNFAIR GRADING PRACTICES. CAVEAT: BEFORE YOU THINK TOO DEEPLY ABOUT IT YOU SHOULD KNOW THAT AT AN IVY LEAGUE SCHOOL. THE STUDENT LOST. THE GENERAL HOLDING IS THAT UNIVERSITIES ARE THE BEST JUDGES OF THEIR OWN EDUCATIONAL POLICIES. INSTRUCTORS ARE LIKE MEDIEVAL RULERS, "EIUS RELIGIO, CUIUS REGIO," AND WHAT PLEASURES THE INSTRUCTOR "LEGES VIGOREM HABET." (YOU SHOULD ALSO BE AWARE THAT THE GREAT ENGLISH JURIST, COKE, WAS GIVEN TO FABRICATING ANCIENT ROMAN LAW MAXIMS TO SUIT DIFFICULT SITUATIONS.

COURTROOM DRAMA PROVIDES ENTERTAINMENT FOR THE AMERICAN PEOPLE, TAKE HIGH PROFILE CASES SUCH AS THE O.J. SIMPSON CASE OR THE FORTH-COMING 9/11 CASE. CONSIDER THE ODD AND IMAGINATIVE TWISTS IN VARIOUS "PERRY MASON STYLE" DEFENCES (PROBABLY BETTER THAN JOHN WAYNE STYLE OR TEMPLE HOUSTON'S SHOOTING A GUN IN COURT TO DISPERSE THE JURY.) TAKE "THE TWINKIE DEFENSE" OR "THE DEVIL MADE ME DO IT DEFENSE." WE MAY SOON HAVE DEFENSES BASED UPON GENETIC IRRESPONSIBILITY OR MALPRACTICE AS WE HAVE HAD CASES ON PARENTAL MALPRACTICE (SENT ME TO A SCHOOL THAT WAS TOO COMPETITIVE); SPOUSAL MALPRACTICE (FAILED TO SHOVEL THE SNOW WHICH RESULTED IN A STRAIN); WAITSTAFF MALPRACTICE (FAILED TO GIVE US BOTH MENUS WITH PRICES (ACTUALLY NOT A MALPRACTICE CASE:" EDUCATIONAL MALPRACTICE (FAILED TO OFFER COURSES THAT ARE LISTED IN THE COLLEGE CATALOGUE.) BEWARE THE FRIVILIOUS LAWSUIT AND RECOGNIZE THE NEED FOR TORT REFORM, BUT WE ARE NOT QUITE TO THE STAGE OF DE LEGIBUS COMBURENDO, OR BURN THE LAWS AND THE LAWYERS, NOT QUITE TO THE STATE THAT IF THERE WERE NO CRIMINAL LAWS, THERE WOULD BE NO CRIMINALS, AND NOT TO THE STAGE OF "ONE PRISONER, ONE TV SET."

MORE SERIOUSLY, LIKE THE CONSTITUTION THE LAWS THEMSELVES HAVE A MYTHOLGY ALL THEIR OWN, HANDED DOWN FROM A TEMPLE IN WASHINGTON, D.C., BY JUDGES DRESSED IN AN ALMOST PRIESTLY FASHION. JUDGES BY THE WAY ARE SINGULARLY GIVEN TO TOLERATING WEAPONS, CELL PHONES, AND DEMONSTRATIONS IN ANY AREAS EXCEPT THEIR OWN SACRED PRECINCTS. THE SYSTEM INDEED AND AS THAT IN PLATO'S REPUBLIC PLACES SEVERE BELIEF DEMANDS ON ITS CITIZENS. PLATO ASKS US TO BELIEVE THAT IT IS BETTER TO BE CAUGHT AND PUNISHED THAN TO ESCAPE JUSTICE. HE PUSHES THE CONCEPT OF JUSTICE AS A "DIVISION OF LABOR. THE AMERICAN SYSTEM ASKS US TO BELIEVE THAT AN INDIVIDUAL IS "INNOCENT UNTIL PROVEN GUILTY" (ALTHOUGH HOW CAN ANYONE WHO IS INNOCENT BE SUMMONED BEFORE THE NOCTURNAL COUNCIL?) WE ARE ASKED TO BELIEVE THAT AN INDIVIDUAL MAY BE DECLARED "NOT GUILTY" UNDER THE "REASONABLE DOUBT" STANDARD BUT HAVE TO PAY DAMAGES UNDER THE CIVIL "PREPONDERANCE OF THE EVIDENCE STANDARD." WE ARE ASKED TO BELIEVE THAT A POOR MAN HAS AS MUCH CHANCE OF OBTAINING JUSTICE WITH A PUBLIC DEFENDER AND WITHOUT A JURY SELECTION CONSULTANT AS DOES A WEALTHY MAN/WOMAN. SUCH BELIEF DEMANDS PLACE STRAINS ON THE CONCEPT OF "THE RULE OF LAW."

N.B. TWO STREET MAXIMS "DENY, DENY, DENY" AND "LAWYER UP." (THE SUPREME COURT SHOULD NOT HAVE TO BE CONCERNED WITH ELIGIBILITY IN FOOTBALL AAA TEXAS OR CHEERLEADER ELECTIONS.)

MOOT COURT CASE I

SUPREME COURT OF OWLS

1 RICE 1

IN RE THE SPELUNCEAN EXPLORERS

NB. LON L. FULLER: "THE CASE OF THE SPELUNCEAN EXPLORERS," HARVARD LAW REVIEW, VOL. 62 #4, FEBRUARY 1949

DEFENDANTS, AMBASSADORS FROM SPELUNCEA TO THE UNITED STATES, WERE TOURING THE ROCKY MOUNTAINS. THEY WERE TRAPPED BY A ROCKSLIDE IN A CAVE. RESCUE WAS VERY DIFFICULT BECAUSE ALL EXITS WERE TIGHTLY BLOCKED. THE THREE MEN HAD SCANT PROVISIONS. COMMUNICATIONS WITH THE RESCUERS WERE CONDUCTED BY WALKIE-TALKIE. A PHYSICIAN DETERMINED THAT THEY COULD NOT ALL SURVIVE WITH THE PROVISIONS THEY HAD. THEREFORE THE AMBASSADORS AGREED TO SACRIFICE ONE OF THEIR NUMBER. LOTS WERE CAST, AND ONE WAS SACRIFICED. THE RESCUERS DID NOT KNOW OF THESE ACTIVITIES.

IGNORE THE DIPLOMATIC IMMUNITY ACT OF 1790.

THE ISSUE IS REVERSION TO A "STATE OF NATURE" AND "NATURAL LAW."

RULES OF PLEADING:

- I. IN GENERAL ASSUME STANDING AND JURISDICTION
- II. EXAMINE THE PROPER FORM FOR A LEGAL BRIEF. PRESENTATIONS SHOULD BE LIMITED TO TEN MINUTES OF ARGUMENT.
- III. CONCENTRATE ON NO MORE THAN FOUR MAJOR CONTENTIONS
- IV. EACH ADVOCATE WILL ARGUE THE CASE AND BE PERMITTED FIVE MINUTES OF REBUTTAL. QUESTIONS FROM THE PANEL OF JUDGES OR THE CLASS WILL CONSUME THE REMAINDER OF THE PERIOD.

\*\*N.B. BRIEF FOR MOOT COURT ARE NOT THE SAME AS BRIEFS FOR ORAL ARGUMENT. LOOK UP THE FORM OF A LEGAL BRIEF.

WEEK II. THE ORIGINS OF JUDICIAL POWER AND JUDICIAL REVIEW

A. READ HAYBURN'S CASE 2 U.S. 409 (1792)

MARBURY V. MADISON 5 U.S. 137 (1803)

COHENS. V. VIRGINIA 19 U.S. 264 (1821)

B. THE COURT AS A POLITICAL INSTITUTION: CALDER V. BULL

C. JUSTICES HUGHES' GREAT SELF-INFLICTED WOUNDS

D. UNDERSTAND THE NATURAL LAW BASIS OF THE CONSTITUTION

READ: FLETCHER V. PECK 10 U.S. 87 (1810)

E. UNDERSTAND HOW NATURAL LAW RELATES TO THE "RULE OF REASON"  
AND "SUBSTANTIVE DUE PROCESS" IN THE MINNESOTA AND NEBRASKA  
RATE CASES

\*\*F. EXAMINE THE CURRENT DOCKET (PENDING CASES) BEFORE THE  
SUPREME COURT

NOTE: JOHN A. GARRATY: QUARRELS THAT HAVE SHAPED THE CONSTITUTION

ROBERT G. MCCLOSKEY: THE AMERICAN SUPREME COURT

BOTH ARE NOW IN REVISED EDITIONS.

ALSO VALUABLE IS PROF. CORWIN'S THE CONSTITUTION AND  
WHAT IT MEANS TODAY WHICH PROVIDES A RUNNING COMMENTARY ON  
THE CONSTITUTION.

SUPPLEMENT: MR. JUSTICE HUGHES' "GREAT SELF INFLICTED WOUNDS"

ONLY THREE TIMES IN THE NINETEENTH CENTURY DID THE SUPREME COURT VENTURE TO DECLARE A LAW OF CONGRESS UNCONSTITUTIONAL. EACH TIME THE COURT FOUND ITSELF "AT THE QUIET OF A STORM CENTER," SURROUNDED BY POLITICAL CONTROVERSY. AT STAKE, AS DURING THE 1930'S WITH PRESIDENT ROOSEVELT'S "COURT-PAKING PLAN" (Q.V.) WAS THE COURT'S OWN ROLE IN THE FEDERAL SYSTEM.

NOTE: EX PARTE MCCARDLE 74 US 506 (1869) CONGRESSIONAL CONTROL OVER APPEALS JURISDICTION; NOTE STANDING IN TAXPAYER SUITS.

"GREAT SELF INFLICTED WOUNDS"

- I. DRED SCOTT V. SANFORD 60 US 393 (1856): ISSUE WAS SLAVERY AND THE CONSTITUTIONALITY OF THE MISSOURI COMPROMISE. CASE COULD HAVE BEEN DECIDED ON JURISDICTIONAL GROUNDS SINCE DRED SCOTT WAS NOT A "CITIZEN."
- II. HEPBURN V. GRISWOLD 78 U.S. 603 (1869) (4-3)  
LEGAL TENDER CASES 79 U.S. 487 (1870) (5-4) WITH THE APPOINTMENT BY PRESIDENT GRANT OF JUSTICES BRADLEY AND STRONG. THE ISSUE WAS THE CONSTITUTIONALITY OF PAPER MONEY (GREENBACKS) WHICH HAD BEEN AUTHORIZED DURING THE CIVIL WAR UNDER THE "WAR POWERS."
- III. POLLOCK V. FARMERS' LOAN AND TRUST 157 US 429 (1896)  
DECLARED THE INCOME TAX (WHICH HAD ALSO BEEN JUSTIFIED UNDER THE "WAR POWERS" TO BE UNCONSTITUTIONAL. THE COURT ROSE TO A PLEA TO "STOP THE MARCH OF COMMUNISM."  
  
    POLLOCK RESULTED IN THE PASSAGE OF THE XVITH AMENDMENT. THE ONLY OTHER CASE TO HAVE THAT RESULT WAS CHISHOLM V. GEORGIA
- IV. CANDIDATES FOR A FOURTH GREAT SELF-INFLICTED WOUND HAVE BEEN NUMEROUS IN THE TWENTIETH CENTURY:
  - BAKER V. CARR 396 U.S. 186 (TENNESSEE REAPPORTIONMENT CASE IN WHICH THE COURT ABANDONED THE DOCTRINE OF "POLITICAL QUESTIONS)
  - LUCAS V. FORTYFOURTH GENERAL ASSEMBLY 377 U.S. 713 (1964)  
IN WHICH THE COURT SET ASIDE A COLORADO REFERENDUM ON REAPPORTIONMENT. N.B. WARD E.Y. ELLIOTT ON "GUARDIAN DEMOCRACY" NOTE: ORAL ARGUMENTS
  - MISSOURI V. JENKINS 491 U.S. 274 (1989) IN WHICH THE COURT DECIDED TO EXPAND ITS ROLE IN DETERMINING TAX DOLLAR PRIORITIES IN PUBLIC EDUCATION.



## JUDICIAL SELF-RESTRAINT

JUDICIAL SELF-RESTRAINT IS THE OPPOSITE OF JUDICIAL ACTIVISM. YOU SHOULD ASK YOURSELF WHICH OF THE TWO ROLES IS MORE APPROPRIATE FOR THE SUPREME COURT?

READ: ASHWANDER V. TENNESSEE VALLEY AUTHORITY 297 U.S. 298

(ONLY THOSE PARTS DEALING WITH THE DOCTRINE OF SELF-RESTRAINT)

TO PARAPHRASE AND SOMEWHAT CONDENSE THE HUGHES' COURT'S SUMMARY:

- (1) NO HYPOTHETICAL, NON-ADVERSARIAL, OR ADVISORY CASES
- (2) THE COURT WILL NOT ANTICIPATE A CONSTITUTIONAL QUESTION (BEFORE IT IS APPROPRIATELY RAISED).
- (3) WILL NOT CREATE A BROADER RULE THAN NECESSARY
- (4) WILL DECIDE A CASE ON NON-CONSTITUTIONAL GROUNDS, IF POSSIBLE, E.G. JURISDICTION. (NORMALLY THE COURT WILL DEFER TO THE STATE SUPREME COURT'S INTERPRETATION OF STATE LAW, BUT THERE ARE A LOT OF EXCEPTIONS.)
- (5) PARTY MUST SHOW REAL DAMAGE AND NOT HAVE BENEFITED FROM THE OPERATION OF THE CHALLENGED STATUTE
- (6) COURT WILL SEARCH FOR A REASONABLE INTERPRETATION TO SAVE THE CONSTITUTIONALITY OF THE STATUTE BASICALLY A PRESUMPTION OF INNOCENCE OF THE CHALLENGED LAW AND RATIONALITY ON THE PART OF THE LEGISLATORS.)

ROBERT G. MCCLOSKEY'S MATRIX

PERIOD	PROCEDURAL CONCERN	SUBSTANTIVE CONCERN	POLITICS
FEDERAL TO 1860	JUDICIAL REVIEW	STATES RIGHTS UNION/SLAVERY JOHN MARSHALL V. ROGER B. TANNEY	CIVIL WAR
1860-1937	SUBSTANTIVE DUE PROCESS "RULE OF REASON" NATURAL LAW	PRIVATE PROPERTY RIGHTS/ LAISSEZ FAIRE/CORPORATIONS AS PERSONS	NEW DEAL
1937("SWITCH IN TIME WHICH SAVED NINE" -1975	DECLINE OF SUBSTANTIVE DUE PROCESS/RISE OF SUBSTANTIVE EQUAL PROTECTION	EMPHASIS ON CIVIL RIGHTS AND CIVIL LIBERTIES	WORLD WAR II
1970-PRESENT	JUDICIAL SELF RESTRAINT	CONSERVATISM LIMITATIONS ON POWER BURGER/RHENQUIST/ROBERTS	TERRORISM

UNDERSTAND THE ALTERNATION BETWEEN JUDICIAL ACTIVISM AND JUDICIAL SELF-RESTRAINT.

UNDERSTAND THE LEADING SCHOOLS OF JUDICIAL INTERPRETATION: ANALYTICAL, HISTORICAL, AND PARTICULARLY "SOCIOLOGICAL JURISPRUDENCE" (ROSCOE POUND) VS. "MECHANICAL JURISPRUDENCE (JUSTICE ROBERTS IN U.S. V. BUTLER).

THE SUPREME COURT AS A POLITICAL INSTITUTION:  
"POLITICAL QUESTIONS" VS. POLITICAL ISSUES

"POLITICAL QUESTIONS" IS A SELF-RESTRAINING DOCTRINE DESIGNED TO KEEP THE COURT OUT OF POLITICAL CONTROVERSY. POLITICAL ISSUES IS SIMPLY A COMMONPLACE PHRASE FOR PARTISANSHIP. ALEXIS DE TOCQUEVILLE IN DEMOCRACY IN AMERICA DESCRIBED THE SUPREME COURT'S INVOLVEMENT IN POLITICS. THE "GREAT SELF-INFLICTED WOUNDS" REEMPHASIZED THE COURT AS AN ACTIVIST INSTITUTION. JUDICIAL CONFIRMATION HEARINGS SUCH AS THE CONFRONTATION BETWEEN CLARENCE THOMAS AND ANITA HILL ARE LARGELY POLITICAL IN NATURE.\*\*

READ: BUSH V. GORE (ENCYCLOPEDIA/INTERNET) WAS THE COURT BEING MISCHIEVOUS OR WAS IT SUPPORTING A DANGEROUS DOCTRINE OF JUDICIAL INTERVENTION?

EXAMINE: TEXAS SENATORIAL ELECTION WITH "LANDSLIDE LYNDON" IN 1948 IN DUVAL COUNTY. RUMOR HAD IT THAT JUSTICE BLACK INTERVENED AT THE BEHEST OF THE ROOSEVELT ADMINISTRATION TO DELIVER THE NOMINATION TO JOHNSON OVER GOVERNOR COKE STEVENSON.

\*\* . CP. CONFIRMATION HEARINGS FOR JUSTICES BLACK AND DOUGLAS AS WELL AS THE PROBLEMATIC DOCTRINE OF "ORIGINALISM" IN THE JUDGE BORK HEARINGS. BORK WAS REJECTED.

ORIGINS OF THE CONTROVERSY: THE DORR REBELLION IN RHODE ISLAND READ: LUTHER V. BORDEN 49 US 1 (1849)

QUESTION: SHOULD THE COURT BE INVOLVED IN POLITICS? NOTE AGAIN THE BACKGROUND OF CALDER V. BULL (1796).

## THE AXIS OF POWER: CONFLICT IN SEPARATION

ONE OF THE MOST MYTHOLOGICAL ASPECTS OF THE CONSTITUTION IS THE MANNER IN WHICH CUSTOMS AND TRADITIONS ACCUMULATE QUITE ASIDE FROM THE FORMAL AMENDING PROCESS, E.G., THE INHERENT POWERS OF THE PRESIDENCY TO ACT RAPIDLY IN CASE OF A NATIONAL EMERGENCY. CF. GRANT MCCONNELL, STEEL AND THE PRESIDENCY (1962). PRESIDENT NIXON AND THE WATERGATE AFFAIR ALSO HIGHLIGHTED THE EXTRA-CONSTITUTIONAL CUSTOMS AND TRADITIONS WHICH HAVE ACCUMULATED WITHIN THE CONSTITUTIONAL FRAMEWORK. REMEMBER THAT THERE IS NO REFERENCE TO POLITICAL PARTIES IN THE CONSTITUTION AT ALL, MUCH LESS NOMINATING CONVENTIONS, YET THESE INSTITUTIONS ARE PART OF WHAT WALTER BAGEHOT IN THE NINETEENTH CENTURY TERMED THE "EFFICIENT FUNCTIONS" OF GOVERNMENT AS OPPOSED TO THE "DIGNIFIED FUNCTIONS" (CEREMONIAL). IN WATERGATE AS IN THE RECENT CONTROVERSY REGARDING THE VICE PRESIDENT AND THE ENERGY TASKFORCE YOU HAD THE ASSERTION OF "EXECUTIVE PRIVILEGE," AN ASSERTION OF THE RIGHT OF SECRECY IN MATTERS OF NATIONAL SECURITY. (YOU HAD SIMILAR ASSERTIONS REGARDING MEMOS OF THE WHITE HOUSE COUNSEL ON THE GROUNDS THAT THE PRESIDENT NEEDED CANDID ADVICE.) EXECUTIVE PRIVILEGE IS NOT MENTIONED IN THE CONSTITUTION. NEITHER IS CONGRESS' POWER TO INVESTIGATE ALTHOUGH SUCH AUTHORITY MIGHT BE REASONABLY DERIVED OR INHERITED FROM BRITISH PRACTICE OR CONSIDERED AN ADJUNCT TO THE LAW-MAKING PROCESS. "JUDICIAL REVIEW" IS ALSO NOT SPECIFIED IN CONFLICTS WITHIN THE SEPARATION OF POWERS DOCTRINE. INDEED, JUDICIAL REVIEW MIGHT BE EQUATED WITH JUDICIAL SUPREMACY WHICH IS CONTRARY TO THE LOCKEAN NOTION OF LEGISLATIVE SUPREMACY. INCIDENTALLY IT IS WORTH REVIEWING THE NUMEROUS ANTI-MAJORITARIAN FEATURES OF THE CONSTITUTION WHICH ARE ALSO ANTI-EQUALITARIAN. THE POINT IS THAT THE DOCUMENT OF 1789 DOES NOT ALWAYS CORRESPOND WITH THE PRACTICE OF 2010. THE SAME OBSERVATION COULD BE MADE WITH THE POWERS OF THE GOVERNOR IN THE TEXAS CONSTITUTION, EVEN SPECIFICALLY THE POWER OF THE GOVERNOR TO WARD OFF HOSTILE INDIAN ATTACKS ON THE FRONTIER. BOTH TEXANS AND AMERICANS ARE ATTACHED TO THE IDEA OF HISTORY AND TRADITIONAL CUSTOMS AS PART OF CONSTITUTIONAL "COMMON LAW."

READ: YOUNGSTOWN STEEL V. SAWYER 343 U.S. 579 (1952). PAY PARTICULAR ATTENTION TO THE CONSENSUS THAT THERE ARE INHERENT POWERS IN THE CHIEF EXECUTIVE BUT SEIZURE OF THE STEEL MILLS IS NOT ONE OF THEM (ESPECIALLY BECAUSE OF THE PRESENCE OF THE TAFT-HARTLEY ACT, "NO GOOD, DO-NOTHING" AS TRUMAN CALLED THE CONGRESS WHICH PASSED IT.) PAY ATTENTION TO THE INDIVIDUAL OPINIONS, BLACK, FRANKFURTER, VINSON, MINTON, REED.

READ: UNITED STATES V. CURTISS-WRIGHT (1936) WHICH PROF. GARRATY CALLS "THE CASE OF THE SMUGGLED BOMBER," "CHACO WAR CASE."

NOTE LEGISLATIVE INVESTIGATION IN WATKINS V. U.S. AND BARRENBLATT V. U.S. EVALUATE PRESIDENTIAL AND CONGRESSIONAL POWERS DURING CIVIL WAR AND RECONSTRUCTION.

OTHER PRESIDENTIAL POWERS: THE CONSTITUTION DOES NOT ENNUMERATE A REMOVAL POWER: "DELEGATED LEGISLATION," SPECIAL POWERS IN FOREIGN AFFAIRS.

READ: MISSOURI V. HOLLAND 252 U.S. 416 (1920) AND NOTE UNITED STATES V. PINK "EXECUTIVE AGREEMENTS." ALSO: UNITED STATES V. BELMONT.

WEEK III-V

CONTRASTING JUDICIAL PHILOSOPHIES OF MARSHALL AND TANEY:

I. CONTRACT

II. COMMERCE

III. FEDERALISM

HERE YOU WILL FIND IT USEFUL TO REVIEW FROM POLI 209: "JOHN MARSHALL: MASTER MYTHMAKER" AND BE AWARE OF BEVERIDGE'S CLASSIC LIFE OF JOHN MARSHALL. REVIEW BIOGRAPHIES OF BOTH JUDGES ON WIKIPEDIA. MARSHALL'S "LOOSE CONSTRUCTION" AND TANEY'S "STRICT CONSTRUCTION" BECOME THE TWO MAIN SCHOOLS OF JUDICIAL THOUGHT. REMEMBER, HOWEVER, THAT IN CALDER V. BULL, THE FEDERALISTS WERE WILLING TO ALTER THEIR BROAD CONSTRUCTION, THEIR ADHERENCE TO PRIVATE PROPERTY RIGHTS AND THEIR ATTITUDE TOWARD THE STATES IN THE FEDERAL SYSTEM IN ORDER TO ACHIEVE A SPECIFIC POLITICAL RESULT. MARSHALL WOULD ALWAYS SURPRISE HIS JEFFERSONIAN OPPONENTS BY YIELDING IN THE SHORT TERM IN ORDER TO EXPAND JUDICIAL POWER IN THE LONG TERM. WHERE HE WAS UNCERTAIN AS TO HOW MUCH "THE CONTRACT CLAUSE" OR "THE COMMERCE CLAUSE" WOULD STAND, HE WOULD RELY UPON A SECONDARY BASIS, SUCH AS NATURAL LAW IN FLETCHER V. PECK. BECAUSE TANEY WAS CONSERVATIVE HE STRESSED ADHERENCE TO PRECEDENT OR "STARE DECISUS," AND BECAUSE THE PRECEDENTS WERE ALWAYS FEDERALIST OR MARSHALL'S HE WAS IN A PERPETUAL STATE OF CONFLICT BETWEEN HIS JUDICIAL THEORY AND HIS POLICY OBJECTIVES.

READ THE "COMMERCE CLAUSE" AND THE "CONTRACT CLAUSE" IN THE CONSTITUTION.

MOOT COURT CASE II: TO BE SELECTED

MOOT COURT CASE III: PRIVATE SCHOOL DISCRIMINATION IN ADMISSIONS POLICY.

MOOT COURT CASE IV: STUDENT RIGHTS AT A PRIVATE UNIVERSITY

WEEK IV.: "THE CONTRACT CLAUSE IS DEAD; LONG LIVE THE CONTRACT CLAUSE!"

I. DISTINGUISH AND CONTRAST THE MARSHALL AND TANEY POSITIONS ON THE CONTRACT CLAUSE:

- A. IS THERE AN "IMPLIED CONTRACT?"
- B. IS THE CONTRACT TO BE CONSTRUED TO FAVOR THE ADVENTURERS (ENTREPRENEURS) OR IN FAVOR OF THE PUBLIC?
- C. WHAT ARE THE COMPETING THEORIES OF ECONOMIC DEVELOPMENT BEHIND THE INTERPRETATIONS?

II. READ:

DARTMOUTH COLLEGE V. WOODWARD 17 US 518 (1819)

ONE OF DANIEL WEBSTER'S FINEST CASES AND THE REASON GOVERNOR PERRY CAN'T TAKE OVER RICE.

REVIEW: FLETCHER V. PECK 10 US 87 (1810)  
NATURAL LAW

CHARLES RIVER BRIDGE V. WARREN BRIDGE COMPANY (1837) 36 US 420

TANEY'S MOST IMPORTANT CONTRACT CLAUSE DECISION. NOTE: MR. JUSTICE'S STORY'S POSITION WHICH IS POSSIBLY THE ONE MARSHALL WOULD HAVE TAKEN IF HE HAD LIVED.

HOME LOAN COMPANY V. BLAISDELL 290 U.S. 398 (1934)

THE MINNESOTA MORTGAGE MORATORIUM CASE; "THE CONTRACT CLAUSE IS DEAD." NOTICE HOW THE CONSTITUTION, WHICH WAS INTENDED TO PREVENT DEBTOR RELIEF LEGISLATION NOW FACILITATES IT BECAUSE OF AN ECONOMIC EMERGENCY.

UNITED STATES TRUST OF NEW YORK V. NEW JERSEY 431 US 1 (1977)

HARBOR DEVELOPMENT BONDS FOR RAILWAYS, NO WAY: "LONG LIVE THE CONTRACT CLAUSE" AND THE SUPREME COURT.

WEEK V. "THAT COMMERCE WHICH AFFECTS MORE STATES THAN ONE"

THE CONSTITUTION WAS DRAFTED IN RESPONSE TO DEMANDS FROM THE ANNAPOLIS CONVENTION OF 1787 TO SOLVE THE PROBLEM OF COMMERCIAL RIVALRY (INCLUDING THE PENNAMITE WARS) BETWEEN THE STATES. THE INTERPRETATION OF THE COMMERCE CLAUSE BECAME ONE OF THE MOST IMPORTANT AND CONTROVERSIAL SOURCES OF JUDICIAL POWER BECAUSE OF SLAVERY. AGAIN THE CONTRAST BETWEEN MARSHALL'S AND TANEY'S APPROACH TO CONSTITUTIONAL INTERPRETATION IS VERY MARKED.

READ: GIBBONS V. OGDEN 22 US 1 (1824)

ALTHOUGH GIBBONS IS MARSHALL'S FIRST GREAT EXPOSITION OF BROAD, NATIONAL REGULATORY POWERS UNDER THE "COMMERCE CLAUSE," ULTIMATELY IT IS DECIDED ON THE BASIS OF THE "SUPREMACY CLAUSE," THE CONFLICT BETWEEN THE FEDERAL PILOT LICENSING ACT AND THE NEW YORK STEAM BOAT MONOPOLY ACT. AS USUAL, THE JEFFERSONIANS WERE PLEASED WITH THE SHORT-TERM RESULT, THE STRIKING DOWN OF THE MONOPOLY. THEY DID NOT COMPLETELY PERCEIVE THE LONG-TERM POTENTIAL FOR NATIONAL REGULATION.

WILLSON V. BLACKBIRD CREEK MARSH COMPANY 27 US 245 (1829)

SOME SCHOLARS SEE THIS CASE AS ONE OF MARSHALL'S GREATEST MISSED OPPORTUNITIES. JUST AS IN COHENS V. VIRGINIA HE HAD UPHELD THE ANTI-LOTTERY LAW IN THIS CASE HE SUSTAINED STATE REGULATION IN THE AREA OF INTERSTATE COMMERCE UNDER THE "STATE POLICE POWER," THE RIGHT OF THE STATE TO LEGISLATE FOR THE HEALTH, MORALS, AND SAFETY OF ITS CITIZENS.

COOLEY V. BOARD OF WARDENS 53 US 299 (1851)

TANEY AGAIN UPHOLDS STATES RIGHTS AND TRIES TO OBTAIN A PRAGMATIC FORMULA TO DESCRIBE WHEN THE STATES MAY REGULATE IN THE AREA OF INTERSTATE COMMERCE AND WHEN THEY MAY NOT. HE OBTAINS A RULE BUT NOT EXACTLY THE ONE HE WANTS IN AN EFFORT TO SYNTHESIZE GIBBONS AND BLACKBIRD CREEK. THE "COOLEY DOCTRINE" IS ALSO THE "RULE OF SELECTIVE EXCLUSIVENESS." THE FEDERAL PILOT LICENSING ACT WHICH WAS CRITICAL TO GIBBONS IS ALSO PRESENT IN COOLEY.

KEEP AN EYE ON THE CONFLICT BETWEEN THE STATE POLICE POWER AND THE COMMERCE CLAUSE, PARTICULARLY AS THE ROBERTS COURT HAS BEEN ATTEMPTING TO ENHANCE STATE POWER.



WEEK VI CONFLICT OF STATE AND FEDERAL POWER IN INTERSTATE COMMERCE

UNDER TANEY'S THEORY OF "DUAL FEDERALISM" BOTH THE STATES AND THE FEDERAL GOVERNMENT CAN EXERCISE POWERS IN COMMERCE AND IN TAXATION. THERE ARE SEVERAL CONFLICTING SERIES OF PRECEDENTS, FOR EXAMPLE, THAT THE STATES COULD NOT REGULATE BECAUSE OF THE NEED FOR NATIONALLY UNIFORM STANDARDS OR THAT COMMERCE IN A PARTICULAR AREA WAS AN "EXCLUSIVE POWER" OF THE FEDERAL GOVERNMENT. UP UNTIL THE 1880'S AND 1890'S WITH THE CLAYTON AND SHERMAN ANTI-TRUST ACTS AND TEDDY ROOSEVELT'S TRUST-BUSTING POLICY, THE FEDERAL GOVERNMENT, HOWEVER, HAD NOT REGULATED, MUCH IN ACCORD WITH THE COURT'S PREVAILING LAISSEZ-FAIRE PHILOSOPHY. AS IN ANY OTHER FIELD OF CONSTITUTIONAL LAW, THERE ARE SOME SURPRISING EXCEPTIONS TO THE GENERAL RULES OF JUDICIAL POLICY AND DECISION-MAKING. FOR EXAMPLE, THE DAYTON GOOSE CREEK RAILWAY CASE ALLOWS THE SEIZURE OF EXCESS PROFITS OF AN INTRA-STATE CARRIER TO DEVELOP "COMPETITION."

LIMITATIONS ON FEDERAL REGULATORY AUTHORITY:

- A. STATE POLICE POWER
- B. INDIRECT EFFECTS
- C. INTRA-STATE COMMERCE
- D. CERTAIN SUBJECTS SUCH AS INSURANCE AND BASEBALL
- E. MINING, AGRICULTURE BEFORE THE COMMERCIAL PROCESS: NOTE THE EXCEPTIONS IN AUTO THEFT, KIDNAPPING, PROSTITUTION, DRUGS, SAWED OFF SHOT-GUNS. THIS IS THE DOCTRINE KNOWN AS "NOXIOUS PRODUCTS AND DELETERIOUS EFFECTS. THE ULTIMATE QUESTION IS IF THE COURT LIKES THE SUBJECT REGULATED. COMPARE ARTIFICIALLY COLORED OLEO-MARGARINE (THE COURT LIKES REAL BUTTER) AND CHILD LABOR (THE COURT HATES KIDS). ADD LEISEY V. HARDIN (THE PEORIA BEER CASE)

LIMITATIONS ON STATE AUTHORITY

- A. INTERSTATE
- B. NEED FOR NATIONAL UNIFORM STANDARDS
- C. DIRECT EFFECT (BUT IS THERE ANYTHING LEFT WHICH DOESN'T? REMEMBER CASES SUCH AS WILLY'S PUB, WISCONSIN COTTON QUOTA, CP. WICKARD V. FILBURN)

DURING THE NEW DEAL THE COMMERCE POWER RATHER THAN RESTRICTING THE FEDERAL GOVERNMENT WAS USED TO PERMIT ALMOST ANY SORT OF REGULATION. THE COMMERCE POWER DECLINED AS AN OBSTACLE TO FEDERAL REGULATION AS WELL AS TO STATE REGULATION.

STATE REGULATORY POWER IN THE FIELD OF INTERSTATE COMMERCE. YOU BE THE JUDGE  
"THE UPSET FRUIT-BASKET CASES"

GIVEN THESE "HYPOTHETICAL" SITUATIONS, IT IS FOR YOU TO DETERMINE IF THE SUPREME COURT WILL DECLARE THAT THERE IS AN "UNDUE BURDEN" ON INTERSTATE COMMERCE OR IF THE STATE'S ACTIVITY IS PERMISSIBLE.

MAY A STATE:

PASS A LAW LIMITING THE LENGTH OF TRAINS?

REQUIRING A CABOOSE AT THE END OF A TRAIN?

REQUIRING THAT A FRUIT PRODUCED IN A STATE BE PROCESSED IN THE STATE AND LABELLED AS THAT STATE'S PRODUCT?

REQUIRING AN INSPECTION FOR MEDFLY OR HOOF AND MOUTH DISEASE?

PROHIBITING THE SALE OF FRUIT (AVOCADOS) IF THEY HAVE PASSED A CERTAIN OILY CONTENT?

LIMITING THE PRODUCTION OF OIL WITHIN A STATE?

LIMITING THE PRODUCTION OF COAL WITHIN A STATE?

GIVING FIRST-PREFERENCES TO BUILDING CONTRACTORS WITHIN A STATE OF CEMENT PRODUCED WITHIN A STATE?

IN SPITE OF THE FACT THAT THE ORIGINAL CONSTITUTION AIMED AT PREVENTING ECONOMIC PROTECTIONISM THE SUPREME COURT HAS ALLOWED REGULATION IN SOME CASES AND NOT IN OTHERS. ALTHOUGH AT TIMES THE POLITICAL CONTEXT OF THE DECISION GIVES SOME INFORMATION, THE OUTCOME OF MANY COMMERCE CLAUSE CASES HAS BEEN DIFFICULT TO PREDICT.

WEEK VII-VIII MANTRAS AND DOCTRINES OF THE INEVITABLE:  
TAXATION

- I. "THE POWER TO TAX IS THE POWER TO DESTROY."
- II. "A TAX IS A TAX IS A TAX."
- III. "A TAX IS A TAX IS A PENALTY."
- IV. DOCTRINE OF "RECIPROCAL IMMUNITIES"
- V. WHAT IS MEANT BY A "DIRECT TAX?" (THE COURT HAS NEVER REALLY MADE A CLEAR DETERMINATION.)
- VI. ALTHOUGH "INTENT OF THE FRAMERS" MAY BE A NON-ISSUE, WHAT ABOUT LEGISLATIVE INTENT OR MOTIVE IN PASSING A LAW?

ANTICIPATING THE PROBLEMS TO BE RAISED WITH REGARD TO EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, CONSIDER THE ISSUES RAISED IN YICK WO V. HOPKINS 118 US 356 ALTHOUGH NOT A TAX CASE YICK WO FAIRLY RAISES THE ISSUE OF INTENT.

READ: HYLTON V. UNITED STATES 3 U.S. 171 (1796)  
DIRECT TAX

READ: MCCULLOCH V. MARYLAND 17 U.S. 316 (1819)

UNDERSTAND THE DOCTRINE OF RECIPROCAL IMMUNITIES.

AS IN THE CASE OF INTERSTATE COMMERCE THE PERMISSABILITY OF EXTENSIVE USE OF THE TAX POWER DEPENDS LARGELY ON WHAT BEHAVIOR THE COURT APPROVES OF AND NOT WHAT THE CONSTITUTION SAYS.

COMPARE THE RESULTS:

UNITED STATES V. E.C. KNIGHT "THE SUGAR TRUST CASE" 156 U.S. 1 (1895)

HAMMER V. DAGENHART ("CHILD LABOR CASE") / BAILEY V. DREXEL FURNITURE  
247 U.S. 254 (1918); 259 U.S. 20 (1922)

MCCRAY V. UNITED STATES ("OLEO TAX CASE") 195 U.S. 27 (1904)

CARTER V. CARTER COAL (NATIONAL BITUMINOUS COAL ACT/TAX OF 10%)  
298 U.S. 238 (1936)

STEWART MACHINE COMPANY V. DAVIS (SOCIAL SECURITY TAX) 301 U.S. 548 (1937)

NOTING COMMERCE: CHAMPION V. AMES (LOTTERY TICKETS) 185 U.S. 321 (1903)

TAXATION SUPPLEMENT: "RECIPROCAL IMMUNITIES" FOLLOWING MCCULLOCH  
V. MARYLAND, YOU BE THE JUDGE.

COLLECTOR V. DAY 78 U.S. 113 (1871)

SOUTH CAROLINA V. UNITED STATES 199 U.S, 437 (1905)

NEW YORK V. UNITED STATES 326 U.S. (1946)

NATIONAL LEAGUE OF CITIES V. USERY 426 U.S. 833 (1976)

GARCIA V. SAMTA 469 U.S. 523 (1985)

ALTHOUGH THIS GROUP OF CASES IS SIGNIFICANT BOTH WITH REGARD TO STATE  
SOVEREIGNTY AND TO THE JUDICIAL PROCESS, YOU MAY CHOOSE NOT TO READ THEM.

WEEK IX-X

THE COURT OF LAST RESORT: DECONSTRUCTING THE  
FOURTEEN AMENDMENT

READ: THE FOURTEENTH AMENDMENT AND BE PREPARED TO COMMENT IN DETAIL ON THE SPECIFIC MEANING OF EACH WORD AND PHRASE. FOR THE STUDENT OF CONSTITUTIONAL LAW THE TWO MOST IMPORTANT PHRASES ARE "DUE PROCESS" AND "EQUAL PROTECTION" BUT THE WORDS "STATE" AND "PERSON" HAVE ALSO CAUSED SIGNIFICANT LITIGATION. ALTHOUGH IN GENERAL THE THEORY OF RIGHTS IN THE AMERICAN CONSTITUTION IS THAT THEY ARE INDIVIDUALLY HELD, THE COURT HAS DEVELOPED THE "CLASS ACTION DEVICE" TO ALLOW LAWSUITS ON BEHALF OF "THOSE SIMILARLY SO SITUATED" IN ORDER TO MITIGATE THE DOCTRINE OF "EXHAUSTION OF ADMINISTRATIVE REMEDIES" (SUCH AS APPEALS FOR ADMISSION TO THE SCHOOL BOARD BUREAUCRACY.) IN RECENT YEARS THERE HAS BEEN A GOOD DEAL OF LITIGATION REGARDING QUOTAS AND AFFIRMATIVE ACTION AS WELL AS ALLEGATIONS REGARDING REVERSE DISCRIMINATION.

FIRST PHASE: TABULA RASA OR "THE BANDED BUTCHERS ARE BUSTED." READ:  
THE SLAUGHTERHOUSE CASES 83 U.S. 36 (1873)

SECOND PHASE: NEGATIVE: READ THE CIVIL RIGHTS CASES 100 U.S. 3 (1883)

THIRD PHASE: "CONSPIRACY:" BE FAMILIAR WITH SENATOR ROSCOE CONKLING'S TESTIMONY THAT CORPORATIONS ARE "PERSONS PROTECTED."

FOURTH PHASE: RECONSTRUCTION OF THE AMENDMENT AND THE EMERGENCE OF SUBSTANTIVE DUE PROCESS FROM PROCEDURAL DUE PROCESS IN THE MINNESOTA AND NEBRASKA RAILWAY RATE CASES CHICAGO, MILWAUKEE, AND ST. PAUL V. MINNESOTA 134 U.S. 418 (1890); MYTH V. AMES 171 U.S. 361 (1898)

FIFTH PHASE: THE RISE OF SUBSTANTIVE DUE PROCESS AND THE "RULE OF REASON"  
READ: LOCHNER V. NEW YORK; MR. JUSTICE PECKHAM'S FINEST MOMENT AND THE HOLMES DISSENT 198 U.S. (1905)

SIXTH PHASE: THE INSERTION OF THE DOCTRINE OF "BUSINESS AFFECTED WITH A PUBLIC INTEREST WHICH PARALLELS JUDICIAL INTERESTS IN INTERSTATE COMMERCE IN DEALING WITH "NOXIOUS PRODUCTS AND DELETERIOUS EFFECTS" READ THE EARLIER CASE: MUNN V. ILLINOIS. 94 U.S. 113 (1877)

THE DOCTRINE OF "BUSINESS AFFECTED WITH A PUBLIC INTEREST WHICH GOES BACK TO SIR MATTHEW HALE'S DE PORTIBUS MARIS IS ORIGINALLY INTENDED AS A PERMISSIVE CATEGORY BUT CONVERTS TO RESTRICTIVE AS THE COURT RULES THAT "COMMON CALLINGS" SUCH AS "THE BUTCHER, THE BAKER, AND THE CANDLESTICK-MAKER" ARE NOT BUSINESSES AFFECTED WITH A PUBLIC INTEREST.

FINAL PHASE: THE NEW DEAL AND THE DECLINE OF SUBSTANTIVE DUE PROCESS

BE FAMILIAR WITH THE BRANDEIS BRIEF IN MULLER V. OREGON AND THE RISE OF "SOCIOLOGICAL JURISPRUDENCE." MULLER AT 208 U.S. 412 (1908)

WEEK XI:

THE NATIONALIZATION OF THE BILL OF RIGHTS

: ARE CERTAIN RIGHTS MORE FUNDAMENTAL THAN OTHERS? WHAT DOES THE PROHIBITION THAT " CONGRESS SHALL MAKE NO LAW" MEAN IN PRACTICE. NOTE THAT THE SAME CONGRESS WHICH PASSED THE BILL OF RIGHTS ALSO PASSED THE ALIEN AND SEDITION ACTS WHICH LIMIT THOSE RIGHTS.

READ: GRISWOLD V. CONNECTICUT 381 U.S. 479 (1965)

UNDERSTAND THE POSITIONS OF THE VARIOUS JUSTICES:

I. INCORPORATION

II. INCORPORATION PLUS

III. INCORPORATION MINUS

READ: ROE V. WADE 410 U.S. 113 (1973)

CONSIDER THE IXTH AMENDMENT AND THE CONCEPT OF "THE RIGHT TO PRIVACY" AND PENUMBRAL RIGHTS. REMEMBERS THAT THE AUTHORS OF THE FEDERALIST PAPERS WERE CONCERNED THAT IF ONLY CERTAIN RIGHTS WERE LISTED THAT OTHERS, EQUALLY FUNDAMENTAL, WOULD BE UNPROTECTED. A BILL OF RIGHTS WAS NOT INCLUDED IN THE ORIGINAL CONSTITUTION. MOST OF THE PROTECTION OF INDIVIDUAL RIGHTS WAS LEFT TO THE STATE JUDICIARIES. UNTIL THE PASSAGE OF THE FOURTEENTH AMENDMENT THE BILL OF RIGHTS DID NOT DIRECTLY LIMIT "STATE ACTION."

READ: WYMAN V. JAMES 400 U.S. 309 (1971) AND CP. GOLDBERG V. KELLEY 397 U.S. 254 (1970)

THE CASE IS AN INTERESTING ONE BECAUSE OF THE BREADTH OF VISION OF MR. JUSTICE DOUGLAS'S THEORY OF SOCIAL REFORM AND ENTITLEMENT. THE MAJORITY OF THE COURT HOLDS THAT THERE IS NO "RIGHT TO WELFARE" AND THAT THE "RIGHT TO PRIVACY" ARGUMENT IS COUNTERBALANCED BY THE NEED OF THE PUBLIC TO KNOW HOW ITS WELFARE BUDGET IS BEING ADMINISTERED.

READ: EDWARDS V. CALIFORNIA 314 U.S. 160 (1941) UNCONSTITUTIONALITY OF CALIFORNIA'S ANTI-OKIE LAW, PREVENTING THE "RIGHT OF FREE MOBILITY." HOW DOES THIS CASE MODIFY WITH CASES DEALING WITH HOMELAND SECURITY AND THE PATRIOT ACT?

## CONSTITUTIONAL LAW

AS A STUDENT AT A PRIVATE UNIVERSITY, YOU ARE FREQUENTLY CONFRONTED WITH SITUATIONS WHICH MAY RAISE CONSTITUTIONAL QUESTIONS. YOUR ROOMMATE, ALBERT PATRICK, IS A TROUBLOUS SORT. YOU ARE NOT EVEN CERTAIN WHICH AREAS ARE "PUBLIC" AND WHICH ARE "PRIVATE."

1. AN OFF-CAMPUS RELIGIOUS SOLICITOR PASSES OUT PAMPHLETS ON CAMPUS AND IS TOLD HE WILL BE ARRESTED FOR TRESPASSING.
2. A PORNOGRAPHIC MOVIE IS SHOWN ON CAMPUS.
3. A ROOM SEARCH IS CONDUCTED FOR COLLEGE SILVER, BUT MARIJUANA IS FOUND.
4. THE STUDENT ASSOCIATION DONATES \$1000 FROM BLANKET TAX FUNDS FOR A SPECIFIC PRESIDENTIAL CAMPAIGN.
5. THE SA ASKS THE UNIVERSITY TO COLLECT FEES SUPPORTING A PIRG ORGANIZATION.
6. THE STUDENT NEWSPAPER IS THREATENED WITH HAVING ITS FUNDS CUT OFF IF IT DOES NOT DIVULGE PHOTOGRAPHS OF FANS WHO DEMONSTRATED AT A FOOTBALL GAME.
7. THE UNIVERSITY SPONSORS DELEGATES TO A CONFERENCE ON SUPPRESSING UNDERGROUND NEWSPAPERS.
8. STREAKERS RUN THROUGH A PRAYER MEETING.
9. YOU ARE ASKED TO WAIVE CERTAIN RIGHTS AS A PRECONDITION OF MATRICULATION.
10. THE UNIVERSITY BARS TOY GUNS FROM CAMPUS.
11. NO SPECIFIC CHARGES OR RIGHTS ARE GIVEN IN A HEARING BEFORE THE COLLEGE COURT.
12. YOUR ROOMMATE BURNS AN AMERICAN FLAG IN THE QUAD.
13. A GROUP OF OFF-CAMPUS STUDENTS IS EXPELLED FOR FORMING A FRATERNITY.
14. ACADEMIC QUALIFICATIONS FALL DIFFERENTIALLY ON VARIOUS MINORITY OR ETHNIC GROUPS.

MANY OF THESE SITUATIONS ARE MERELY HYPOTHETICAL AND ARE NOT INTENDED TO REFLECT ACTUAL SITUATIONS AT A PARTICULAR UNIVERSITY. SOME SCHOOLS HAVE HAD DIFFICULTIES INVOLVING PRESS CENSORSHIP AND "FREE SPEECH ZONES."

WEEK XII : PROBLEMS OF APPLYING THE "RULE OF REASON" IN  
CRIMINAL JUSTICE CASES

UNDERSTAND: "THE SILVER PLATTER DOCTRINE AND ITS ABANDONMENT" SHOULD  
LAW ENFORCEMENT OFFICERS PLAY AN "IGNOBLE ROLE?" OR IS IT AN "IGNOBLE ROLE"  
TO CATCH THE CRIMINAL AS DO THE HARDY BOYS AND SHERLOCK HOLMES. THERE ARE  
FINE LINE AND DIFFICULT DISTINCTIONS AT CRIMINAL LAW.

I. THE EXCLUSIONARY RULE (WHEN IS A SEARCH AND SEIZURE UNREASONABLE?)

READ: MAPP V. OHIO (1961)

NOTE: CHIMEL V. CALIFORNIA (1969) CIRCUMSTANCES JUSTIFYING A  
WARRANTLESS SEARCH: VALID ARREST, OFFICER ENDANGERED, AREA UNDER  
SUSPECT'S IMMEDIATE CONTROL; "PROBABLE CAUSE; UNREASONABLE FOR  
OFFICER TO LEAVE THE SCENE TO OBTAIN A WARRANT. WHAT HAPPENS IF  
A THREE YEAR OLD "GIVES PERMISSION" OR A ROOMMATE?

SPECIAL CASES: AUTOMOBILE SEARCHES/RANDOM DRIVER'S LICENSE  
CHECKS: NOTE: CALIFORNIA V. ACEVEDO 500 U.S. (BAG OF MARIJUANA  
IN THE TRUNK) MAY SEARCH CAR AND CONTAINERS IF THEY HAVE PROBABLE  
CAUSE.

ELECTRONIC SEARCHES: OLMSTEAD V. UNITED STATES (1924)  
A WASHINGTON STATUTE MADE INTERCEPTION OF TELEPHONE MESSAGES  
A MISDEMEANOR (EXPAND TO E-MAIL; INTERNET; LIBRARY BOOK RECORDS:  
"REASONABLE EXPECTATION OF PRIVACY) ARGUMENT IS MADE THAT TOO  
HIGH A STANDARD OR TOO MUCH LIMITATION WOULD "MAKE SOCIETY SUFFER."  
KATZ V. U.S. (1967) "FOURTH AMENDMENT PROTECTS PEOPLE NOT PLACES."  
PROBLEM OF HI-TECH SENSOR SCANNING FOR MARIJUANA." KYLLO V. UNITED  
STATES (2001) GOVERNMENT ARGUED "HEAT OFF THE WALL RATHER THAN  
THROUGH THE WALL."

ATWATER V. CITY OF LAGO VISTA (2001) TEXAS SEATBELT LAW"  
ALLEGEDLY HAD SMALL CHILDREN IN THE FRONT SEAT; PROBLEM OF  
WARRANTLESS ARREST"

TERRY V. OHIO (1965) "STOP AND FRISK" TERRY FOUND WITH A CONCEALED  
WEAPON. OFFICER MCFADDEN OBSERVED SUSPICIOUS ACTIVITIES

STUDENT DRUG TESTING (ADMINISTRATIVE DRUG SEARCHES) RECENT CASE  
14 YEAR OLD/ NO DRUGS FOUND.

II. RIGHT TO COUNSEL: POWELL V. ALABAMA ANTHONY LEWIS' GIDEON'S TRUMPET  
ON GIDEON V. WAINWRIGHT (AN EXCELLENT CASE STUDY) SEE POWELL V. ALABAMA  
(1932) SCOTSBORO CASES.

III. MIRANDA WARNING (FAILURE TO ADVISE OF RIGHT TO COUNSEL)

IV. CAPITAL PUNISHMENT

V. BETTS V. BRADY 'ALL YOU HAVE TO DO IN ORDER TO PRACTICE LAW' IS  
TO BE A CRIMINAL'



WEEK XIII: CIVIL RIGHTS AND CIVIL LIBERTIES DURING WARTIME

THE GREATEST LIMITATION ON CIVIL LIBERTIES AND CIVIL RIGHTS OCCURS DURING WARTIME SITUATIONS, E.G. INTERNMENT OF JAPANESE-AMERICANS IN CALIFORNIA DURING WORLD WAR II. NATURALLY THERE HAS BEEN A HEIGHTENED INTEREST IN THIS AREA AS A RESULT OF THE FORT HOOD SHOOTINGS AND THE SEIZURE OF IRANIAN FINANCIAL ASSETS AS WELL AS THE CIVILIAN TRIALS FOR INDIVIDUALS ASSOCIATED WITH THE 9/11 CONSPIRACY RATHER THAN BY MILITARY TRIBUNALS. IT IS WORTH REMEMBERING THAT LINCOLN ASKED: "CAN WE SAVE THE CONSTITUTION AND LOSE THE UNION? LINCOLN IN THE ABSENCE OF CONGRESSIONAL AUTHORIZATION BLOCKADED THE SOUTHERN PORTS, SEIZED THE RAILROADS, SUSPENDED THE WRIT OF HABEAS CORPUS IN NON-COMBATANT AREAS, AND FOR GOOD MEASURE FURLOUGHED THE SOLDIERS TO GO VOTE IN THE CRITICAL STATES OF PENNSYLVANIA AND OHIO. LINCOLN'S CONCEPT OF THE CONSTITUTION RESEMBLED THAT OF JOHN MARSHALL AND THE FEDERALISTS AS CONTAINING A TRANSCENDENTAL SENSE OF JUSTICE WHICH HAD TO BE GUARDED EVEN IF CIVIL LIBERTIES WERE VIOLATED. THE TANEY COURT, SUSPECT AS A PRO-CONFEDERATE INSTITUTION WAS INEFFECTIVE IN PROTECTING CIVIL LIBERTIES DURING A WAR WHICH WAS SUPPOSEDLY BEING FOUGHT TO PRESERVE FUNDAMENTAL RIGHTS. AS AT THE PRESENT TIME THE SUPREME COURT WAS FACED BY THE DIFFICULT TASK OF BALANCING NATIONAL SECURITY AGAINST THE PROTECTION OF INDIVIDUAL RIGHTS. (NOTE: THE PRIZE CASES).

BE FAMILIAR WITH: "UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS TO INTERCEPT AND OBSTRUCT TERRORISM" (2001) ACRONYM THE PATRIOT ACT. CP. ALSO "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT" (RICO) (1970) WHICH IS SIMILARLY COMPREHENSIVE AND DEALS WITH ORGANIZED CRIME, PROVIDES FOR SURVEILLANCE. BORDER SECURITY. AND PREVENTS MONEY-LAUNDERING. BROWSE: LEADING CASES WIKIPEDIA: HELL'S ANGELS; CHURCH SEX ABUSES; MAJOR LEAGUE BASEBALL; LATIN KINGS, AND PRO-LIFE ACTIVISTS HAVE BEEN INVESTIGATED AND CHARGED UNDER RICO.

READ: EX PARTE MILLIGAN 71 U.S. 2 (1866) CIVIL WAR COPPERHEADS

EX PARTE QUIRIN 317 U.S. 1 (1942) NAZI SABOTEURS

IN RE YAMASHITA 387 U.S. 1 (1946) "THE BUTCHER OF BATAAN"

HAMDI V. RUMSFELD 580 U.S. 567 PLUS WIKIPEDIA

UNITED STATES V. LINDH "AMERICAN TALIBAN CASE"

YOU MAY ALSO WANT TO REVIEW THE WORLD WAR ONE SYNDICALISM CASES AS WELL AS THE NEW YORK TIMES CASE DEALING WITH THE PENTAGON PAPERS. THERE ARE QUITE A FEW CASES DEALING WITH VARIOUS ASPECTS OF AMERICAN PARTICIPATION IN THE VIETNAM WAR.

WEEK XIV: SUBSTANTIVE EQUAL PROTECTION: LEGITIMATE AND ILLEGITIMATE CATEGORIES AND DISTINCTIONS

IN MANY CASES DISCRIMINATION IS "INVIDIOUS." DISCRIMINATION MAY OCCUR IN LEGISLATIVE INTENT; ON THE SURFACE; OR IN ADMINISTRATION OF AN ACT. IN THE FIELD OF VOTING RIGHTS, FOR EXAMPLE, "GRANDFATHER CLAUSES" (CP. CRYSTAL CITY "GRANDMOTHER CLAUSE" IN CHEERLEADER ELECTIONS); RESIDENCY REQUIREMENTS, POLL TAXES, AND LITERACY TESTS ARE FACIALLY NEUTRAL. IN SOME DISTRICTS, HOWEVER, MINORITY VOTERS WOULD BE GIVEN CONSTITUTIONALLY DIFFICULT PASSAGES TO QUALIFY, E.G. WHAT IS MEANT BY AN "EELYMOSYNARY INSTITUTION?" AS OPPOSED TO WHAT IS A BALLOT? (ALTHOUGH I HAVE HAD TO EXPLAIN THAT ONE TOO.) WHERE, HOWEVER, THE EFFECT OF THE LAW IS "BENEFICIAL," THE DISCRIMINATION MAY BE DEEMED ACCEPTABLE. PROBLEMS ARISE IN THE AREA OF "PROFILING" V. NATIONAL SECURITY WHERE THERE IS A "COMPELLING STATE INTEREST" WHICH MAY JUSTIFY OR NOT JUSTIFY THE ADMINISTRATIVE ACTION. OTHER PROBLEMS LIE IN GERRYMANDERING AND REDISTRICTING (READ: UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH V. CAREY 430 U.S. 144 (1977))

YOU MAY FIND MICHAEL J. KLARMAN: "THE WHITE PRIMARY RULINGS: A CASE STUDY IN SUPREME COURT DECISION-MAKING" 29 FLORIDA STATE UNIVERSITY LAW REVIEW 55 ET SEQ. USEFUL. PAY PARTICULAR ATTENTION TO AND READ: SMITH V. ALLWRIGHT 321 U.S. 649 (1944) AND TERRY V. ADAMS 345 U.S. 461 (1953). THE FIRST CASE DEALS WITH DISCRIMINATION IN HARRIS COUNTY, TEXAS; THE SECOND WITH THE END OF THE JAYBIRD DEMOCRATIC ASSOCIATION IN NEARBY FORT BEND COUNTY. CF. CHANDLER DAVIDSON, BIRACIAL POLITICS, LSU PRESS (1972).

BESIDES VOTING RIGHTS YOU SHOULD READ: BROWN V. BOARD OF EDUCATION 347 U.S. 294 (1955) AND PLESSY V. FERGUSON 163 U.S. 537 (1896) ("SEPARATE BUT EQUAL DOCTRINE" IN PUBLIC TRANSPORTATION; SWEATT V. PAINTER 339 U.S. 629 (1950) (UNIVERSITY OF TEXAS LAW SCHOOL CASE NARROWING "SEPARATE V. EQUAL" IN DEALING WITH PROFESSIONAL EDUCATION.

UNDERSTAND THESE TERMS: "SUSPECT CLASS," "STRICT SCRUTINY," "RATIONAL BASIS STANDARD," AND "COMPELLING STATE PURPOSE." IN GENERAL "STRICT SCRUTINY" OF A STATUTE IS TRIGGERED BY IMPINGEMENT UPON A FUNDAMENTAL RIGHT OR THE PRESENCE OF A SUSPECT CLASS. FUNDAMENTAL RIGHTS ARE MOSTLY FIRST AMENDMENT. SUSPECT CLASSES INCLUDE RACIAL, ETHNIC, AND RELIGIOUS GROUPS AS WELL AS GENDER-BASED DISCRIMINATION AND DISCRIMINATION BASED ON POVERTY. THE LAST TWO CATEGORIES HAVE BEEN LESS FULLY INCORPORATED INTO SUBSTANTIVE EQUAL PROTECTION THAN THE OTHERS. EVEN IF THERE IS DISCRIMINATION, A STATE MAY JUSTIFY THE LAW ON THE BASIS OF A COMPELLING STATE PURPOSE, SOMETHING POSSIBLY LIKE PREVENTING AUTOMOBILE ACCIDENTS. THE COURT, OF COURSE, FREQUENTLY REJECTS THESE ARGUMENTS. THE ROBERTS COURT HAS, PERHAPS, BEEN SOMEWHAT LESS INTERESTED IN EXPANDING SUBSTANTIVE EQUAL PROTECTION AND SUSPECT CLASSES THAN ITS PREDECESSORS.

REMEMBER: "THE SUPREME COURT ABHORS A VACUUM" SO IT NEEDS TO JUSTIFY ITS ROLE.

QUERY: AGE AND GENDER-BASED DISCRIMINATION. IS DISCRIMINATION ON THE BASIS OF AGE? OKLAHOMA PERMITTED WOMEN TO PURCHASE ALCOHOL AT 18 BUT MEN AT 21. WAS THIS A LEGITIMATE DISTINCTION? CF. CRAIG V. BOREN 239 U.S. 190 (1976). CF. ALSO SOUTH DAKOTA V. DOLE 483 U.S. 203 (1987). THE ISSUE IN THIS CASE IS STATE COMPLIANCE WITH NATIONAL DRINKING STANDARDS. THE PENALTY FOR NON-COMPLIANCE WAS NOT TO RECEIVE FEDERAL HIGHWAY FUNDS. NOTE THE SPECIAL STATUS OF PUERTO RICO WHERE THE DRINKING AGE IS 18. IS THERE A COMPELLING STATE PURPOSE FOR A 21 YEAR OLD DRINKING AGE (ACCIDENTS/INSURANCE) IF SO, WHAT IS THE REASONING THAT ALLOWS PROHIBITION AMONG A CERTAIN CLASS OF CITIZENS WITHOUT THE MODIFICATION OF THE REPEAL OF PROHIBITION (XXI AMENDMENT).

CAN PUERTO RICO PROHIBIT ITS OWN CITIZENS FROM GAMBLING AT 18 OR ANY OTHER AGE? WOULD SUCH A STATUTE RECEIVE "STRICT SCRUTINY?" WHAT WOULD BE THE COMPELLING STATE PURPOSE OR WOULD THE STATUTE BE JUDGED ON A RATIONAL BASIS STANDARD.

SUPPOSE TENNESSEE DECIDES TO ALLOW DRINKING FOR 18 YEAR OLD SOLDIERS: "OLD ENOUGH TO FIGHT AND VOTE IS OLD ENOUGH TO DRINK?" WOULD SUCH AN EXEMPTION BE CONSTITUTIONALLY PERMISSIBLE?

WEEK XV: "SHOUTING FIRE IN A CROWDED THEATER:" WHAT ARE  
ACCEPTABLE STANDARDS IN LIMITING FIRST AMENDMENT FREEDOMS?

READ: SCHENCK V. UNITED STATES 249 U.S. 47 (1917) ESPIONAGE ACT

COMPARE: "CLEAR AND PRESENT DANGER TEST" (HOLMES) TO "REMOTE BAD  
TENDENCY TEST)

READ: NEAR V. MINNESOTA 283 U.S. 697 (1931) "DOCTRINE OF PRIOR  
RESTRAINT" (NOTE: JEHOVAH'S WITNESSES CASES: FLAG SALUTE DURING WORLD WAR  
II. MINERSVILLE V. GOBITIS 310 U.S. (1942) WEST VIRGINIA V. BARNETTE  
319 U.S. 624 (1943) \*\*  
"HATE SPEECH"

"FIGHTING WORDS"

"SLANDER"/"LIBEL"

"TIME, PLACE, MANNER"

"NATIONAL SECURITY"

\*\* JUSTICE JACKSON: "FREEDOM TO DIFFER IS NOT LIMITED TO THINGS THAT  
DO NOT MATTER MUCH."

"OBSCENITY"/ "PORNOGRAPHY"/ THE ISSUE OF "UNCONSTITUTIONAL VAGUENESS"  
VS. PASSING A LAW WHICH IS SO EXPLICIT THAT IT MAY BE DEEMED OBSCENE. NOTE:  
FCC V. PACIFICA RADIO (2003) IN WHICH A PERFORMANCE WAS DEEMED "INDECENT  
BUT NOT OBSCENE." THE COURT IS STILL GRAPPLING WITH THE ESTABLISHMENT OF  
FORMULAS OR STANDARDS OF LIMITATION IN DEALING WITH SUCH MATTERS AS  
"WARDROBE FAILURES" AND "SCHOOL DRESS CODES."

ONE GROUP ON THE COURT WANTED TO RESTRICT ANYTHING OFFENSIVE CF.  
THE BRITISH EXPERIENCE WITH THE CAMPBELL LAW (WHAT COULD BE READ ALOUD  
IN ONE'S OWN HOME). ANOTHER GROUP WOULD LEAVE CIVIL LIBERTIES UNRESTRICTED:  
'ONE PERSON'S PORNOGRAPHY IS ANOTHER'S LITERARY MASTERPIECE' MEMOIRS OF  
A WOMAN OF PLEASURE CASE. ANOTHER GROUP INSISTS ON "REDEEMING SOCIAL  
VALUE." A COMPROMISE HAS BEEN REACHED IN APPLYING THE "STANDARDS OF THE  
LOCAL COMMUNITY," BUT THOSE STANDARDS VARY CONSIDERABLY. HOUSTON IS AN  
EXAMPLE OF SUCH DIVERSITY.

NOTE: THE VICTORIAN BRITISH STANDARD IN REGINA V. HICKLIN WHICH TAKES  
"THE MOST SENSITIVE MEMBER OF THE COMMUNITY" AS THE STANDARD.

SIMILAR PROBLEMS OCCUR IN FREEDOM OF RELIGION, TAKE NEWDOW ON  
THE INSERTION OF "UNDER GOD" IN "THE PLEDGE OF ALLEGIANCE" OR PRESIDENT  
BUSH'S "FAITH-BASED INITIATIVE." THERE ARE TWO LIMITATIONS HERE: "NO  
ESTABLISHMENT" AND "SEPARATION OF CHURCH AND STATE." A LARGE NUMBER OF  
CASES HAVE BEEN BROUGHT ON PRAYERS IN SPACE, PAPAL USE OF THE WASHINGTON  
MALL, "IN GOD WE TRUST," LEGISLATIVE CHAPLAINS, "GODLY GOVERNMENT,"  
COMMENCEMENT AND FOOTBALL PRAYERS (SEE: COMMUNITY - SANTA FE, TEXAS).

CF. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE 530 U.S. 290 (2000)

LOCALLY THERE HAVE ALSO BEEN CONTROVERSIES REGARDING THE BIBLE AS WELL AS MARKERS OR MEMORIALS ON CITY PROPERTY. IT IS INTERESTING TO SEE HOW THESE CONTROVERSIES IMPINGE ON YOU AS TEXANS. IF ALL POLITICS IS LOCAL, MOST SUPREME COURT DECISIONS ARE ALSO. THE SUPREME COURT, RIGHTLY OR WRONGLY, HAS INTRUDED INTO ALMOST EVERY ASPECT OF AMERICAN LIFE, OUR SCHOOLS, OUR ROADS, AND OUR HIGHWAYS, BUT THEN THE COURT IS A PERSONAL INSTITUTION AND A POLITICAL INSTITUTION, PAR EXCELLENCE. IT IS ALSO A MYTHOLOGICAL INSTITUTION AND CAN BEST BE VIEWED IN ITS ROLE IN CREATING MYTH-POWER-VALUE. SOMETIMES I WANT TO THINK THAT IT HAS MORE POWER, MORE MYTH, AND LESS VALUE THAN THE PRESIDENCY OR CONGRESS, BUT THE SUPREME COURT AS LONG AS IT IS A RESTRAINED INSTITUTION DOES HOLD THE COUNTRY TOGETHER. GOVERNMENT BY THE MEDIA IS WORSE THAN GOVERNMENT BY THE COURT. HERE I HAVE TRIED TO DRAW TOGETHER THE MAIN STRANDS OF JUDICIAL MYTHS, PHILOSOPHY, AND POLITICS, "TO TELL IT LIKE IT IS." LIKE DARRELL ROYAL SAID (FAMILIARIZE YOURSELF WITH DARRELL ROYAL) "YOU DANCE WITH THEM THAT BRUNG YOU."