14th Amendment

II. Supplemental Readings

Equal Protection

***Brown* and Continuing Issues of Race**

Due Process: Detainees

Equal Protection: Age, Gender, Disabilities and Other Cases

Immigration and Non Citizens

Gay Rights

Dred Scott v. Sandford (1857)

http://www.landmarkcases.org/dredscott/background2.html

Background Summary

Dred Scott was born a slave in Virginia around 1799. In 1830, Scott and his master moved to Missouri, which was a slave state. Four years later, a surgeon in the U.S. army named Dr. John Emerson bought Scott and moved him to the free state of Illinois. In 1836, Scott and Emerson moved to Fort Snelling, Wisconsin Territory. The Missouri Compromise prohibited slavery in this territory. That same year, Scott married a slave named Harriet. In 1838, the Emersons and the Scotts moved back to Missouri where the Scotts had two daughters. Emerson died in 1843 and left his possessions, including the Scotts, to his widow Irene. In 1846, Scott asked Mrs. Emerson if he could work for his freedom. According to Scott, she refused.

Scott sued Mrs. Emerson for "false imprisonment" and battery. Scott argued that he was being held illegally because he had become a free man as soon as he had lived in a free state. He claimed he was taken to a slave state against his will. Many slaves had sued their owners in this way and won their freedom in the past. In 1847, Emerson won in the Missouri Circuit court because Scott's lawyers failed to prove that she was holding Scott as a slave. Scott's lawyers successfully argued for a new trial.

By the time the new case went to trial in 1850, Emerson had moved to Massachusetts leaving her brother, John Sanford, in charge of Scott's case. The jury agreed that Scott and his family should be freed in accordance with the doctrine "once free, always free." The case was appealed to the Missouri Supreme Court in 1852, where two of the three judges found for Emerson and Sanford. William Scott wrote the decision of the court, stating that states have the power to refuse to enforce the laws of other states.

Sanford was legally recognized as Scott's owner in 1853. Sanford moved to New York leaving the Scotts in Missouri. Scott filed a new lawsuit in federal court (the other suits had been in state court). Federal courts settle disputes between citizens of different states. A clerk mistakenly added a letter to Sanford's name, so the case permanently became Dred Scott v. John F.A. Sandford.

In 1854, the U.S. Court for the District of Missouri heard the case. John Sanford argued in this federal lawsuit that Dred Scott could not sue because he was not a citizen. Judge Wells did not accept this argument, but he did instruct the jury to apply only the laws of Missouri in its decision. The jury found in favor of Sanford. Dred Scott then appealed to the Supreme Court of the United States.

Unfortunately for Scott, the political divisions over slavery worsened from the time his case first came to trial in 1847 through 1857, when the Court finally announced its decision. Events of this period that increased conflicts included the passage of the Fugitive Slave Act (1850), publication of Uncle Tom's Cabin (1852), enactment of The Kansas-Nebraska Act (1854), violence in "bleeding Kansas" (1856), and Representative Brooks's battery of Senator Sumner in the U.S. Senate (1856). Like almost all people of their time, the justices had strong personal views about slavery. One justice, Peter V. Daniel of Virginia, supported slavery so much that he even refused to travel north of the Mason-Dixon line into a free state. Some historians believe that Chief

Justice Taney hoped that his decision in the Dred Scott case would help prevent, not create future disputes over slavery.

Key Excerpts from the Majority Opinion

The decision was 7 to 2.
Chief Justice Roger B. Taney delivered the opinion of the Court.

. . . Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

We think they [people of African ancestry] are not [citizens], and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

. . . [T]he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased...to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.
There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation

by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

. . . [I]t may be safely assumed that citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose. The principle upon which our Governments rests is the union of States, sovereign and independent within their own limits in . . . their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States. . . .

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it.

. . . [T]he rights of private property have been guarded with . . . care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

. . . [I]n the case of Strader et al. v. Graham . . . the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio. . . .

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.
Read the judgment in the Supreme Court case Dred Scott v. John F. A. Sandford, March 6, 1857 from the National Archives.

Equal Protection: An Overview

http://www.law.cornell.edu/wex/index.php/Equal_protection#other_topics

The Equal Protection Clause of the 14th amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. See U.S. Const. amend. XIV (http://www.law.cornell.edu/constitution/constitution.amendmentxiv.html). In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. A violation would occur, for example, if a state prohibited an individual from entering into an employment contract because he or she was a member of a particular race. The equal protection clause is not intended to provide "equality" among individuals or classes but only "equal application" of the laws. The result, therefore, of a law is not relevant so long as there is no discrimination in its application. By denying states the ability to discriminate, the equal protection clause of the Constitution is crucial to the protection of civil rights. See Civil Rights and Discrimination.

Generally, the question of whether the equal protection clause has been violated arises when a state grants a particular class of individuals the right to engage in activity yet denies other individuals the same right. There is no clear rule for deciding when a classification is unconstitutional. The Supreme Court has dictated the application of different tests depending on the type of classification and its effect on fundamental rights. Traditionally, the Court finds a state classification constitutional if it has "a rational basis" to a "legitimate state purpose."

The Supreme Court, however, has applied more stringent analysis in certain cases. It will "strictly scrutinize" a distinction when it embodies a "suspect classification." In order for a classification to be subject to strict scrutiny, it must be shown that the state law or its administration is meant to discriminate. Usually, if a purpose to discriminate is found the classification will be strictly scrutinized if it is based on race, national origin, or, in some situations, non U.S. citizenship (the suspect classes). In order for a classification to be found permissible under this test it must be proven, by the state, that there is a compelling interest to the law and that the classification is necessary to further that interest.

The Court will also apply a strict scrutiny test if the classification interferes with fundamental rights such as first amendment rights, the right to privacy, or the right to travel. The Supreme Court also requires states to show more than a rational basis (though it does not apply the strictly scrutiny test) for classifications based on gender or a child's status as illegitimate.

The 14th amendment is not by its terms applicable to the federal government. Actions by the federal government, however, that classify individuals in a discriminatory manner will, under similar circumstances, violate the due process of the fifth amendment. See U.S. Const. amend. V (http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmentv).

Corporate personhood

http://www.answers.com/topic/corporate-personhood

Corporate personhood is a term used to describe the legal fiction used within United States law that a corporation, under the concept of legal entity, has a limited subset of the same constitutional rights as a human being. The choice of the word 'person' in 'personhood' arises from the way Section One of the 14th Amendment to the United States Constitution was worded and from earlier legal usage of the word 'person'.

Corporations as legal entities have always been able to perform commercial activities, similar to a person acting as a sole proprietor, such as entering into a contract or owning property. Therefore corporations have always had some limited amount of 'personhood', which has allowed corporations to conduct business while shielding individual stockholders from personal financial risk (i.e., protecting personal assets which were not invested in the corporation).

The stronger concept of corporate personhood is often traced to the 1886 U.S. Supreme Court case Santa Clara County v. Southern Pacific Railroad Company (118 U.S. 394), which provided some greater degree of protection from arbitrary state action. However that particular Supreme Court decision affirmed a circuit court decision on the basis of "the assessment, which was the foundation of the action, included property of material value which the state board was without jurisdiction to assess" and ignored any links to the 14th Amendment.

Santa Clara County v. Southern Pacific Railroad Company

An 1886 Supreme Court decision, Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118, is often cited for the principle that the term person as used in the Equal Protection Clause of the Fourteenth Amendment applies to corporations as well as to natural persons.

The Southern Pacific Railroad Company refused to pay a tax assessed by the California Board of Equalization upon its franchise, roadways, roadbeds, fences, and rolling stock. The county brought an action in state court against the railroad to recover the delinquent taxes. The railroad had the action removed to the federal district court. The court agreed with the defendant that the assessment of the tax was void because the board had no jurisdiction to act. It also ruled that the defendant had been denied equal protection of the law because the assessment of the property was made at full monetary value without the discount that was given to individual property owners for outstanding mortgages on their property. The county filed a writ of error to the federal court, and the U.S. Supreme Court heard the case.

The Court agreed with the railroad that the state board had no jurisdiction to assess the tax. The assessment of taxes by the board on fences belonging to the railroad was deemed void because the board was authorized by the state constitution to assess only "the franchise, roadway roadbed, rails, and rolling stock." The Court rejected the argument that the fences constituted part of the roadway for purposes of taxation. The constitution required a separate assessment for "land, and improvements thereon" and a state statute expressly included the term fence within the categories of improvements. The state board acting through the county sought to have the plaintiff liable for a single sum, incorporating taxes assessed upon various types of property, including property that the board had no power to assess. The Court declared that since part of the assessment was

illegal, it could not support an action for the county to recover the entire tax; therefore, it affirmed the judgment for the defendants.

The Court did not explicitly discuss the Fourteenth Amendment in its opinion, basing its decision on the invalidity of the assessment. In its statement of the facts of the case, it did, however, set out the Fourteenth Amendment claims of the railroad. The California constitution denied "railroads and other quasi public corporations" equal protection of laws as guaranteed by the Fourteenth Amendment to the Constitution because the board did not reduce the value of property for assessment purposes by the amount of any outstanding mortgage debts on it, as it did for property owned by natural persons or other corporations. Although the Supreme Court did not specifically rule on the constitutionality of the treatment of the railroad by the state, the case of County of Santa Clara v. Southern Pacific Railroad Company is cited to support the principle that both corporations and natural persons are entitled to equal protection of laws pursuant to the Fourteenth Amendment to the Constitution.

Death by 'Due Process'
Activist courts are defying, not enforcing, the Constitution.

Lino Graglia
Wall Street Journal. May 24, 2005
http://www.opinionjournal.com/editorial/feature.html?id=110006730

The battles in Congress over the appointment of federal judges reveal a recognition that judges are now, to a large extent, our real lawmakers. Proposals to amend the Constitution to remove lifetime tenure for Supreme Court justices, or to require that rulings of unconstitutionally be by more than a majority (5-4) vote, do not address the source of the problem. The Constitution is very difficult to amend — probably the most difficult of any supposedly democratic government. If opponents of rule by judges secure the political power to obtain an amendment, it should be one that addresses the problem at its source, which is that contemporary constitutional law has very little to do with the Constitution. Judge-made constitutional law is the product of judicial review — the power of judges to disallow policy choices made by other officials of government, supposedly on the ground that they are prohibited by the Constitution. Thomas Jefferson warned that judges, always eager to expand their own jurisdiction, would "twist and shape" the Constitution "as an artist shapes a ball of wax." This is exactly what has happened.

The Constitution is a very short document, easily printed on a dozen pages. The framers wisely meant to preclude very few policy choices that legislators would have occasion to make.

The essential irrelevance of the Constitution to contemporary constitutional law should be clear enough from the fact that the great majority of Supreme Court rulings of unconstitutionality involve state, not federal, law; and nearly all of them purport to be based on a single constitutional provision, the 14th Amendment — in fact, on only four words in one sentence of the amendment, "due process" and "equal protection." The 14th Amendment has to a large extent become a second constitution, replacing the original.

It does not require jurisprudential sophistication to realize that the justices do not decide controversial issues of social policy by studying those four words. No question of interpretation is involved in any of the court's controversial constitutional rulings, because there is nothing to interpret. The states did not lose the power to regulate abortion in 1973 in Roe v. Wade because Justice Harry Blackmun discovered in the 14th Amendment something no one noticed before.

The problem is that the Supreme Court justices have made the due process and equal protection clauses empty vessels into which they can pour any meaning. This converts the clauses into simple transferences of policymaking power from elected legislators to the justices, authorizing a court majority to remove any policy issue from the ordinary political process and assign it to themselves for decision. This fundamentally changes the system of government created by the Constitution.

The basic principles of the Constitution are representative democracy, federalism and the separation of powers, which places all lawmaking power in an elected legislature with the judiciary merely applying the law to individual cases. Undemocratic and centralized lawmaking by the judiciary is the antithesis of the constitutional system.

Because most of the Supreme Court's activist rulings of unconstitutionality purport to be based on a 14th Amendment that it has deprived of specific meaning, the problem can be very largely

solved by simply restoring the 14th Amendment to its original meaning, or by giving it any specific meaning. The 14th Amendment was written after the Civil War to provide a national guarantee of basic civil rights to blacks. If a constitutional amendment could be adopted reconfining the 14th Amendment to that purpose or, better still, expanding it to a general prohibition of all official racial discrimination, the court's freehand remaking of domestic social policy for the nation would largely come to an end. If the justices lost the ability to invalidate state law on the basis of their political preferences, their ability and willingness to invalidate federal law on this basis would likely also diminish.

Plato argued for government by philosopher-kings, but who could argue for a system of government by lawyer-kings? No one can argue openly that leaving the final decision on issues of basic social policy to majority vote of nine lawyers — unelected and life-tenured, making policy decisions for the nation as a whole from Washington, D.C. — is an improvement on the democratic federalist system created by the Constitution. Yet that is the form of government we now have.

Rule by judges is in violation, not enforcement of the Constitution. Ending it requires nothing more complex than insistence that the court's rulings of unconstitutionality should be based on the Constitution — which assigns "all legislative power" to Congress — in fact as well as name.

Lino Graglia is a law professor at the University of Texas.

The 14th Amendment and the "Second Bill of Rights"

In 1815, John Barron, a successful businessman, owned a wharf located at the deepest part of Baltimore's harbor. That year, several city street improvement projects diverted streams, which caused soil to build up in front of Barron's wharf. By 1822, no ships could tie up at the wharf and John Barron was out of business.

Barron went to a state court and sued the city of Baltimore for destroying his wharf business. According to the Fifth Amendment of the Bill of Rights, Barron argued, private property could not be taken or reduced in value for public use without "just compensation." The case finally ended up before the U.S. Supreme Court. Writing for the majority of the Supreme Court, Chief Justice John Marshall dismissed Barron's lawsuit on the grounds that the Fifth Amendment, as well as all the amendments of the Bill of Rights, applied only to the national government and not to the states. [Barron v. Baltimore, 7 Peters 243 (1833)]

The Barron decision established the principle that the rights listed in the original Bill of Rights did not control state laws or actions. A state could abolish freedom of speech, establish a tax-supported church, or do away with jury trials in state courts without violating the Bill of Rights.

The Due Process Clause

In the first Congress in 1789, Congressman James Madison had submitted proposed amendments for the Bill of Rights. One of Madison's proposed amendments would have prohibited states from violating the rights of conscience, freedom of the press, and trial by jury in criminal cases. The House passed Madison's proposed amendment. But the Senate rejected it because all the states already had their own bills of rights. The first 10 amendments thus limited only the national government.

When members of Congress debated the 14th Amendment after the Civil War, they hardly discussed whether the amendment made the entire Bill of Rights apply to all the states. A key provision of the amendment is its due process clause: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Did this due process clause apply all the guarantees in the Bill of Rights to the states? Or, did it merely refer to those rights related to a fair trial like the identically worded due process provision in the Fifth Amendment? Raoul Berger, a scholar who wrote extensively on the 14th Amendment, argued that the elusive due process clause was simply intended to protect the civil rights of the ex-slaves in the South following the Civil War.

When the Supreme Court interpreted the 14th Amendment for the first time in 1873, the justices avoided ruling on the meaning of the due process clause [Slaughterhouse Cases, 16 Wallace 36 (1873)]. The Supreme Court did eventually begin to rule on its meaning. In 1897, the justices unanimously held that the due process clause required state and local governments to give "just compensation" for taking private property for public purposes. Still, this decision (which would have pleased John Barron) did not connect the due process clause of the 14th Amendment to the Bill of Rights. According to the Supreme Court, "just compensation" was a right within the meaning of the due process clause itself. [Chicago Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897)]

The Supreme Court first applied the Bill of Rights to the states in 1925 in the Gitlow case. Benjamin Gitlow was a Socialist Party member who had been convicted of writing several revolutionary pamphlets in violation of New York's Criminal Anarchy Act. His attorneys argued that the New York law violated Gitlow's First Amendment freedom of speech. They contended that the due process clause of the 14th Amendment protected a citizen's freedom of speech from state laws as well as national law. While upholding Gitlow's conviction, the Supreme Court ruled for the first time that the First Amendment freedoms of speech and press "are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States." [Gitlow v. New York, 268 U.S. 652 (1925)]

The Supreme Court did not say in the Gitlow decision that all the protections of the Bill of Rights applied to the states. But the majority of justices did agree that at least some of these rights limited the powers of state and local governments. Following this landmark decision, the Supreme Court on a case-by-case basis applied most of the guarantees of the Bill of Rights to the states. When the last of these cases was decided in 1969, the Supreme Court had created what amounted to a "second bill of rights" limiting the actions of state governments just as the original Bill of Rights had limited the national government. See the chart below:

The "Second Bill of Rights" Freedom Case	**Amendment**	**Supreme Court**	**Date**
Of Speech & Press	First	Gitlow v. New York	1925
To Have Attorney In Capital Cases	Sixth	Powell v: Alabama	1932
To Exercise Any Religion	First	Hamilton v. Regents of U.C.	1934
Of Assembly & Petition	First	DeJonge v. Oregon	1937
From Establishment of Religion	First	Everson v. Board of Ed.	1947
To Have a Public Trial	Sixth	In re Oliver	1948
From Unreasonable Searches & Seizures	Fourth	Mapp v. Ohio	1961
From Cruel & Unusual Punishments	Eighth	Robinson v. California	1962
To Have Attorney for Felony Cases	Sixth	Gideon v. Wainwright	1963
From Self-incrimination	Fifth	Malloy v. Hogan	1964
To Confront Witnesses	Sixth	Pointer v. Texas	1965
To Have an Impartial Jury Trial	Sixth	Parker v. Gladden	1966

To Have a Speedy Trial	Sixth	Klopfer v. North Carolina	1967
To Compel Witnesses to Testify	Sixth	Washington v. Texas	1967
To Trial by Jury	Sixth	Duncan v. Louisiana	1968
From Double Jeopardy	Fifth	Benton v. Maryland	1969
To Have Attorney for Charges That Could Be Jailed For	Sixth	Argersinger v. Hamilin	1972

"Fundamental Rights" and the "Incorporation Doctrine"

By 1937, freedom of speech, press, religion, assembly, and petition had all been "incorporated" into the 14th Amendment's due process clause. This meant that these First Amendment freedoms were now also part of the 14th Amendment, which limited state laws and actions. The Supreme Court had yet to explain why some rights from the Bill of Rights had been "incorporated" while others had not.

In a case involving the Fifth Amendment protection against double jeopardy (being tried twice for the same crime), Justice Benjamin Cardozo explained that only "fundamental rights" need be "incorporated" into the 14th Amendment. He went on to define these rights as "of the very essence of a scheme of ordered liberty" and "rooted in the tradition and conscience of our people."

While such rights as freedom of speech were clearly "fundamental," according to Justice Cardozo and the Supreme Court majority, others were not. Thus, the Supreme Court established the principle of "partial incorporation": Only certain "fundamental rights," not the entire Bill of Rights, apply to the states through the due process clause of the 14th Amendment. [Palko v. Connecticut, 302 U.S. 319 (1937)] By 1972, the Supreme Court had "incorporated" into the 14th Amendment all but five rights named in the Bill of Rights. Those rights still not deemed "fundamental" include the Second Amendment right to bear arms, the Third Amendment protection against quartering troops in private homes, the Fifth Amendment right of grand jury indictment, the Seventh Amendment right of trial by jury in civil cases, and the Eighth Amendment guarantee against excessive bail and fines. (The Ninth and Tenth amendments do not name specific personal rights.)

As a practical matter today, the Bill of Rights protects Americans from both national and state governments. In the view of scholar Richard Cortner, the Supreme Court "has transformed the Due Process Clause of the Fourteenth Amendment into our second bill of rights, a bill of rights more salient [significant] to the liberty of the average American than the original document authored by Madison and ratified by the states in 1791."

The Slaughterhouse Cases

Docket: None
Citation: 83 U.S. 36 (1873)
Petitioner: The Slaughterhouse Cases

Case Media

No media files currently available
Written Opinion (Courtesy of Justia)

Abstract

Oral Argument: Monday, February 3, 1873
Decision: Monday, April 14, 1873
Categories: commerce clause, federalism, fourteenth amendment, race discrimination, slavery, states

Advocates

Not available

Facts of the Case

Louisiana had created a partial monopoly of the slaughtering business and gave it to one company. Competitors argued that this created "involuntary servitude," abridged "privileges and immunities," denied "equal protection of the laws," and deprived them of "liberty and property without due process of law."

Question

Did the creation of the monopoly violate the Thirteenth and Fourteenth Amendments?

Conclusion

No. The involuntary servitude claim did not forbid limits on the right to use one's property. The equal protection claim was misplaced since it was established to void laws discriminating against blacks. The due process claim simply imposes the identical requirements on the states as the fifth amendment imposes on the national government. The Court devoted most of its opinion to a narrow construction of the privileges and immunities clause, which was interpreted to apply to national citizenship, not state citizenship.

Cite this page

The OYEZ Project, The Slaughterhouse Cases, 83 U.S. 36 (1873), available at: <http://www.oyez.org/cases/1851-1900/1872/1872_2/> (last visited Thursday, May 10, 2007).

Strauder v. West Virginia

Docket: None
Citation: 100 U.S. 303 (1880)
Petitioner: Strauder
Respondent: West Virginia

Case Media

No media files currently available
Written Opinion (Courtesy of Justia)

Abstract

Oral Argument: Tuesday, October 21, 1879
Decision: Monday, March 1, 1880
Categories: criminal, equal protection, jury, race discrimination, trial by jury

Advocates

Not available

Facts of the Case

A West Virginia law declared that only whites may serve on juries.

Question

Does the state law barring blacks from jury service violate the Equal Protection Clause of the Fourteenth Amendment?

Conclusion

Yes. Strong, writing for the majority, declared that to deny citizen participation in the administration of justice solely on racial grounds "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

Cite this page

The OYEZ Project, Strauder v. West Virginia, 100 U.S. 303 (1880), available at: <http://www.oyez.org/cases/1851-1900/1879/1879_0/> (last visited Thursday, May 10, 2007).

YICK WO V. HOPKINS (1886)

http://usinfo.state.gov/usa/infousa/facts/democrac/64.htm

As early as 1820, Chinese were immigrating to California, and by 1870 over 49,000 Chinese lived in the state. That number increased to over 75,000 by 1880, amounting to nearly 10 percent of California's population. Of this Chinese community, 40 percent, or about 30,000 people, lived in the San Francisco Bay area. Many Caucasian and Hispanic Californians did not like this influx of Asians, and as a result both the state as well as many localities began passing laws that specifically discriminated against them. The first anti-Chinese law passed was the Foreign Miner's License Tax of 1853, which placed a special burden on Chinese miners. The pace of these discriminatory laws increased in the 1870s, leading to the banning of Chinese from certain occupations and the adoption of anti-Chinese provisions in the new state constitution of 1877.

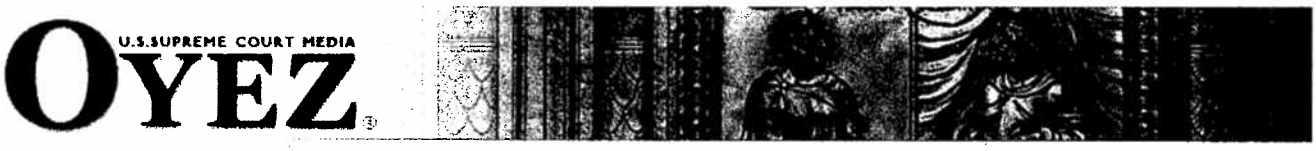
Because of the many restrictions on them, Chinese tended to concentrate in particular businesses; they constituted 97 percent of all persons working in cigar-making in the San Francisco area, 84 percent of the boot and shoemakers, 88 percent of the garment manufacturers and 89 percent of the laundry workers. Chinese did not go into the laundry business by choice, and once there had to deal with hostile non-Chinese customers. The general public read many lurid stories denouncing laundries as fronts for immoral activities such as opium smoking and prostitution, although in truth most laundries were small family enterprises.

A San Francisco ordinance prohibited operating a laundry located in a wooden building without the consent of the Board of Supervisors; laundries in brick or stone buildings needed no comparable approval. By itself the law seemed a reasonable exercise of the state's police power, since the wooden buildings were vulnerable to the many fires that plagued San Francisco and other nineteenth-century cities. At the time, over 95 percent of the 320 laundries in the city were located in wooden buildings, and of these, two-thirds had Chinese owners.

The Board of Supervisors granted permission to operate laundries in wooden buildings to all but one of the non-Chinese owners, but none to the 200 Chinese applicants. Yick Wo, a Chinese alien who had operated a laundry in the city for many years, was refused a permit. When he continued to run the business, he was arrested and convicted under the ordinance.

The Supreme Court reversed the conviction, not because the ordinance specifically discriminated against Chinese -- it did not -- but because it was administered in a discriminatory fashion. Yick Wo v. Hopkins is the first instance of the Court inferring the existence of discrimination from data about a law's application, a technique that would be used again in the 1960s to strike down statutes discriminating against African Americans

For further reading: G. Barth, Bitter Strength: A History of the Chinese in the United States, 1850-1870 (1964); A. Saxton, The Indispensable Enemy: Labor and the Anti-Chinese Movement in California (1971); and H.T. Shih-shan, The Chinese Experience in America (1986).



Lochner v. New York

Docket: 292
Citation: 198 U.S. 45 (1905)
Petitioner: Lochner
Respondent: New York

Case Media

No media files currently available
Written Opinion (Courtesy of Justia)

Abstract

Oral Argument: Thursday, February 23, 1905
Decision: Monday, April 17, 1905
Categories: contract clause, due process, employment, fourteenth amendment, labor, police power, states

Advocates

Not available

Facts of the Case

The state of New York enacted a statute forbidding bakers to work more than 60 hours a week or 10 hours a day.

Question

Does the New York law violate the liberty protected by due process of the Fourteenth Amendment?

Conclusion

The Court invalidated the New York law. The majority (through Peckham) maintained that the statute interfered with the freedom of contract, and thus the Fourteenth Amendment's right to liberty afforded to employer and employee. The Court viewed the statute as a labor law; the state had no reasonable ground for interfering with liberty by determining the hours of labor.

Cite this page

The OYEZ Project, Lochner v. New York, 198 U.S. 45 (1905),
available at: <http://www.oyez.org/cases/1901-1939/1904/1904_292/>
(last visited Thursday, May 10, 2007).

The Logic of the Colorblind Constitution

The Claremont Institute
http://www.claremont.org/publications/pubid.379/pub_detail.asp#
Harry V. Jaffa, Dec. 6, 2004

The crisis of American constitutionalism today turns on the interpretation of the equal protection clause of the 14th Amendment. Since Brown v. Board of Education in 1954, the jurisprudence of something called the "living constitution" has largely replaced the traditional jurisprudence of "original intent." What has ruled the judicial process or the last half century is not what the framers and ratifiers of the original Constitution, as modified by the framers and ratifiers of the amendments, understood their words to mean, but what justices (and litigators) think those words ought to mean. In the Brown case, Chief Justice Warren, speaking for a unanimous Court, declared public school segregation to be in violation of the equal protection clause of the 14th Amendment, because of the irreparable damage it inflicted on the "minds and hearts" of black school children. This damage was asserted on the basis of modern psychology, which was not available to those who framed and ratified the Amendment. Hence it was not asserted on the basis of what the equal protection clause had meant when it was ratified. Warren's opinion in Brown thus cut the jurisprudence of the 14th Amendment—and with it the jurisprudence of the Constitution as a whole—loose from any anchor in the historic meaning of the Constitution. There is no longer any constructive relationship between the Constitution and constitutional law.

In 1896, in Plessy v. Ferguson, the Court decided that "separate but equal" did not violate the equal protection clause, and the South (and not only the South) relied upon this decision in building their systems of racially segregated public schools. The Court's 1896 decision can be explained in part by reason of the fact that the country—and the Western World generally—was then nearly submerged by the "evolutionary" enlightenment. This movement, which dominated the intellectual elites in the universities, the law schools, and the media, denied the story of Creation in the Bible, and rejected the hitherto received idea that "God hath made of one blood all nations of men for to dwell on all the face of the earth." It entertained instead the idea that the races of mankind did not all emerge at the same time from the subhumanity which preceded their humanity. Evolutionary doctrine encouraged the idea that there was a fundamental inequality among the aforesaid races, and this idea virtually relegated to the "dustbin of history" the contrary idea, enshrined in the Declaration of Independence and the Gettysburg Address, "that all men are created equal."

Mr. Justic Harlan's dissenting opinion in Plessy, that the Constitution was colorblind, and that it did not countenance different and unequal classes of citizens, was based upon a belief in the truth of the principle of equality in which the founders and Lincoln had so profoundly believed. But this belief had been buried by progressivism, and has not been resurrected, except by the intellectual heirs of Leo Strauss. On intellectual grounds, it has never been refuted, and ought never to have been abandoned. There is not now, and never has been any such difference between one human being and another human being, or whatever race or color, such that one is by nature the ruler of the other, as any human being is by nature the ruler of any dog or any horse. For this reason, legitimate political authority can arise only by the consent of the governed, and consent can never be given for any reason other than the equal protection of the rights of the governed. Hence equal protection is the foundation of all constitutionalism, even apart from its specific inclusion in the Constitution itself. For more reasons than one, Justice Harlan's dissenting opinion ought to have been the opinion of the Court in 1896; even more ought it to have been the opinion

of the Court in 1954. As Professor Edward J. Erler has demonstrated in the pages of the Claremont Review of Books (Summer 2004), the principle of equal protection has never become the opinion of the Supreme Court of the United States, nor has it been favored in the writings of conservative jurists.

Professor Michael M. Uhlmann has defended this non-recognition of the colorblind Constitution ("Correspondence," CRB, Fall 2004) on the ground that there was no political consensus in its favor:

> Justice Harlan's differences with his colleagues on the Supreme Court in the 1880s and 1890s mirror the earlier differences within Congress about the nature and scope of federal authority under the 14th Amendment. His dissents in Plessy and the Civil Rights Cases eloquently state the latitudinarian position on legislative intent, but that view cannot easily be ascribed to a majority of the 39th Congress.

I believe the original intent of the 14th Amendment, and of the Congress and the American people who ratified it, can best be understood in the light of the change it effected in antecedent constitutional law. Taney's opinion in Dred Scott was still in effect as the Civil War came to an end. By it Negroes, whether free or slave, could not be citizens of the United States. Although the 13th Amendment abolished slavery, it did not settle the question of Negro citizenship. This was however decided by the opening sentence of the 14th Amendment. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The intent of this sentence could however be frustrated if it were possible to make distinctions within citizenship, by which some citizens would have more rights, and others less. It was to prevent this that the Amendment went on to declare that "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

The 14th Amendment was intended to drive a stake through the heart of Dred Scott. The heart of that opinion consisted in the assertion that Negroes were so far inferior that they had no rights which white men were bound to respect. This meant that as far as the Constitution was concerned, the distance between whites and blacks was no less than the distance between whites and any other inferior species. A white man had the same right to rule a Negro as he had to rule dog or a horse. Hence according to Taney blacks were not and could not have been included in the proposition "that all men are created equal." Whether or not they were intended to be so included was among the questions most fiercely debated by Lincoln and Douglas. No result of the Civil war was more fundamental than the authoritative assertion of the inclusion of human beings of any color and any ethnicity in the proposition of human equality. A consensus in favor of the colorblind Constitution is provided by the logic of reality and the logic of history.

Brown and Originalism
There's more than one way to get it right.

National Review Online, May 11, 2005
Edward Whelan
http://www.nationalreview.com/script/printpage.p?ref=/comment/whelan200505110758.asp

The Left invokes the Orwellian euphemism of the "living Constitution" as it promotes and applauds lawless judicial decisions, like Roe v. Wade, that have no conceivable basis in the text or structure of the real Constitution. The "metastasizing Constitution" would be a far more honest moniker. For the real living Constitution — the Constitution that came to life in 1789 and that grew to full fruition with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments in the aftermath of the Civil War — is suffering from foreign cells metastasizing in its vital organs. The only means of restoring its health is a vigorous dose of originalist medicine.

The Left's "killer" argument against an originalist reading of the Constitution is that adherence to the original meaning of the Fourteenth Amendment purportedly would not have yielded the just result — the end to the evil of segregated public schools — mandated by the Supreme Court's landmark 1954 ruling in Brown v. Board of Education. Margaret Talbot's interesting but flawed profile of Justice Scalia and originalism in a recent issue of the New Yorker (which I wrote about here) is typical: The only "way to get to Brown," she asserts, is "to embrace the 'living Constitution.' " Why's that? "[I]t's hard to see an originalist justification" for Brown, since, she claims, the "same Congress that passed the Fourteenth Amendment segregated Washington schools." Justice Scalia "sometimes acknowledges as much, saying that a faulty — that is, a non-originalist — method can occasionally produce good results, a Scalian variation on 'Even a broken watch is right twice a day.' " And further, she tells us, liberal legal scholar Cass Sunstein has declared that a "doctrinaire originalist" would reject Brown. Case closed. No need for further discussion.

But wait: Every one of Talbot's assertions is off the mark. First, the 37th Congress created segregated public schools for black children in D.C. in 1862, but it was a later, different Congress — the 39th — that in 1866 proposed the Fourteenth Amendment, which was ratified in 1868. As the brilliant scholar (and now tenth-circuit judge) Michael McConnell explains in his 1995 Virginia Law Review article "Originalism and the Desegregation Decisions": "At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District [of Columbia] (although Congress appropriated money for the segregated schools that already existed)." In addition, the restrictions of the Fourteenth Amendment apply only to states, not to Congress, so congressional action with respect to D.C. schools provides a shaky foundation for any inference as to the contemporaneous understanding of the Fourteenth Amendment.

Second, what Talbot characterizes as an acknowledgment by Justice Scalia is no such thing. To make the obvious point that non-originalist decisions — that is, judges doing whatever they want — can produce good results in no way implies that originalism would not yield those same results. To use Talbot's analogy: That a broken clock is right twice a day doesn't mean a working clock is wrong twice a day.

Third, just as one may rightly be suspicious when liberals instruct conservatives on what "genuine" conservatives would do, one need not accept Cass Sunstein as the final word on how an originalist would decide Brown.

If Talbot found it "hard to see an originalist justification" for ending state-sponsored segregation, it's because she wasn't looking in the right places. As early as 1880 — a mere twelve years after ratification of the Fourteenth Amendment — the Supreme Court in Strauder v. West Virginia read the Fourteenth Amendment as "declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

Even in its notorious 1896 ruling in Plessy v. Ferguson, the majority stated that the "object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law." But then, in the sort of freewheeling non-originalist excursion that advocates of the phony "living Constitution" have come to celebrate, the majority looked to the mystery of the universe to assert that "in the nature of things" the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality." By contrast, Justice Harlan's celebrated dissent quoted Strauder and declared that the purpose of the Fourteenth Amendment was to "remove[] the race line from our governmental systems."

Further, as McConnell's law-review article shows, in the years immediately following ratification of the Fourteenth Amendment, as Congress acted to enact legislation enforcing the requirements of the Fourteenth Amendment, a substantial majority of both houses of Congress repeatedly voted to abolish segregation in the public schools. Although filibuster tactics and other procedural obstacles prevented ultimate passage of legislation abolishing segregated schools, McConnell demonstrates that these votes provide powerful evidence that the original understanding of the Fourteenth Amendment was that segregated public schools were unconstitutional.

Under an alternative originalist approach, as Judge Bork and others have argued, even if the ratifiers of the Fourteenth Amendment assumed that segregated public schools were consistent with equality, objective comparisons of facilities and resources had, by the time of Brown, long since disproved this assumption. Under this approach, an originalist opinion in Brown would therefore have concluded that the Fourteenth Amendment's clear purpose of establishing racial equality under the law required an end to segregated schooling.

The legitimacy of originalism as the only proper method (or class of methods) of constitutional interpretation inheres in the very nature of the Constitution as law and does not depend on the results that originalism yields. Originalists will have disputes among themselves. But those who seek to discredit originalism by hiding behind Brown — the same people, by and large, who absurdly contend that the text of the Fourteenth Amendment stating that no state shall "deprive any person of life, liberty, or property, without due process of law" somehow should be twisted to guarantee rights to abortion and same-sex marriage — should hardly be presumed sound arbiters of how originalism should apply.

— Edward Whelan is president of the Ethics and Public Policy Center> and directs EPPC's program on the Constitution, the Courts, and the Culture. Whelan formerly served as a law clerk to Justice Scalia.

Back to the Supreme Court: racial balance in schools

On Monday, the court takes up cases from Seattle and Louisville on the role of race in school enrollment.

Warren Richey. The Christian Science Monitor, Dec. 4. 2006
http://www.csmonitor.com/2006/1204/p01s03-usju.html

America is one of the most racially and ethnically diverse countries in the world. Yet 52 years after Brown v. Board of Education - the landmark Supreme Court decision that struck down segregation - US classrooms are growing increasingly segregated.

In part, the racial divide reflects the persistence of segregated housing patterns and the stifling grip of poverty. But it also reflects national disagreement and confusion over how best to address the issue of race.

Monday, the US Supreme Court takes up two cases that confront the heated debate over race. On one side are those who believe affirmative action and other race-conscious programs are necessary to fight the effects of discrimination and inequality. On the other side are those who believe the Constitution mandates a colorblind approach to race relations - that government programs granting benefits based on a person's race are just as illegal as withholding benefits because of a person's skin color.

At issue in the two cases are race-based student enrollment plans at public school districts in Seattle and in Louisville, Ky. Both plans were designed by the local school boards to voluntarily achieve racial integration to provide a diverse learning environment for the benefit of all students. Both plans are under attack by local parents who say the use of race to maintain a racial balance amounts to an unconstitutional form of government discrimination.

The cases confront fundamental issues that stretch back to 1954, when the high court ruled in the Brown case that racial segregation violates the constitutional principle of equal protection.

"This is about what is left, if anything, of Brown v. Board of Education," Theodore Shaw, president of the NAACP Legal Defense and Educational Fund, said in a recent debate hosted by the Century Foundation. If the high court strikes down the Seattle and Louisville programs, "it will be a reversal of historic proportions," he said.

The Brown decision is also the starting point for those challenging the plans, including the Bush administration. But they draw a different lesson from the landmark case.

"In Brown v. Board of Education the court held that intentionally classifying students on the basis of race violates the equal protection clause, and declared the ultimate objective ... to be achieving a system of determining admission to the public schools on a nonracial basis," writes Solicitor General Paul Clement in his brief to the court.

The Supreme Court last considered a similar issue in a 2003 case over race-based admissions procedures at the University of Michigan Law School. The court split 5 to 4, with then-Justice Sandra Day O'Connor casting the deciding vote upholding the affirmative-action plan as a means to bring racial diversity to the elite law school.

Justice O'Connor's retirement earlier this year opens the door for a possible shift at the high court, with Justice Anthony Kennedy now potentially in position to cast the deciding vote in the Seattle and Louisville cases, legal analysts say. Justice Kennedy dissented in the Michigan Law School case and was sharply critical of what he said was an overly permissive standard of review used by O'Connor.

"Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race- neutral alternatives," Kennedy wrote.

The enrollment plans under challenge in Louisville and Seattle are similar in that they are both attempts to address de facto segregation tied in part to housing patterns. The voluntary desegregation programs are aimed at preventing the school districts from sliding into a starkly segregated environment with minority students isolated in inner-city schools and white students isolated in suburban schools.

To achieve a meaningful mix, both school boards decided they would have to use race as a factor in deciding which students should attend particular schools.

In Seattle, the school board set student enrollment at the district's most popular high schools within 15 percentage points of the overall racial balance of the district's students. The balance was 40 percent white and 60 percent nonwhite.

Students were permitted to apply to attend any of the district's 10 high schools. But because some schools were more popular than others, the board created a racial tiebreaker to determine eligibility at the most popular schools.

If a new student would cause that particular school's white or nonwhite student population to increase above the 55 percent cutoff, the student was barred from attending that school. In the plan's first year, more than 300 white students were denied admission to their preferred school because of their skin color. Thirty students left the public school system rather than attend their assigned school.

Parents who oppose the plan say Seattle schools are already diverse and that the race tiebreaker is an attempt to achieve unconstitutional racial balancing.

Lawyers for the school board counter that the desire to integrate public schools is not the constitutional equivalent of seeking to maintain a segregated system.

Supporters say the Seattle plan is consistent with the promise made by the high court in Brown v. Board of Education. There is a fundamental difference between using race to segregate students and using it to integrate them, they say.

The same debate is under way in Louisville. There, the Jefferson County School Board established a broad goal that each of the district's schools should have black student enrollment set between 15 percent and 50 percent of the school's total enrollment. African-American enrollment districtwide is about 35 percent. It is up to school administrators to determine the exact racial mix at each school.

The program is aimed at encouraging students to attend schools outside their own neighborhood, but flexibility is the key to the Jefferson County plan. It seeks to offer options for those parents

who want their children to attend school close to home, yet it also seeks to achieve meaningful diversity in every school throughout the district.

The impact of being denied admission to a particular school for racial reasons is cushioned by an approach that urges parents - both black and white - to work with district officials to identify acceptable alternative schools. "You just keep working the process through with parents," says Pat Todd, director of the Jefferson County Schools student assignment plan.

"I don't mean to tell you it works perfectly. I have [some] dissatisfied parents. It is controversial. It is imperfect," Ms. Todd says. But in a broad way, the program is a microcosm of how democracy works, she says. "It is not about perfection. It is about managing the imperfections to people's greatest level of satisfaction. That is what this process is all about."

Not all schools in the Jefferson County system use race as a deciding factor. A federal judge has ordered that four schools offering unique educational programs cannot use race in selecting students - including Louisville's historically black Central High School. Since the judge's ruling six years ago in a case brought by African-American students, black enrollment at Central has risen steadily and now stands at 83 percent.

In addition, districtwide "traditional" schools use a random computer-drawn list to decide who attends those schools.

Todd says she and her staff work to ensure that the proportion of black applicants to white applicants at traditional schools reflects the districtwide goal for black enrollment. That is done in the hope that the random draw will subsequently reflect the desired black-white mix, Todd says.

A similar random draw would not work at the elementary school level, Todd says. It would eliminate the flexibility to allow dissatisfied parents to choose a second, or third, or fourth school option. It is that follow-up effort that helps blunt the impact of being denied admission to a first-choice school because of a student's race.

Todd says although the district uses some race-neutral alternatives, meaningful integration requires using race. "I don't think we can keep our school desegregated over time without the yardstick and vision of some racial guidelines," she says.

Others disagree. The school district's approach "denigrates a 5-year-old's self-worth and self-esteem by comporting him to be color coded throughout his educational career," says Teddy Gordon, who represents Crystal Meredith, a mother who is challenging the Louisville plan.

Mr. Gordon says in his brief that the school district may only use a race-conscious plan to remedy intentional discrimination. Anything else is unconstitutional racial balancing, he says.

The school district's lawyer, Francis Mellen, says that since all schools in Louisville receive similar funding and offer similar programs, students are not deprived of a benefit when they are denied enrollment in their chosen school.

"The student has not been denied an education, only a choice," Mr. Mellen says.

Decisions in the two cases - Parents Involved in Community Schools v. Seattle School District No. 1 and Crystal Meredith v. Jefferson County Board of Education - are expected by the end of the court's term next summer.

USA TODAY
June 18, 2006

It's discrimination. It's wrong.

By: Sharon L. Browne

When Crystal Meredith of Louisville tried to enroll her young son in Bloom Elementary School, she was told he couldn't transfer out of Young Elementary, the school where he was already assigned.

Why? Not because of his grades or interests. It was because he is white. As a federal district court later recounted the facts, he "was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition."

Did this happen in 1950, when students were routinely barred from certain schools on grounds of skin color? No, it was 2002. Called "managed choice," the race-based policy is the district's attempt to achieve the so-called "right" racial balance of students, ensuring that schools have at least 15% African-American students and no more than 50% African-American students.

Not surprisingly, Ms. Meredith objected to her son being turned away from a public school because of his skin color. She filed suit, arguing that he had been denied his equal protection rights under the U.S. Constitution.

This month, the U.S. Supreme Court sent a hopeful message when it agreed to hear this case and a similar one brought by Seattle parents, setting the stage for a decision on the constitutionality of these practices.

Some say these race-based policies are about diversity. They're not. They amount to blatant and illegal racial discrimination.

Sadly, Louisville and Seattle school administrators aren't alone. Nearly 1,000 school districts today are using race-based policies to assign students.

Supporters of these policies say that getting a balance of different races in each school can help the academic performance of minority kids. That claim is questionable.

Judges opposing Seattle's race-based assignments cited this passage from a report co-authored by George Mason University social scientist David Armor: ". . . racial composition by itself has little effect on raising the achievement of minority students or on reducing the minority-white achievement gap. Some studies show that there is no relationship at all between black achievement and racial composition . . . and other studies show that there is no relationship between the black-white achievement gap and racial composition."

The high court's decision to take these cases is particularly important since lower courts have misapplied prior decisions involving higher education institutions, using those rulings to wrongly justify discriminatory practices in K-12 public schools.

The court has repeatedly made a clear distinction between universities and their academic freedom to exchange ideas and K-12 public schools where students are required to attend. Further, the court has said that race cannot be the sole factor in categorizing students, yet the Louisville and Seattle K-12 schools have used race mechanically.

In 2003, the Supreme Court rejected the University of Michigan's undergraduate admissions point formula that was even less racially focused than the systems in Louisville and Seattle, where students have been assigned to schools solely based on their color.

More than 50 years after the landmark Brown v. Board of Education decision, our nation's justices can put an end to government-ordered discrimination policies.

In 2006, decades after the civil rights movement, no one in America should be judged by skin color. That's a message that everyone, from school administrators to children, needs to hear.

Sharon L. Browne is a principal attorney with Pacific Legal Foundation, a non-profit, public-interest organization based in Sacramento that filed briefs in both cases before the Supreme Court.

Parents Involved in Community Schools v. Seattle School District No. 1

Docket: 05-908
Citation: None
Petitioner: Parents Involved in Community Schools
Respondent: Seattle School District No. 1, et al.

Case Media

Oral Argument
Briefs
Docket

Abstract

Granted: Monday, June 5, 2006
Oral Argument: Monday, December 4, 2006

Advocates

Harry J.F. Korrell	(argued the cause for Petitioner)
Michael F. Madden	(argued the cause for Respondents)
Paul D. Clement	(argued the cause for Petitioner)

Facts of the Case

The Seattle School District allowed students to apply to any high school in the District. Since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 40% white and 60% non-white), the racial tiebreaker went into effect. At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal.

A non-profit group, Parents Involved in Community Schools (Parents), sued the District, arguing that the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment as well as the Civil Rights Act of 1964 and Washington state law. A federal District Court dismissed the suit, upholding the tiebreaker. On appeal, a three-judge panel the U.S. Court of Appeals for the Ninth Circuit reversed.

Under the Supreme Court's precedents on racial classification in higher education, *Grutter v. Bollinger* and *Gratz v. Bollinger*, race-based classifications must be directed toward a "compelling government interest" and must be "narrowly tailored" to that interest. Applying these precedents to K-12 education, the Circuit Court found that the tiebreaker scheme was not narrowly tailored. The District then petitioned for an "en banc" ruling by a panel of 11 Ninth Circuit judges. The en banc panel came to the opposite conclusion and upheld the tiebreaker. The majority ruled that the District had a compelling interest in maintaining racial diversity. Applying a test from *Grutter*, the Circuit Court also ruled that the tiebreaker plan was narrowly

tailored, because 1) the District did not employ quotas, 2) the District had considered race-neutral alternatives, 3) the plan caused no undue harm to races, and 4) the plan had an ending point.

Question

1) Do the decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* apply to public high school students?

2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3) Does a school district that normally permits a student to attend the high school of her choice violate the Equal Protection Clause by denying the student admission to her chosen school because of her race in an effort to achieve a desired racial balance?

Conclusion

None

Cite this page

The OYEZ Project, Parents Involved in Community Schools v. Seattle School District No. 1, (No. 05-908),
available at: <http://www.oyez.org/cases/2000-2009/2006/2006_05_908/>
(last visited Saturday, May 26, 2007).

Balancing the races by racial edicts: The Monitor's View

Christian Science Monitor, Dec. 5, 2006
http://www.csmonitor.com/2006/1205/p08s02-comv.html

The Supreme Court Monday heard arguments in a case involving the use of skin color to decide where a student attends school. The hearing comes after Michigan voters banned such types of racial preferences, following California and Washington.

The court's decision in this case may be the most significant of its term. The issue is whether Seattle and Louisville, Ky., can assign schools by race to overcome de facto housing segregation and to create diversified classrooms that reflect local racial balances.

The court might end up touching the constitutional brakes after a half century of successes in racial integration spawned by its 1954 decision in Brown v. Board of Education, a decision that outlawed intentional segregation in schools. In other words, the justices could set new limits on various government efforts to increase racial diversity in public life by intentional integration.

The decision, expected by June, will come as political momentum builds out of a citizen initiative in Michigan, passed last month, that may further roll back affirmative action in the US by making state governments colorblind in their decisions. Other states could easily see similar initiatives in 2008.

These ballot initiatives reflect a general weariness, mainly by whites, with the decades-long effort to keep giving special consideration to blacks and other minorities to correct racial inequality through unequal treatment of the races.

Even the Supreme Court justices, in individual opinions written for cases over the years, differ in how to sort out issues of race, especially in deciding when government can use discrimination to fight past discrimination. Again and again, they are asked whether a measure of unequal treatment should be allowed to overcome inequalities, or whether creating an American society of harmonious racial relations will require inharmonious means to achieve it.

The Seattle/Louisville case provides an opportunity for the court to be definitive - rather than split in its reasoning, as in past decisions. How much can the Constitution's provision on equal treatment before the law be compromised for a social good such as racially diverse classrooms?

Both of those school districts often force blacks and whites alike to attend distant schools to achieve a racial balance. The benefits and the harm of this policy are shared. Many students of all races are often denied their first choice to attend a nearby school. This "equal discrimination" is a long-term attempt to address the results of de facto segregation of housing.

As former Justice Harry Blackmun wrote in a 1978 case that allowed affirmative action in graduate schools: "To get beyond racism, we must first take account of race." (But how long must the "first take" go on?)

In contrast, the new chief justice, John Roberts, wrote in a recent dissenting opinion: "It is a sordid business, this divvying us up by race." (Yes, but racial discrimination remains sordid in the public sphere.)

The state has a compelling interest to end discrimination. But how compelling is the goal of racial diversity if that requires narrowly tailored discrimination by skin tone?

The justices must know the public is demanding a clearer answer.

The Supreme Court Decides Whether Race-Based Pupil-Assignment Systems Are Constitutional

By EDWARD LAZARUS
http://writ.lp.findlaw.com/lazarus/20061207.html
Dec. 07, 2006

This week, the Supreme Court dove back into the most vexed problem in our constitutional history - the problem of how to achieve racial equality and racial harmony, despite the inequalities and divisions that a racist history has bequeathed to us.

The occasion was the oral argument in two cases (one from Seattle, the other from Louisville) raising the issue of whether the Constitution permits local school officials to promote racial diversity in their classrooms by using a pupil's race as one factor in devising school assignments.

Based on the oral argument, a narrow majority of five justices seem to be poised to strike down both school assignment plans at issue. Although the Seattle and Louisville plans differ in their particulars, both allow parents to make an initial choice about which school their children will attend, after which the school district uses the student's race as one "tie-breaking" factor in smoothing out enrollment between oversubscribed and undersubscribed schools. The goal of both school districts is to keep the racial makeup of every school within the range of the racial makeup of the school district as a whole.

As I have written before, I think the Supreme Court would be wrong to strike these plans down; I'll briefly recap the reasons that convinced me of this position. In this column, written in the wake of the Supreme Court oral argument, I want to go on to consider another issue: Not just whether these programs will be allowed to stand, but also what rationale the Court majority will use to strike them down, if indeed it does so.

Why the Plans Should Be Upheld

To begin, let me briefly discuss my reasons for believing the plans are constitutional.

Of course, it is always of concern when the government classifies individuals on the basis of race. But the Seattle and Louisville plans advance society's compelling interest in fostering racial diversity, and they do so without spreading the poison of discrimination.

The Seattle and Louisville programs do not oppress minorities, like the Jim Crow laws of old. Nor do they impose a brand of inferiority by separating people on account of race (just the opposite, in fact; the idea is not to allow various schools within the district to become, in effect, racially segregated). Nor do they give members of one racial group a leg up over members of another group, as typical affirmative action programs do; pupil assignments may affect students of any race.

For all these reasons, I believe the Seattle and Louisville plans do not run afoul of constitutional prohibitions against pernicious racial discrimination, such as that which existed in segregated schools before Brown.

A Colorblind Reading of the Constitution Ignores Both Text and History

I can appreciate the ideals of those justices who would read the Constitution as requiring absolute colorblindness in all governmental actions. Racial classifications have led to terrible wrongs historically. Even well-intentioned affirmative action programs have created their share of victims. Worse, a few have actually been little more than economic power grabs engineered by minority-majority local governments.

But justifying a colorblind reading of the Constitution is no easy matter, especially, ironically, for conservative jurists. Here, resort to "original intent" - the conservative staple -- backfires. The historical evidence is very strong that the Framers of the Fourteenth Amendment's Equal Protection Clause were comfortable with racial preferences designed to benefit blacks.

Difficulty, however, is no excuse for misusing the Court's most important iconography. To twist Brown into a decision denying local officials the ability to nurture the ideal of white and black children going to school together, would be a slap in the face to the community that still remembers what Brown was really about.

Whatever the justices do with the pending cases, we should hope they don't strike that foul blow.

Edward Lazarus, a FindLaw columnist, writes about, practices, and teaches law in Los Angeles. A former federal prosecutor, he is the author of two books -- most recently, Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court.

Why the Supreme Court Is Right to Be Skeptical of Race-Based Assignment Systems For Public School Students

By DOUGLAS KMIEC
http://writ.lp.findlaw.com/commentary/20061206_kmiec.html
Wednesday, Dec. 06, 2006

Recently, the Supreme Court held oral argument in two Equal Protection cases, coming from school districts in Seattle and Louisville. In both cases, the Supreme Court will have to decide whether it is ever appropriate for public officials to use race for the purpose of deciding which pupils will be assigned to the most highly-desired schools in a given district.

The Supreme Court has long made plain - for instance, in Miller v. Johnson -- that "the central mandate of the equal protection clause is racial neutrality in governmental decision-making." Accordingly, it's no surprise that the Justices' questions to the attorneys defending this blatantly race-based program were quite demanding.

Justice Anthony Kennedy was among those expressing deep skepticism about Seattle's program. The school district seems to be telling its students that "everybody can get a meal," but only certain people can get "dessert," Kennedy said - which is plainly unfair. The Court's questions indicated that it's inclined to strike down these programs, and it should do so.

The Broad, Radical Arguments the School Districts Presented to the Court

The arguments made on behalf of racial balancing were more sweeping and radical than those made on behalf of any previous claim that it is constitutional to use race in public decisionmaking. The advocates of the use of the so-called "racial tiebreaker" and other like devices in student assignment seek perfectly-integrated neighborhood schools. But this may or may not be everyone's cultural ideal.

After all, we still applaud singular racial and ethnic achievement: Many people are very proud of breaking barriers, of being the first Hispanic-, or Polish-, or African- or Irish-American to claim a particular achievement as his or her own. Moreover, it is still commonplace for families to select neighborhoods that reflect their personal interests, which in the freedom of American society, may include interests in group identity, social class status, religion, and/or ethnicity. As one well-known sociologist put it, "Religion and ethnicity are essential parts of our lives, and government should not detail how we express them in the private sphere."

Notwithstanding ethnic and racial pride, which is understandable enough, for many, a world where race is simply irrelevant, in both public and private decisionmaking, is the ultimate objective. Ethnicity and the like meant more to my great-grandfather, the first in our family to emigrate to the United States, than it means to my father or to me and my children. The melting pot is still a cultural ideal for many, and a school board's conception of what constitutes an appropriate racial balance, may well be part of that. As Justice Kennedy again observed, it can be conceded that the school board desires only the common good. But here is the key point: A cultural ideal cannot be attained by sacrificing constitutional principle.

Even if a Melting Pot Is Ideal, the Government Cannot Constitutionally Turn Up the Heat

In particular, the pursuit of the ideal cannot be accomplished by government force. Indeed, according to Supreme Court precedent, government force - the compelled use of race - is permissible only in two situations: When it is designed to rectify the harm of prior discrimination, and in the context of public higher education, where the Court has held that consideration of race can be one of many factors in an admissions decision in order to secure diversity of viewpoint. Neither of these situations exists in the pupil assignment cases.
Column continues below _

First, the schools in these cases either have never engaged in prior discrimination (Seattle) or have long since given up that odious practice, and have been found by the federal courts to be "unitary" (Louisville). Thus, the compelled use of race cannot be justified as a required constitutional remedy.

Second, the small constitutional allowance for using race as one of many considerations in public university admissions simply does not apply here. Some of the Justices, most notably Justice Ginsburg, pointed out that public elementary and secondary schools - unlike universities -- generally do not depend on selective, competitive admissions. ("Magnet" schools are an obvious exception, but is the pursuit of the most highly desired schools in these cases really different? The racially-excluded parents and their children in Louisville and Seattle surely must feel they lost in competition.) Oddly, even if one indulges Justice Ginsburg's premise that the selection practices in these two cases do not constitute a competition, this is not a fact that should give greater latitude to public elementary and secondary schools, but just the opposite.

As the Supreme Court held in 2003, in Grutter v. Bollinger, when it upheld the limited use of race by an elite public university, "it would be a sad day indeed for America to become a quota-ridden society, with each identifiable minority assigned proportional representation . . . ." But that is exactly what race-base pupil assignment systems contemplate. The idea, after all, isn't to foster diversity, but simply to mirror the racial composition of the district in each individual school.

These Cases Can't Be Convincingly Likened to Brown and Its Progeny

In the end, likening the present cases to the school desegregation landmarks is unpersuasive. The present matters are simply not a logical extension of the Court's 1954 decision in Brown v. Board of Education, or of Brown's progeny.

The school desegregation cases necessarily depended upon a finding of de jure - by law - segregation. The pupil assignment cases are purely about de facto - factual - segregation. To fail to see the difference between that which is compelled, and that which is chosen, is to fail to appreciate both human freedom and the limits of the law. However regrettable the continued social patterns that often divide us by race may be, to accept the use of race in public decisionmaking for the indefinite future is merely to cement those divisions, not to erase them.

The Court Should Avoid a Jurisprudence of Racial Stereotype

Public school racial balancing does not just harm white or non-minority students. As disclosed in the briefing and oral argument, while the vast majority of excluded students were white, there were also an abundance of excluded minority students to reach the desired racial percentages sought by school officials. Are individual white or African-American public school students really better off being transported all over the district just so school officials can proclaim "balance achieved"?

Too often, the implicit premise is that minority students can only receive a proper education when they are in the presence of whites. As Justice Thomas, the Court's only African-American member, once observed in his concurrence in Missouri v. Jenkins, this is "a jurisprudence based upon a theory of black inferiority." It is certainly a jurisprudence based on stereotype. Seattle, for example, lumps together as fungible "minority," African-Americans, Asians, Latinos and Native Americans. Even worse, if a student in registration materials declines to identify his or her race as a matter of principle, the school district engages in "visual inspection." It seems diversity has more to do with skin pigment than anything else.

The justices were appropriately skeptical of the school districts' systems. Unfortunately, they may also be divided as to these systems' constitutionality. Can Chief Justice Roberts, given his commitment to collegiality and consensus, move the court from a five-four split, to the six-three or seven-two split needed to express firmly that public decisions ought not to depend on race?

For the Chief Justice to build consensus, he will need to remind his court of the importance of a colorblind Constitution, even in a world that still too frequently supplies examples of racial intolerance or ignorance, like that of Michael Richards on a comedy stage, or in the lunchrooms of the LAFD. Racism is neither funny nor excusable. But this much should be clear: racism is also not alleviated by greater public reliance upon race.

Douglas W. Kmiec is the Chair and Professor of Constitutional Law at Pepperdine University. He is also the former constitutional legal counsel to Presidents Reagan and George H. W. Bush.

Why race-based 'Survivor' makes us squirm

Segregation is seeping back into public schools, though we justify it away. Perhaps our discomfort with this TV show is in its reflection of truths in our society.

Jonathan Turley
http://blogs.usatoday.com/oped/2006/09/why_racebased_s.html

Millions of Americans tonight will watch different races fight for supremacy over a patch of land. No, this is not the latest installment of an Adolf Eichmann production. It is this season's CBS Survivor: Cook Islands.

With a ratings fall from a high of 29.8 million in 2001 to 16.6 million last year, the show's producers are clearly looking for something to captivate more viewers. To do so, they decided to try a TV version of divide and conquer: Fuel the racial identification of viewers, pit them against other races and reap the benefits of racial pride —or racial animus.

Not surprisingly, this year's reality-show theme produced an orgy of condemnations —and, for the producers, a steady stream of free publicity. Of course, denouncing TV producers as craven, ratings-seeking deviates is hardly news. Most executives would make the Rape of Nanking into a reality program if they could avoid Federal Communications Commission fines, throw in bikinis, and capture an additional share of the critical 25-54 demographic age group.

The problem is that this is a reality program that is far too real for our sensibilities. Despite decades of affirmative action, we remain a highly race-conscious society with highly segregated neighborhoods, schools, prisons and —yes —entertainment. More important, the 6-year-old show reflects a growing return to segregationist policies across the country.

A reflection of society

Survivor's producers insist that the use of racially segregated teams is designed to boost minority participation and possible success in the show. Moreover, Mark Burnett, executive producer of the show, has said, "I've learned that the social time you spend is predominantly in your own ethnic group."

That rationale is being used in public schools. Arguing that segregation helps minorities perform, states have introduced schools segregated by race, gender and even sexual orientation.

Survivor is embracing a "separate but equal" policy that was the scourge of the civil rights movement, ultimately rejected by the Supreme Court in Brown v. Board of Education. It is now the solution to everything from low school scores to low self-esteem —and apparently low ratings.

Just as producers feel comfortable with segregation, so do legislators. Congress effectively embraced the doctrine in a 2004 law that allows gender-segregated schools to receive federal funds so long as equal opportunities are made available at other schools. The Nebraska Legislature created three school districts in Omaha designed along racial lines with whites, Hispanics and blacks receiving their own districts.

Other states are experimenting with micro-segregation on the individual school or class levels. Recently, Chicago created the Urban Prep Charter Academy for Young Men, a school described as an "all-boys high school to primarily serve black youths."

In addition to racially segregated schools, there are also more than 200 single-sex educational programs, according to the National Association for Single Sex Public Education. New York has five all-girl and three all-boy public schools. Many states, such as Wisconsin, will soon offer not only a segregated high school for girls but also segregated classes in co-ed schools.

The new segregation extends beyond matters of race and gender. New York created the Harvey Milk High School for gay, lesbian, bisexual and transgender students. The courts prevented the city from creating a special school for the Jewish Hasidic community after parents said the children, who were also disabled, experienced "panic, fear and trauma" in public schools because of their different appearance and beliefs.

These schools are sometimes defended as purely voluntary and open to all students —though their purpose and de facto segregation is undeniable. The fact is that these schools affect relatively few students, but they offer appealing images for systems that have failed to address low scores, homophobia and crime.

There is no evidence such segregation leads to significantly higher scores. Any benefit is more likely because of increased money and smaller classes afforded to the students —not some comfort zone created through racial or gender segregation. The research used to support these programs has been challenged as stereotypes dressed up as science. Segregation at the Young Women's Leadership Charter School in Chicago was defended on the basis that it fosters "sisterhood" and that girls can "roll out of bed without worrying about makeup (and) hair," among other benefits.

The island

Given these growing programs, the segregation of Cook Islands is hardly a surprise. We are voting gay students, girls and other groups "off the island" to leave the appearance of tranquility and progress.

Yet, our schools are often the last opportunity for society to monitor and shape future citizens. They were once viewed as ideal forums to reinforce our values of pluralism and tolerance —a managed microcosm of society where students learn to interact with the other races and gender.

Integration themes, however, are not drawing much of a crowd on TV or in society. ABC recently scrapped the reality show Welcome to the Neighborhood, in which various minority groups competed for a house in a conservative white neighborhood.

Ironically, while shows such as The Simple Life appear tediously manufactured, CBS found a theme that resonates with our most base, racist tendencies. The fact is that Cook Islands is repellant not because it looks too little, but too much, like our society. It is a reality that many are likely to watch, but few want to recognize.

More states and the courts, too, may ban racial preferences. What's a state university to do for diversity?

Christian Science Monitor. May 11, 2007
http://www.csmonitor.com/2007/0511/p08s01-comv.htm

Get ready for a new round in the race debate. A grass-roots movement wants more states to outlaw racial preferences in public education and hiring. But state universities that seek more minorities are fighting back, hoping to "deflect ... defeat ... and debunk" this drive for race neutrality.

A strategy paper issued in March by the College Board and more than 30 educational institutions calls for targeting "those who attempt to step into the fray and deprive higher education leaders of the tools ... to achieve the benefits of diversity."

The "fray" is the use of voter initiatives to end racial, gender, and ethnic considerations in public employment and schools. Since 1997, four states – California, Florida, Washington, and Michigan – have forbidden such preferences in universities. The leader of this drive, black businessman Ward Connerly of California, plans ballot propositions in at least five well-chosen states in 2008 (Arizona, Colorado, Missouri, Oklahoma, and South Dakota).

The political wind is at his back after a 58 percent win for Michigan's 2007 initiative, which especially riled the University of Michigan. In 2003, it won a high court nod for its use of race as one of many factors in law-school admissions (although the court banned a numerical advantage for underrepresented minorities in undergrad enrollment).

Mr. Connerly contends that affirmative action has run its course, violates US civic principles, and hurts minorities elevated beyond their merit. On that last point, at least one study, focusing on law graduates, backs him up. And former Justice Sandra Day O'Connor, writing for the court in the 2003 decision, stated, "Twenty-five years from now, the use of racial preferences will no longer be necessary."

No wonder public universities are seeking political allies. And admission officials are enlisting lawyers to avoid lawsuits as they devise race-blind ways to enroll more blacks and Hispanics who don't meet minimum grades or test scores. The military academies, too, reportedly face a Pentagon directive to end favoring minority and female applicants for their affiliated "preparatory schools." And in coming weeks, two more decisions on racial preferences are expected from a more conservative Supreme Court.

Universities say that campuses need more than the best-educated students. (They no longer argue for curing discrimination.) A "critical mass" of minorities enhances education and prepares graduates for the workplace and society.

But it's difficult to achieve that mass while not subtly setting targets. Can there be racial goals without some racial discretion? Schools are trying many proxy ways to do it. Some give top graduates of all state high schools a ticket to admission. Or applicants are chosen by low income, neighborhood, or experiences of discrimination.

Schools want those white applicants who lose slots to minorities to see the greater social value in campus diversity. But they're up against divided courts and, lately, state-by-state voter initiatives against racial preferences.

The ultimate solution lies in giving minorities a better K-12 education. State universities that work with urban schools for better academic preparation may end up someday not needing to seek diversity by skin color.

Cooper v. Aaron

Docket: 1
Citation: 358 U.S. 1 (1958)
Petitioner: Cooper et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al.
Respondent: Aaron et al.
Consolidated: Aaron et al. v. Cooper et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al., No. 1 MISC

Case Media

Oral Argument
Written Opinion

Abstract

Oral Argument: August 28, 1958, September 11, 1958
Decision: Friday, September 12, 1958
Issues: Civil Rights, Desegregation, Schools

Advocates

Richard C. Butler (Argued the cause for the petitioners)
J. Lee Rankin (Argued the cause for the United States, as amicus curiae, in support of the respondents)

Facts of the Case

The Governor and the Legislature of Arkansas openly resisted the Supreme Court's decision in Brown v. Board of Education. They refused to obey court orders designed to implement school desegregation. Local officials delayed plans to do away with segregated public facilities.

Question

Were Arkansas officials bound by federal court orders mandating desegregation?

Conclusion

In a signed, unanimous per curiam opinion, the Court held that the Arkansas officials were bound by federal court orders that rested on the Supreme Court's decision in Brown v. Board of Education. The Court noted that its interpretation of the Fourteenth Amendment in Brown was the supreme law of the land and that it had a "binding effect" on the states. The Court reaffirmed its commitment to desegregation and reiterated that legislatures are not at liberty to annul judgments of the Court.

Supreme Court Justice Opinions and Votes (by Seniority)

Sort by Ideology
(More information here)

Per Curiam with Argument: Civil Rights, Desegregation, Schools: 9 – 0

Milliken v. Bradley

Docket: 73-434
Citation: 418 U.S. 717 (1974)
Petitioner: Milliken
Respondent: Bradley
Consolidated: No. 73-435; No. 73-436

Case Media

Oral Argument
Written Opinion

Abstract

Oral Argument: Wednesday, February 27, 1974
Decision: Thursday, July 25, 1974
Issues: Civil Rights, Desegregation, Schools
Categories: education, race

Advocates

Robert H. Bork	(Argued the cause for the United States as amicus curiae urging reversal)
J. Harold Flannery	(Argued the cause for the respondents in all cases)
Nathaniel R. Jones	(Argued the cause for the respondents in all cases)
Frank J. Kelley	(Argued the cause for the petitioners in No. 73-434)
William M. Saxton	(Argued the cause for the petitioners in Nos. 73-435 and 73-436)

Facts of the Case

A suit charging that the Detroit, Michigan public school system was racially segregated as a result of official policies was filed against Governor Milliken. After reviewing the case and concluding the system was segregated, a district court ordered the adoption of a desegregation plan that encompassed eighty-five outlying school districts. The lower court found that Detroit-only plans were inadequate. The U.S. Court of Appeals for the Sixth Circuit affirmed the metropolitan plan. This case was decided together with Allen Park Public Schools v. Bradley and Grosse Point Public School System v. Bradley.

Question

Did federal courts have the authority to impose a multi-district desegregation plan on schools outside the Detroit area?

Conclusion

In a 5-to-4 decision, the Court held that "[w]ith no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect," the district court's remedy was "wholly impermissible" and not justified by Brown v. Board of Education. The Court noted that desegregation, "in the sense of dismantling a dual school system," did not require "any particular racial balance in each 'school, grade or classroom.'" The Court also emphasized the importance of local control over the operation of schools.

Gratz v. Bollinger

Oral Argument: Tuesday, April 1, 2003
Decision: Monday, June 23, 2003
Issues: Civil Rights, Affirmative Action
http://www.oyez.org/cases/2000-2009/2002/2002_02_516/

Facts of the Case

In 1995, Jennifer Gratz applied to the University of Michigan's College of Literature, Science and the Arts with an adjusted GPA of 3.8 and ACT score of 25. In 1997, Patrick Hamacher applied to the University with an adjusted GPA of 3.0, and an ACT score of 28. Both were denied admission and attended other schools. The University admits that it uses race as a factor in making admissions decisions because it serves a "compelling interest in achieving diversity among its student body." In addition, the University has a policy to admit virtually all qualified applicants who are members of one of three select racial minority groups - African Americans, Hispanics, and Native Americans - that are considered to be "underrepresented" on the campus. Concluding that diversity was a compelling interest, the District Court held that the admissions policies for years 1995-1998 were not narrowly tailored, but that the policies in effect in 1999 and 2000 were narrowly tailored. After the decision in Grutter, Gratz and Hamacher petitioned the U.S. Supreme Court pursuant to Rule 11 for a writ of certiorari before judgment, which was granted.

Question

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964?

Conclusion

Yes. In a 6-3 opinion delivered by Chief Justice William H. Rehnquist, the Court held that the University of Michigan's use of racial preferences in undergraduate admissions violates both the Equal Protection Clause and Title VI. While rejecting the argument that diversity cannot constitute a compelling state interest, the Court reasoned that the automatic distribution of 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race was not narrowly tailored and did not provide the individualized consideration Justice Powell contemplated in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Chief Justice Rehnquist wrote, "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause."

Majority: Rehnquist, O'Connor, Scalia, Kennedy, Thomas
Dissent: Ginsburg, Souter, Stevens

Grutter v. Bollinger

Oral Argument: Tuesday, April 1, 2003
Decision: Monday, June 23, 2003
Issues: Civil Rights, Affirmative Action
http://www.oyez.org/cases/2000-2009/2002/2002_02_241/

Facts of the Case

In 1997, Barbara Grutter, a white resident of Michigan, applied for admission to the University of Michigan Law School. Grutter applied with a 3.8 undergraduate GPA and an LSAT score of 161. She was denied admission. The Law School admits that it uses race as a factor in making admissions decisions because it serves a "compelling interest in achieving diversity among its student body." The District Court concluded that the Law School's stated interest in achieving diversity in the student body was not a compelling one and enjoined its use of race in the admissions process. In reversing, the Court of Appeals held that Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), constituted a binding precedent establishing diversity as a compelling governmental interest sufficient under strict scrutiny review to justify the use of racial preferences in admissions. The appellate court also rejected the district court's finding that the Law School's "critical mass" was the functional equivalent of a quota.

Question

Does the University of Michigan Law School's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964?

Conclusion

No. In a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. The Court reasoned that, because the Law School conducts highly individualized review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Justice O'Connor wrote, "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."

Majority: Stevens, O'Connor, Souter, Ginsburg, Breyer
Dissent: Rehnquist, Scalia, Kennedy, Thomas

Regents of the University of California v. Bakke

Oral Argument: October 12, 1977
Decision: June 26, 1978
Issues: Civil Rights, Affirmative Action
Categories: affirmative action, discrimination, education, race, race discrimination
http://www.oyez.org/cases/1970-1979/1977/1977_76_811/

Facts of the Case

Allan Bakke, a thirty-five-year-old white man, had twice applied for admission to the University of California Medical School at Davis. He was rejected both times. The school reserved sixteen places in each entering class of one hundred for "qualified" minorities, as part of the university's affirmative action program, in an effort to redress longstanding, unfair minority exclusions from the medical profession. Bakke's qualifications (college GPA and test scores) exceeded those of any of the minority students admitted in the two years Bakke's applications were rejected. Bakke contended, first in the California courts, then in the Supreme Court, that he was excluded from admission solely on the basis of race.

Question

Did the University of California violate the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, by practicing an affirmative action policy that resulted in the repeated rejection of Bakke's application for admission to its medical school?

Conclusion

No and yes. There was no single majority opinion. Four of the justices contended that any racial quota system supported by government violated the Civil Rights Act of 1964. Justice Lewis F. Powell, Jr., agreed, casting the deciding vote ordering the medical school to admit Bakke. However, in his opinion, Powell argued that the rigid use of racial quotas as employed at the school violated the equal protection clause of the Fourteenth Amendment. The remaining four justices held that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. Powell joined that opinion as well, contending that the use of race was permissible as one of several admission criteria. So, the Court managed to minimize white opposition to the goal of equality (by finding for Bakke) while extending gains for racial minorities through affirmative action.

Loving v. Virginia

Oral Argument: April 10, 1967
Decision: June 12, 1967
Issues: Civil Rights, Desegregation
Categories: criminal, discrimination, due process, equal protection, fourteenth amendment, marriage, race, race discrimination
http://www.oyez.org/cases/1960-1969/1966/1966_395/

Facts of the Case

In 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in the District of Columbia. The Lovings returned to Virginia shortly thereafter. The couple was then charged with violating the state's antimiscegenation statute, which banned inter-racial marriages. The Lovings were found guilty and sentenced to a year in jail (the trial judge agreed to suspend the sentence if the Lovings would leave Virginia and not return for 25 years).

Question

Did Virginia's antimiscegenation law violate the Equal Protection Clause of the Fourteenth Amendment?

Conclusion

Yes. In a unanimous decision, the Court held that distinctions drawn according to race were generally "odious to a free people" and were subject to "the most rigid scrutiny" under the Equal Protection Clause. The Virginia law, the Court found, had no legitimate purpose "independent of invidious racial discrimination." The Court rejected the state's argument that the statute was legitimate because it applied equally to both blacks and whites and found that racial classifications were not subject to a "rational purpose" test under the Fourteenth Amendment.

Justices Again Refuse Guantanamo Bay Cases

Amy Goldstein, Washington Post
May 1, 2007

For the second time in a month, the Supreme Court decided yesterday not to hear appeals from terrorism suspects imprisoned at Guantanamo Bay, Cuba, refusing to call a halt to the military commissions they face after Congress authorized the trials last fall.

The court rejected an appeal by Salim Ahmed Hamdan, a former driver for Osama bin Laden who won a landmark Supreme Court case, and Omar Khadr, a Canadian charged in the killing of an Army medic in Afghanistan. They are the only two of about 385 detainees at the U.S. naval base who have been charged with terrorism crimes and are facing military trials.

The justices' decision not to take the appeals of Hamdan and Khadr came less than one year after they struck down the system of military tribunals that the Bush administration had devised to try suspected members of al-Qaeda. Ruling in Hamdan's first case, the court found that the tribunals lacked a basis in federal statute and violated international human rights law.

As a result, the then-Republican-controlled Congress adopted the Military Commissions Act, which authorized the trials and made clear that non-citizens held on foreign soil are not entitled access to U.S. courts to challenge their detention.

In his current case, Hamdan was attempting to persuade the Supreme Court to allow him to bypass the U.S. Court of Appeals for the D.C. Circuit, which has ruled recently against Khadr and other detainees contesting their imprisonment as "enemy combatants."

Three members of the court -- Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer -- said they would hear the appeal. Court rules require the agreement of four of the nine justices to accept a case.

The same three justices dissented in early April from the court's decision not to hear cases involving two groups of Guantanamo Bay detainees who have not been charged but seek access to federal courts to challenge their imprisonment.

Bradwell v. Illinois

Docket: None
Citation: 83 U.S. 130 (1873)
Petitioner: Bradwell
Respondent: Illinois

Case Media

No media files currently available
Written Opinion (Courtesy of Justia)

Abstract

Oral Argument: Saturday, January 18, 1873
Decision: Tuesday, April 15, 1873

Advocates

Not available

Facts of the Case

Myra Bradwell asserted her right to a license to practice law in Illinois by virtue of her status as a United States citizen. The judges of the Illinois Supreme Court denied her application with only one judge dissenting.

Question

Is the right to obtain a license to practice law guaranteed by the Fourteenth Amendment to all citizens of the United States?

Conclusion

No. While the Court agreed that all citizens enjoy certain privileges and immunities which individual states cannot take away, it did not agree that the right to practice law in a state's courts is one of them. There was no agreement, argued Justice Miller, that this right depended on citizenship. In his concurrence, Justice Bradley went above and beyond the constitutional explanations of the case to describe the reasons why it was natural and proper for women to be excluded from the legal profession. He cited the importance of maintaining the "respective spheres of man and woman," with women performing the duties of motherhood and wife in accordance with the "law of the Creator."

Cite this page

The OYEZ Project, Bradwell v. Illinois, 83 U.S. 130 (1873),
available at: <http://www.oyez.org/cases/1851-1900/1872/1872_0/>
(last visited Sunday, June 3, 2007).

PGA Tour v. Martin

http://www.oyez.org/cases/2000-2009/2000/2000_00_24/
Decision: May 29, 2001
Issues: Civil Rights, Rights of Handicapped
http://www.oyez.org/cases/2000-2009/2000/2000_00_24/

Facts of the Case

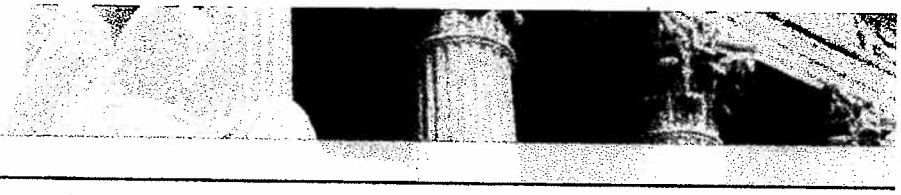
Casey Martin is afflicted with a degenerative circulatory disorder that prevents him from walking golf courses. His disorder constitutes a disability under the Americans with Disabilities Act of 1990 (ADA). When Casey made a request to use a golf cart for the duration of the qualification tournament onto the professional tours sponsored by PGA Tour, Inc., PGA refused. Martin then filed suit under Title III of the ADA, which requires an entity operating "public accommodations" to make "reasonable modifications" in its policies "when... necessary to afford such...accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such...accommodations." Ultimately, the District Court entered a permanent injunction against PGA, requiring it to allow Martin to use a cart. The court found that the purpose of the PGA's walking rule was to insert fatigue into the skill of shot-making, and that Martin suffered significant fatigue due to his disability, even with the use of a cart. In affirming, the Court of Appeals concluded that golf courses are places of public accommodation during professional tournaments and that permitting Martin to use a cart would not fundamentally alter the nature of those tournaments.

Question

Does the Americans with Disabilities Act of 1990 provide access to professional golf tournaments by a qualified entrant with a disability? May a disabled contestant be denied the use of a golf cart because it would "fundamentally alter the nature" of the tournaments to allow him to ride when all other contestants must walk?

Conclusion

Yes and no. In a 7-2 opinion delivered by Justice John Paul Stevens, the Court held that Title III of the ADA, by its plain terms, prohibits the PGA from denying Martin equal access to its tours on the basis of his disability and that allowing Martin to use a cart, despite the walking rule, is not a modification that would "fundamentally alter the nature" of the game. "The purpose of the walking rule is... not compromised in the slightest by allowing Martin to use a cart," wrote Justice Stevens, noting Martin's fatiguing disability. Justice Antonin Scalia, joined by Justice Clarence Thomas, dissented.



Cleburne, TX v. Cleburne Living Center

Docket: 84-468
Citation: 473 U.S. 432 (1985)
Petitioner: Cleburne, TX
Respondent: Cleburne Living Center

Case Media

Oral Argument
Oral Reargument
Written Opinion

Abstract

Oral Argument: Monday, March 18, 1985
Oral Reargument: Tuesday, April 23, 1985
Decision: Monday, July 1, 1985
Issues: Economic Activity, Zoning
Categories: mental health, property

Advocates

Renea Hicks	(Argued the cause for the respondents)
Earl Luna	(Argued the cause for the petitioners)

Facts of the Case

In 1980, Cleburne Living Center, Inc. submitted a permit application to operate a home for the mentally retarded. The city council of Cleburne voted to deny the special use permit, acting pursuant to a municipal zoning ordinance.

Question

Did the denial of the permit violate the Equal Protection rights of Cleburne Living Center, Inc. and its potential residents?

Conclusion

In a unanimous judgment, the Court held that the denial of the special use permit to Cleburne Living Centers, Inc. was premised on an irrational prejudice against the mentally retarded, and hence unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. While the Court declined to grant the mentally retarded the status of a "quasi-suspect class," it nevertheless found that the "rational relation" test for legislative action provided sufficient protection against invidious discrimination.

O'Connor v. Consolidated Coin Caterers Corp.

Docket: 95-354
Citation: 517 U.S. 308 (1996)
Petitioner: O'Connor
Respondent: Consolidated Coin Caterers Corp.

Case Media

Oral Argument
Written Opinion

Abstract

Oral Argument: Tuesday, February 27, 1996
Decision: Monday, April 1, 1996
Issues: Civil Rights, Employment Discrimination

Advocates

George Daly	(Argued the cause for the petitioner)
James B. Spears	(Argued the cause for the respondent)
Paul R. Q. Wolfson	(On behalf of the United States, as amicus curiae, supporting the petitioner)

Facts of the Case

James O'Connor, 56, was fired by Consolidated Coin Caterers Corp. and replaced by a 40-year-old worker. O'Connor filed suit alleging that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA). The District Court granted Consolidated's summary judgment motion. In affirming, the Court of Appeals held that O'Connor failed to make out a prima facie case of age discrimination because he failed to show that he was replaced by someone outside the age group protected by the ADEA since his replacement was 40 years old.

Question

Can an employee file an age discrimination suit under the Age Discrimination in Employment Act of 1967 if his or her replacement is 40 or older?

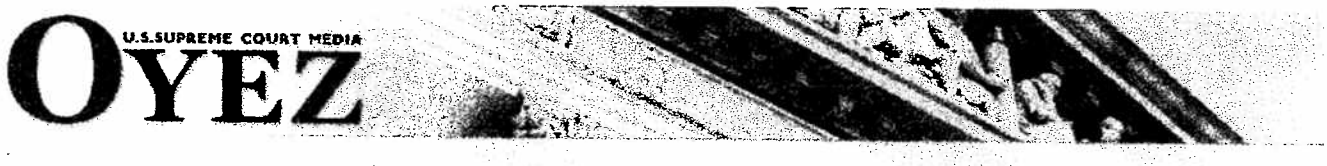
Conclusion

Yes. In a unanimous decision, authored by Justice Antonin Scalia, the Court ruled that although the Age Discrimination in Employment Act of 1967 limits its protection to those who are 40 or older, it prohibits discrimination against those protected employees on the basis of age, not class membership. "That one member of the protected class lost out to another member is irrelevant, so long as he lost out because of his age. The latter is more reliably indicated by the fact that his replacement was substantially younger," wrote Justice Scalia.

Supreme Court Justice Opinions and Votes (by Seniority)

Sort by Ideology
(More information here)

Full Opinion: Civil Rights, Employment Discrimination: 9 - 0



Cruzan v. Director, Missouri Dept. of Health

Docket: 88-1503
Citation: 497 U.S. 261 (1990)
Petitioner: Cruzan
Respondent: Director, Missouri Dept. of Health

Case Media

Oral Argument
Written Opinion

Abstract

Oral Argument: Wednesday, December 6, 1989
Decision: Monday, June 25, 1990
Issues: Privacy, Right to Die

Advocates

William H. Colby	(Argued the cause for the petitioners)
Robert L. Presson	(Argued the cause for the respondent)
Kenneth W. Starr	(Department of Justice, argued the cause for the United States as amicus curiae urging affirmance)

Facts of the Case

In 1983, Nancy Beth Cruzan was involved in an automobile accident which left her in a "persistent vegetative state." She was sustained for several weeks by artificial feedings through an implanted gastronomy tube. When Cruzan's parents attempted to terminate the life-support system, state hospital officials refused to do so without court approval. The Missouri Supreme Court ruled in favor of the state's policy over Cruzan's right to refuse treatment.

Question

Did the Due Process Clause of the Fourteenth Amendment permit Cruzan's parents to refuse life-sustaining treatment on their vegitated daughter's behalf?

Conclusion

In a 5-to-4 decision, the Court held that while individuals enjoyed the right to refuse medical treatment under the Due Process Clause, incompetent persons were not able to exercise such rights. Absent "clear and convincing" evidence that Cruzan desired treatment to be withdrawn, the Court found the State of Missouri's actions designed to preserve human life to be constitutional. Because there was no guarantee family members would always act in the best interests of incompetent patients, and because erroneous decisions to withdraw treatment were irreversible, the Court upheld the state's heightened evidentiary requirements.

Vacco v. Quill

Docket: 95-1858
Citation: 521 U.S. 793 (1997)
Petitioner: Vacco
Respondent: Quill

Case Media

Oral Argument
Opinion Announcement
Written Opinion

Abstract

Oral Argument: Wednesday, January 8, 1997
Decision: Thursday, June 26, 1997
Issues: Privacy, Right to Die

Advocates

Walter E. Dellinger, III	(on behalf of the United States, as amicus curiae)
Laurence H. Tribe	(Argued the cause for the respondents)
Dennis C. Vacco	(Argued the cause for the petitioners)

Facts of the Case

Dr. Timothy E. Quill, along with other physicians and three seriously ill patients who have since died, challenged the constitutionality of the New York State's ban on physician-assisted suicide. New York's ban, while permitting patients to refuse lifesaving treatment on their own, has historically made it a crime for doctors to help patients commit or attempt suicide, even if patients are terminally ill or in great pain. Following a District Court ruling favoring the State of New York, the Second Circuit reversed and the Supreme Court granted New York certiorari.

Question

Did New York's ban on physician-assisted suicide violate the Fourteenth Amendment's Equal Protection Clause by allowing competent terminally ill adults to withdraw their own lifesaving treatment, but denying the same right to patients who could not withdraw their own treatment and could only hope that a physician would do so for them?

Conclusion

No. Employing a rationality test to examine the guarantees of the Equal Protection Clause, the Court held that New York's ban was rationally related to the state's legitimate interest in protecting medical ethics, preventing euthanasia, shielding the disabled and terminally ill from prejudice which might encourage them to end their lives, and, above all, the preservation of human life. Moreover, while acknowledging the difficulty of its task, the Court distinguished between the refusal of lifesaving treatment and assisted suicide, by noting that the latter involves the criminal elements of causation and intent. No matter how noble a physician's motives may be, he may not deliberately cause, hasten, or aid a patient's death.

Supreme Court Justice Opinions and Votes (by Seniority) 9-0.

Sort by Ideology
(More information here)

Washington v. Glucksberg

Docket: 96-110
Citation: 521 U.S. 702 (1997)
Petitioner: Washington
Respondent: Glucksberg

Case Media

Oral Argument
Opinion Announcement
Written Opinion

Abstract

Oral Argument: Wednesday, January 8, 1997
Decision: Thursday, June 26, 1997
Issues: Privacy, Right to Die
Categories: due process, privacy

Advocates

Walter E. Dellinger, III	(on behalf of the United States, as amicus curiae)
Kathryn L. Tucker	(Argued the cause of the respondents)
William L. Williams	(Argued the cause for the petitioners)

Facts of the Case

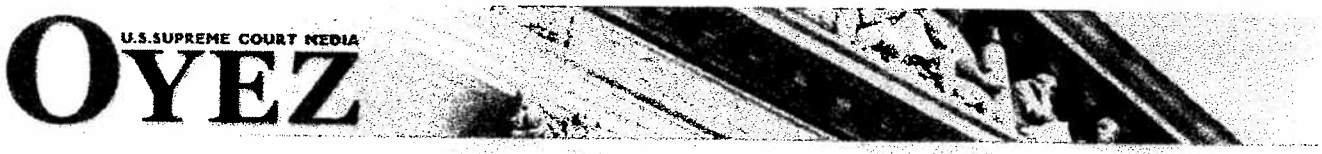
Dr. Harold Glucksberg -- along with four other physicians, three terminally ill patients who have since died, and a nonprofit organization that counsels individuals contemplating physician assisted-suicide -- brought this suit challenging the state of Washington's ban on physician assisted-suicide. The State of Washington has historically criminalized the promotion of suicide attempts by those who "knowingly cause or aid another person to attempt suicide." Glucksberg alleged that Washington's ban [illegible] unconstitutional. Following a District Court ruling favoring Glucksberg and his fellow petitioners, the Ninth Circuit affirmed and the Supreme Court granted Washington certiorari.

Question

Did Washington's ban on physician assisted-suicide violate the Fourteenth Amendment's Due Process Clause by denying competent terminally ill adults the liberty to choose death over life?

Conclusion

No. Analyzing the guarantees of the Due Process Clause, the Court focused on two primary aspects: the protection of our nation's objective fundamental, historically rooted, rights and liberties; and the cautious definition of what constitutes a due process liberty interest. The Court held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause since its practice has been, and continues to be, offensive to our national traditions and practices. Moreover, employing a rationality test, the Court held that Washington's ban was rationally related to the state's legitimate interest in protecting medical ethics, shielding disabled and terminally ill people from prejudice which might encourage them to end their lives, and, above all, the preservation of human life.



Gonzales v. Oregon

Docket: 04-623
Citation: 546 U.S. ___ (2006)
Petitioner: Alberto R. Gonzales, Attorney General, et al.
Respondent: Oregon, et al.

Case Media

Oral Argument
Opinion Announcement
Docket
Written Opinion

Abstract

Granted: Tuesday, February 22, 2005
Oral Argument: Wednesday, October 5, 2005
Decision: Tuesday, January 17, 2006
Issues: Privacy, Right to Die

Advocates

Robert Moorehead Atkinson	(argued the cause for Respondents)
Paul D. Clement	(argued the cause for Petitioners)

Facts of the Case

In 1994 Oregon enacted the Death with Dignity Act, the first state law authorizing physicians to prescribe lethal doses of controlled substances to terminally ill patients. Attorney General John Ashcroft declared in 2001 that physician-assisted suicide violated the Controlled Substances Act of 1970 (CSA). Ashcroft threatened to revoke the medical licenses of physicians who took part in the practice. Oregon sued Ashcroft in federal district court. That court and, later the Ninth Circuit, held Ashcroft"s directive illegal. The courts held that the CSA did not authorize the attorney general to regulate physician-assisted suicide, which was the sort of medical matter historically entrusted to the states.

Question

Did the Controlled Substances Act authorize the attorney general to ban the use of controlled substances for physician-assisted suicide in Oregon?

Conclusion

No. In a 6-3 opinion delivered by Justice Anthony Kennedy, the Court held that Congress intended the CSA to prevent doctors only from engaging in illicit drug dealing, not to define general standards of state medical practice. Moreover, the CSA did not authorize Attorney General John Ashcroft to declare a medical practice authorized under state law to be illegitimate.

Oregon takes stock of 'right to die' law

292 patients have died with aid of physicians since the law went into effect in 1998, new figures show.

Brad Knickerbocker, The Christian Science Monitor, March 12. 2007
http://www.csmonitor.com/2007/0312/p03s02-ussc.html

Ten years after Oregonians passed a controversial ballot measure allowing physicians to help some patients take their own lives, the records show that what critics feared has apparently not happened. No rush to end one's life, no people flocking here from other states, no pressure from family, doctors, and insurance companies to commit suicide.

Relatively few people opt to end their own lives by taking a doctor-prescribed drug, according to recently-released figures for 2006: 46 deaths last year, 292 overall since the law went into effect – about one-tenth of 1 percent of those diagnosed with terminal illnesses in Oregon.

Instead, palliative and hospice care have increased markedly here because the law helped raise awareness about caring for terminally ill patients. As a result, Oregon ranks among the best in the nation in end-of-life care. This means more people are looked after at home with the emotional and spiritual support of their families rather than spending their last days in a hospital.

"The practice has settled into a nice, safe, responsible, conservative record of aid-in-dying practice in the state," says Barbara Combs Lee, president of Compassion & Choices, a Denver-based advocacy group that supports physician-assisted suicide. "Once again, very, very few Oregonians have exercised their option under the law."

Although Oregon remains the only state to allow physician-assisted suicide, California is also moving in that direction, and the topic is being debated in Arizona, Vermont, and Washington. A bill sponsored by California Assembly Speaker Fabian Nunez (D) and other lawmakers patterns Oregon's "Death With Dignity Act."

The Oregon law specifically prohibits "lethal injection, mercy killing, or active euthanasia." But it does allow mentally competent adults who declare their intentions in writing, and have been diagnosed as terminally ill, to take a doctor- prescribed lethal drug themselves, orally, after a waiting period. The California proposal includes what supporters say are additional safeguards: requiring doctors to give patients a written summary of alternatives, and directing that those not under hospice care receive a psychological evaluation.

According to the Field Poll, 70 percent of all adults in California (including 59 percent of Republicans) believe that mentally competent patients diagnosed as incurably ill should have the right to ask for and get life-ending medication. Gallup and other national polls show that a majority of Americans favor the procedure, although it depends how the question is asked – particularly whether the word "suicide" is used.

When asked if doctors should be allowed to help end the life of a patient who is suffering from what's been diagnosed as an incurable disease and wants to die, 75 percent of Americans say "yes," reports Gallup. But when asked if doctors should be allowed to help a patient commit suicide under the same circumstances, the approval rate drops to 58 percent.

The 2006 Field Poll in California found that most Protestants (65 percent), Roman Catholics (64 percent), and even those identifying themselves as born-again Christians (54 percent) favor a choice in ending one's life.

Like abortion, stem-cell research, and the Terri Schiavo case, physician-assisted suicide is a hot-button issue for many religious people. Last August, Sen. Sam Brownback (R) of Kansas introduced the "Assisted Suicide Prevention Act," which would prohibit doctors from prescribing federally controlled substances to help people take their own lives.

"When the law permits killing as a medical treatment, society's moral guidelines are blurred, and killing could gain acceptance as a solution for the chronically ill or vulnerable," Senator Brownback said at the time."Doctor-assisted suicide could actually create a financial incentive for insurance companies to encourage prematurely ending the lives of those in need of long-term care."

The United States Supreme Court has moved carefully on the issue. It upheld state bans on the procedure, ruling that assisted suicide is not a constitutionally protected right. But the high court also ruled that the Bush administration exceeded its authority trying to overturn the Oregon law by arguing that prescribing a lethal drug violates the federal Controlled Substances Act.

Under carefully proscribed laws, such as Oregon's, most doctors say it is ethical to help people diagnosed as terminally ill take their own lives, according to a 2005 national survey of 1,088 physicians.

But in an amicus brief filed in one of the Supreme Court cases, the American Medical Association, the American Nurses Association, and the American Psychiatric Association warned that "physician-assisted suicide would create profound danger for many ill persons with undiagnosed depression and inadequately treated pain, for whom physician-assisted suicide rather than good palliative care could become the norm."

Past attempts to follow Oregon's lead in California and other states have failed.

California Gov. Arnold Schwarzenegger (R) wants the issue to go to the voters rather than through lawmakers. Vermont Gov. Jim Douglas (R) says the proposal there violates the Hippocratic oath, which says "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect."

"There's no question that this topic stirs a lot emotion and a lot of debate," California Assembly Speaker Nunez said during a news conference announcing the proposed "California Compassionate Choices Act" last month. "I think when you pare it down to its essence, however, this is about how people are going to live the last days of their life."

Happy 14th Amendment Day!

Thanks to the visionary constitutional reformers of 1868, America enjoys equal rights for all. Today's anti-immigration zealots want to destroy their legacy.

http://www.salon.com/opinion/feature/2006/07/21/14th_amendment/print.html
Garrett Epps, University of Oregon

Jul. 21, 2006 | What's better than a patriotic holiday in July? Pop a brew tonight, then, and let's celebrate our heritage of democracy and equal rights. We owe these freedoms not so much to the events commemorated every July 4, but to those of July 21.

On this day in 1868, after a bruising ratification struggle, Congress passed a resolution proclaiming that the 14th Amendment was part of the Constitution. More than the Declaration of Independence, more than the original Constitution, more than even the Bill of Rights, it is the 14th Amendment that makes America a democratic country.

But, as the beer commercials say, celebrate responsibly: Our current toxic immigration debate shows that, more than a century later, genuine democracy has powerful enemies. In 2006, the anti-immigrant movement is attacking the amendment's central meaning of equal protection of the law for all.

Please don't feel bad if the words "14th Amendment" don't immediately call to mind a list of rights. Most literate citizens -- and even many lawyers -- have trouble focusing on the radical changes this massive post-Civil War reform made in the original Constitution. The 14th Amendment is such a giant presence in our lives today that it's hard to see it as a single thing.

But consider this. Until the 14th Amendment, the idea of human equality, extolled in the Declaration of Independence, appeared nowhere in the Constitution. The word "equal," when written in the original document, referred mostly to voting privileges for the states. In addition, the Constitution contained no definition of American citizenship, seemingly leaving the matter to the states.

Even the Bill of Rights itself only covered the federal government -- overreaching state governments could, and did, restrict free speech, freedom of religion, due process of law and other basic rights. In short, the Framers of 1787 set up a flawed confederation of insular states, each of which was free to oppress, and even enslave, some or all of its population.

No matter what we've been taught in civics class, that original system was a failure. Its flaws led directly to the bloodiest war in American history. After nearly a million deaths, the anti-slavery leaders of Congress set out in 1865 to re-create the United States as a nation, with a powerful central government, democratic institutions at every level and a list of rights no government, state or federal, could violate. Far more than the Framers of 1787, John Bingham, Thaddeus Stevens, William P. Fessenden and the other authors of the 14th Amendment designed the America we live in today. It was, in their vision, to be a unified nation. Local majorities in states were to be barred by federal power from oppressing religious, political or racial minorities. And immigrants were to be a part of the nation as fully as those native-born, considered equal before the courts.

The concerns that motivated them seem, even 140 years later, remarkably contemporary. The first section of the amendment begins by guaranteeing that "all persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." At one stroke, the framers eliminated the racist Dred Scott doctrine that "we the people" did not mean African-Americans; and they included as citizens every child born here, no matter where their parents were born or how they got here. After that, they required every state to observe the "privileges [and] immunities of citizens of the United States," and to afford due process and equal protection of the laws to "any person" within their borders.

Ohio Rep. John Bingham, the principal architect of Section 1, had spent most of his career campaigning for the rights of slaves and immigrants. Even before the Civil War, he had laid out a vision of "one people, one Constitution, and one country!" States had no "rights" to interfere with their citizens' constitutional rights: "The equality of the right to live; the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which [the] Constitution rests, its sure foundation and defense." Immigrants enjoyed those rights as fully as natives, he insisted, because the Constitution obeyed "that higher law given by a voice out of heaven: 'Ye shall have the same law for the stranger as for one of your own country.'"

The bedrock values of birthright citizenship and equal protection for all immigrants came directly out of the debates over immigration of the 1850s -- debates that sound remarkably like the one going on in Congress today. By 1860, German-born immigrants to the United States totaled 1.2 million out of about 30 million total, and thousands of Irish immigrants were arriving yearly. Prophets of the "Know Nothing" movement warned that these new immigrants were not like previous ones. They did not assimilate; they owed allegiance to the pope; they insisted on speaking their own languages; they would subvert American institutions and destroy American identity.

Even worse, they drank beer.

Many proposals were floated to restrict their rights, requiring 21 years for citizenship or withholding the vote entirely. But anti-slavery Republicans like Bingham insisted that a free republic did not deal in hierarchies of rights.

Today's Know-Nothings are attempting to avoid this central tenet of American democracy by deliberately distorting the meaning of the 14th Amendment. On its Web site, the anti-immigrant Federation for American Immigration Reform dismisses the Citizenship Clause by saying it "was intended to exclude from automatic citizenship American-born persons whose allegiance to the United States was not complete" -- including illegal immigrants.

But there is no shred of evidence in the record to support this strained interpretation. The wording of the clause was designed to exclude from citizenship chiefly the children of diplomats living in the United States under the protection of their countries of origin. And the proponents were utterly clear that birthright citizenship would reach American-born Chinese (whose parents were barred from naturalization) and Mexicans in the Southwest. And while there were no "illegal immigrants" in 1866, anti-immigrant congressmen did warn that the 14th Amendment would extend citizenship to one group that they described very similarly. Democratic Rep. Edgar Cowan warned that the U.S. had been invaded by aliens "who owe to [the U.S. government] no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own -- an imperium in imperio; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen, and perform none of the duties which devolve upon him."

These terrifying intruders were the Roma, or Gypsy people.

Sponsors of the amendment predicted that the United States would survive Gypsy citizenship; and so it has, just as it survived German, Irish, Italian, Jewish and other immigrants, and as it will survive immigration by Spanish-speaking people from Mexico and elsewhere. History shows that new waves of immigration pose far less danger to America than do new efforts to cut back on democracy, or to institute new classes of citizens with, as the Supreme Court said in Dred Scott, "no rights a white man [is] bound to respect."

Sometime between 1860 and today, beer stopped being an alien danger and became an American institution. So today, if you or your parents came to this country from another and gained citizenship; if your family moved from one state to another and received equal treatment in your new home; if you benefit from laws forbidding racial discrimination by government; if you are glad that your local cops can't arrest you without a warrant and torture you until you "confess" to a crime; if you don't think censorship of the news by state and local government is a good idea; if you don't want Jim Sensenbrenner and Tom Tancredo deciding whether your American-born children "deserve" citizenship -- then lift a stein to the 14th Amendment and the far-seeing legislators who wrote it.

Fireworks are appropriate on national holidays. But those who would dismantle our basic constitutional guarantees are playing with real fire. The history they want to repeat -- the imposition of a hereditary, lifelong, racial caste system -- was tragic, and a new system of permanent aliens would be no less so. Our best weapon against this evil is knowledge of our own history and values.

Plyler v. Doe

Oral Argument: December 1, 1981
Decision: June 15, 1982
Issues: Civil Rights, Immigration and Naturalization, Access to Public Education
Categories: aliens, education
http://www.oyez.org/cases/1980-1989/1981/1981_80_1538/

Facts of the Case

A revision to the Texas education laws in 1975 allowed the state to withhold from local school districts state funds for educating children of illegal aliens. This case was decided together with Texas v. Certain Named and Unnamed Alien Child.

Question

Did the law violate the Equal Protection Clause of the Fourteenth Amendment?

Conclusion

Yes. The Court reasoned that illegal aliens and their children, though not citizens of the United States or Texas, are people "in any ordinary sense of the term" and, therefore, are afforded Fourteenth Amendment protections. Since the state law severely disadvantaged the children of illegal aliens, by denying them the right to an education, and because Texas could not prove that the regulation was needed to serve a "compelling state interest," the Court struck down the law.

5-4
Majority: Brennan, Marshall, Blackmun, Powell, Stevens
Dissent: Burger, Rehnquist, White, O'Connor

Hazleton case to test local laws against illegal immigrants
March 09, 2007
By Milan Simonich, Pittsburgh Post-Gazette

Hazleton, an Eastern Pennsylvania city built by blue-collar Slavs and Italians, will go on trial Monday for trying to impose laws to evict illegal immigrants.

Some 60 U.S. cities have conceived or approved their own immigration ordinances, but Hazleton, in Luzerne County, will be the first one to have the constitutionality of its laws tested in federal court.

The Hazleton ordinances, enacted but not yet enforced, would punish landlords who rent to illegal immigrants and business owners who hire them.

The trial is expected to last two weeks and will be held in Scranton before U.S. District Judge James M. Munley. His ruling in the Hazleton case could essentially end local attempts to influence immigration policy or open the way for more cities to try to force newcomers to register at city hall, so their backgrounds could be checked by the locals.

Opponents of Hazleton's ordinances include groups as diverse as the American Civil Liberties Union and the U.S. Chamber of Commerce.

The ACLU says immigration law is complex, and Hazleton's government lacks the expertise and resources to determine who is in the country legally.

The chamber says immigration must be handled by the federal government to prevent a messy patchwork of laws that differ from one town to the next. Chamber members also say the Hazleton ordinances are written so badly that businesses suspected of hiring illegal workers could be stripped of their licenses without any hearing.

Hazleton Mayor Louis Barletta, a Republican, pushed through the immigration laws. He complained that the federal government had done little to stem the tide of illegal immigrants in his city, which is about 80 miles northeast of Harrisburg.

The need for local laws, Mr. Barletta said, was demonstrated by the murder of a Hazleton man last May. Both suspects are illegal immigrants from the Dominican Republic.

In a news conference yesterday, opponents of the Hazleton immigration laws said Mr. Barletta had exaggerated the problems caused by illegal immigrants and hurt innocent people with his crusade.

Vic Walczak, legal director of the ACLU of Pennsylvania, said those challenging Hazleton's laws would call Mr. Barletta as a hostile witness in hopes of pinning him down on various crime statistics. Mr. Walczak said the trial will prove that almost all serious crimes in Hazleton have been committed by U.S. citizens.

In an interview yesterday, Mr. Barletta said he looks forward to taking the stand and shedding light on how life in Hazleton, population 22,000, has deteriorated because of illegal immigrants.

"I'm more than happy to testify first, in the middle of the trial and last," Mr. Barletta said. "Illegal is illegal. That doesn't change."

The mayor, though, said he fears his city is entering the case "with one hand tied behind our back."

Some of the individuals challenging Hazleton's law are illegal immigrants, yet their identities might be concealed at trial. Judge Munley is still weighing whether these witnesses should be compelled to appear in court or whether their anonymous testimony in depositions can simply be entered into the trial record.

"I thought in America you had the right to know who your accusers are," Mr. Barletta said.

Legal immigrants also will be part of the case against Hazleton.

Rudy Espinal, president of the Hazleton Hispanic Business Association, said the immigration ordinances have hurt the city's economy, even though an injunction by Judge Munley stopped them from being enforced at least until the trial concludes.

Mr. Espinal is a native of the Dominican Republic and his wife is from Colombia. He said the mayor has created a climate of fear among Latinos, even those in the country legally.

"In Hazleton, many Hispanic and immigrant businesses operate along and adjacent to Wyoming Street, a major commercial street. Compared to the bustle that existed before Hazleton started passing ordinances targeting immigrants, often it feels like a ghost town," Mr. Espinal said.

Mr. Walczak said two legal immigrants from the Dominican Republic will testify that police stood watch over their market and restaurant after the immigration laws were approved by the city council. The couple's base of customers soon dried up, so they moved their businesses to Arkansas, Mr. Walczak said.

Mr. Barletta, who is running for a third term as mayor, said he plans to attend every day of the trial. National organizations, such as the Federation for American Immigration Reform, are helping him defend Hazleton's laws.

Still, Mr. Barletta remains the public face of Hazleton's campaign. His notoriety has soared since the first of the laws was approved in July. Flaws in the ordinances forced the city to rewrite them in September and again in December, but Mr. Barletta nonetheless went from small-town mayor to national figure.

The immigration issue turned him into a fixture on the cable talk show circuit, and the CBS news program "60 Minutes" featured Mr. Barletta in a segment called "Welcome to Hazleton."

Mr. Barletta said he is pessimistic about the trial being fair, given the possibility that illegal immigrants could be shielded from cross-examination. But, he said, he will keep fighting to implement the Hazleton laws, even if he has to appeal.

"I believe what we're doing is right," he said. "All I want is a level playing field to prove it."

Milan Simonich can be reached at msimonich@post-gazette.com

Immigrants in the armed services
The green-card brigade

Feb 1st 2007, The Economist

How to become an American, via Iraq

ON January 11th Robert Gates, the secretary of defence, proposed increasing the size of the army and marines by 92,000 troops over the next five years. Doing so will be a challenge. Recruiters have thought of everything: higher enlistment bonuses, lower standards, turning a blind eye to the tattooed and the overweight. Now, how about focusing on foreigners?

Immigrants have fought in America's armed forces since the country first fielded one. Today, according to the most recent statistics, there are roughly 30,000 non-citizens on active duty and another 11,000 in the reserves. They come from more than 200 countries, with notable contingents from Mexico, the Dominican Republic, Jamaica and El Salvador. Several thousand are deployed in Iraq and Afghanistan. With very few exceptions, a foreign citizen must have a green card to enlist.

Recruiting non-citizens has clear benefits. Highly motivated soldiers should make dedicated and deserving Americans. And some non-citizens come equipped with useful languages. It takes over a year to teach a soldier Arabic, Pashto, or Dari from scratch. Native speakers can be deployed much more quickly.

These advantages have not gone unnoticed. In 2002 George Bush issued an executive order saying that non-citizen soldiers would in future be eligible to apply for expedited citizenship after serving one day on active duty. Previously, they had to wait several years. Since then, thousands of soldiers have been naturalised, and more than 80 have received posthumous citizenship. The armed forces have tried to bridge the language and culture gaps that can thwart recruitment. During last year's World Cup, for example, the army advertised on Arab Radio and Television.

The idea of recruiting immigrants to serve has its critics. Some argue that these soldiers would, in effect, be mercenaries. Others worry about immigrants taking risks that most Americans avoid. But maybe the current approach does not go far enough. Max Boot of the Council on Foreign Relations has proposed setting aside the requirement that foreigners hold a green card, and recruiting illegal immigrants as well as foreign citizens overseas. "We're looking to increase the size of our military, and this would be the most practical way to do it in the short run," he says. And perhaps a way of tackling the immigration problem, at one fell swoop.

A Military Path to Citizenship

Max Boot and Michael O'Hanlon
Washington Post, October 19, 2006
http://www.washingtonpost.com/wp-dyn/content/article/2006/10/18/AR2006101801500_pf.html

America is a land of immigrants. Their spirit of resolve, adventure, hard work and devotion to an idea bigger than themselves has made this country great. Whatever one thinks of the immigration debate today, particularly the problem of illegal immigrants, foreigners have played a central role in the building of America. Many have done so as soldiers, among them Baron von Steuben and the Marquis de Lafayette in the War of Independence.

Now is the time to consider a new chapter in the annals of American immigration. By inviting foreigners to join the U.S. armed forces in exchange for a promise of citizenship after a four-year tour of duty, we could continue to attract some of the world's most enterprising, selfless and talented individuals. We could provide a new path toward assimilation for undocumented immigrants who are already here but lack the prerequisite for enlistment -- a green card. And we could solve the No. 1 problem facing the Army and Marine Corps: the fact that these services need to grow to meet current commitments yet cannot easily do so (absent a draft) given the current recruiting environment.

Not only would immigrants provide a valuable influx of highly motivated soldiers, they would also address one of America's key deficiencies in the battle against Islamist extremists: our lack of knowledge of the languages and mores in the lands where terrorists reside. Newly arrived Americans can help us avoid trampling on local sensitivities and thereby creating more enemies than we eliminate.

Skeptics might point out that in the just-concluded fiscal year, the military met most of its recruiting and retention goals. But this was done only by relaxing age and aptitude restrictions, allowing in more individuals with criminal records, and greatly increasing the number of recruiters and advertising dollars. Although we generally support what has been done to date, the logic of these measures cannot be pushed much further.

The Army chief of staff, Gen. Peter Schoomaker, has just forecast that U.S. commitments in Iraq may remain at their current level until 2010. With most soldiers and Marines already on a third or even fourth deployment since Sept. 11, 2001, it's doubtful that the all-volunteer force can withstand such a commitment at its current size. Even if it could, it's unfair to ask so much of so few for so long.

Some might object to our proposal on moral grounds, arguing that it is wrong to rely on "mercenaries" and to use such incentives to get prospective immigrants to fight. We disagree. For one thing, we already rely on tens of thousands of real mercenaries: the security contractors the U.S. government employs from Colombia to Iraq to make up for lack of troops. Immigrants who enrolled in our armed forces would be more valuable because they would be under military discipline and motivated by more than just a paycheck.

As for the risks they would run in Iraq or Afghanistan, these would be no greater than the risks run by previous generations of newcomers who built railroads and skyscrapers and toiled in factories and mines. No one would be forced to serve. No existing immigration quotas would be reduced. The military avenue to citizenship would be a new option, not an obligation.

Nativists need not fear that this would lead to a flood of foreigners. Say we decide to recruit 50,000 foreigners a year for the next three years. That sounds like a lot, but it represent less than 10 percent of the total number coming to the United States anyway -- and less than 10 percent of our active-duty armed forces. This would not radically change the demographics of our society or our military, but it would make a big difference in the size of the rotation base for our ongoing missions.

Despite growing anti-Americanism, U.S. citizenship is still one of the world's most precious commodities, so there should be no shortage of volunteers. Since proficiency in English would presumably be important for those joining the armed forces, we might focus on South Asia, anglophone Africa, and parts of Latin America, Europe and East Asia (the Philippines would be a natural recruiting ground) where English is common as a second language. These regions have more than 2 billion people, tens of millions of whom reach military age each year.

The problem would not be the size of the likely applicant pool so much as our ability to vet individuals for their abilities, their dependability and their commitment. Screening would have to be done to ensure that would-be terrorists did not gain access to the armed forces through this program. That might complicate the process of recruiting from certain countries, especially in the Middle East, but it would hardly put a huge dent in the likely applicant pool.

Unlike most issues in the immigration debate, the idea of offering citizenship to foreigners who first join the armed forces should be a winner for everyone. It is good for immigrants who wish to pursue U.S. citizenship, which they could not otherwise attain. It is good for a beleaguered American military that is simply too small for the tasks it has been handed. And it is good for the country, bringing more hardworking patriots to our shores. Before the all-volunteer force breaks, it is high time to consider the idea of such a latter-day foreign legion.

Max Boot is a senior fellow at the Council on Foreign Relations and author of "War Made New: Technology, Warfare, and the Course of History, 1500 to Today." Michael O'Hanlon is a senior fellow at the Brookings Institution and co-author of "Hard Power: The New Politics of National Security."

CONTEMPORARY CONTROVERSIES: GAY AND LESBIAN RIGHTS

Romer v. Evans
116 S.Ct. 1620 (1996)

SETTING

For many years, the city of Aspen, Colorado, has taken progressive stands on contemporary social issues. On November 28, 1977, for example, the city adopted a comprehensive antidiscrimination ordinance that prohibits invidious discrimination in employment, housing, and public accommodations within the city, including discrimination based on affectional or sexual orientation. Other Colorado municipalities followed Aspen's lead.

In response to ordinances banning discrimination based on sexual orientation, Colorado for Family Values (CFV), a grassroots organization with headquarters in Colorado Springs, proposed a state constitutional amendment to be adopted by the initiative process. The amendment provided:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

The announced goal of the amendment was to "close the lid on the entire issue of [civil rights for gay people] here in Colorado." During the campaign on

Excerpted from: Foster, James and Susan M. Leeson. *Constitutional Law: Cases in Context, Vol. II: Civil Rights and Civil Liberties.* New Jersey: Prentice Hall, 1998.

behalf of Amendment 2, CFV characterized gays and lesbians as "morally depraved" persons who undermine "traditional family values and structures" and claimed that part of the "homosexual lifestyle" was to sexually molest children. The CFV campaign emphasized biblical passages justifying discrimination against "gay behavior." CFV also argued that laws that protect gay people from discrimination provide them with "special rights" not available to other Colorado residents. Opponents of Amendment 2 outspent CFV almost two-to-one, and Denver television stations refused to run CFV advertisements. Nonetheless, on November 3, 1992, Amendment 2 passed by a margin of 53.4 percent to 46.6 percent.

Shortly after the passage of Amendment 2, Richard Evans, a gay resident of Denver who is employed by the City and County of Denver, filed suit in Denver District Court requesting a declaration that Amendment 2 was unconstitutional and an injunction to prevent its enforcement. Evans was joined by Angela Romero (lesbian police officer), Paul Brown (gay Colorado employee), Linda Fowler (lesbian contract administrator), Jane Doe (assumed name of a lesbian employee of Jefferson County), Martina Navratilova (professional tennis player), Priscilla Inkpen (lesbian ordained minister), John Miller (gay faculty member at the University of Colorado), Bret Tanberg (heterosexual resident of Evans, Colorado, who was infected with the AIDS virus), Boulder Valley School District RE-2, the Cities of Boulder, Aspen and City and County of Denver. Governor Roy Romer and Attorney General Gale Norton were named as defendants because of their responsibility to implement and enforce Amendment 2. The individual plaintiffs argued that Amendment 2 burdened their ability to participate in the political process and did not rationally advance any legitimate governmental purpose. The governmental plaintiffs contended that Amendment 2 impermissibly restricted their ability to guarantee the rights of individuals to equal protection.

After a four-day hearing, the trial court issued a preliminary injunction pending the outcome of a trial on the merits. Governor Romer appealed to the Colorado Supreme Court, which upheld the preliminary injunction. It held that Amendment 2 "fences out" an independently identifiable class of persons and burdens their "fundamental right" protected by the Equal Protection Clause of the Fourteenth Amendment to have political issues addressed at all levels of government. That court remanded the case for a trial on the merits about whether Amendment 2 was narrowly tailored to achieve a compelling state interest.

The trial lasted from October 12 to October 22, 1993. On December 13, the trial court permanently enjoined enforcement of Amendment 2, ruling that the measure was not narrowly tailored in support of a legitimate and compelling state interest and that it violated the guarantee of Equal Protection of the Laws under the Fourteenth Amendment.

The Colorado Supreme Court affirmed. The state supreme court ruled that Amendment 2 infringed on a fundamental right of an identifiable group to participate equally in the political process. The Supreme Court of the United States granted Governor Romer's petition for a writ of certiorari.

Highlights of Supreme Court Arguments

BRIEF FOR ROMER AND NORTON

◆ The Colorado Supreme Court erred in creating a new "group right" not to be "fenced out" from unfettered political participation at all levels of government. That theory embodies a revolutionary change in the structure of state and local political authority and subverts this Court's rule that dates back to *Luther v. Borden*, 48 U.S. 1 (1849): Sovereignty in every State resides in the people of the state and the people may alter and change their form of government at their own pleasure.

◆ The intent and effect of Amendment 2 is to withdraw a deeply divisive social and political issue from elected representatives and place its resolution squarely in the hands of the people. Core principles of federalism have led this Court to give states extraordinarily wide latitude in such internal allocations of authority among political institutions.

◆ The plaintiffs have wisely waived any argument that they should be accorded the same treatment as racial minorities for purposes of "suspect class" analysis under the Fourteenth Amendment. No suspect class, quasi-suspect class, or fundamental right is implicated in this case.

◆ The new fundamental "group right" recognized by the Colorado Supreme Court finds no support in any previous decision of this Court. Nothing in Amendment 2 deprives anyone of a right to vote, or to have access to the ballot, or to petition government, or to exercise any other fundamental right. The Amendment merely reserves to the people the issue of special protections for homosexuals and bisexuals.

◆ It is impossible under this Court's Equal Protection jurisprudence to characterize an independently identifiable group's ability to define the agendas of all levels of government as a "fundamental right." The "identifiable group-political participation" theory adopted by the Colorado Supreme Court would cast constitutional doubt on a wide range of state and federal legislation, because the definition embraces virtually every conceivable group.

◆ Amendment 2 is subject to rational basis scrutiny and readily satisfies that standard.

AMICUS CURIAE BRIEFS SUPPORTING ROMER

Family Research Council; joint brief of Christian Legal Society, Catholic League for Religious and Civil Rights, Christian Life Commission of the Southern Baptist Convention, Focus on the Family, Lutheran Church—Missouri Synod, and National Association of Evangelicals; American Center for Law and Justice Family Life Project; joint brief of States of Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia; Colorado for Family Values; Equal Rights, Not Special Rights, Inc.; Pacific Legal Foundation; Concerned Women for America, Inc.; joint brief of Oregon Citizens Alliance, No Special Rights Committee, and Stop Special Rights-Pac.

BRIEF FOR CITY OF ASPEN

◆ Amendment 2 tramples on the right of homosexuals to have access to and participate in the political processes of government on an equal basis with other citizens. As a consequence of the amendment, the Colorado Constitution will provide: "No person who is a homosexual may apply for or obtain protection from invidious discrimination without first securing the approval of a majority of the electorate in a statewide election, but everyone else may."

◆ Amendment 2 is not rationally related to any legitimate governmental interest. No legitimate public purpose is served, or anyone benefited, by christening a new class of "untouchables," one openly sanctioned by law and perpetuated by its inability to obtain legal protection or relief from invidious discrimination. A legislative classification that creates an underclass cannot be reconciled with the purposes of the Fourteenth Amendment.

BRIEF FOR EVANS, OTHER INDIVIDUAL PLAINTIFFS, BOULDER VALLEY SCHOOL DISTRICT RE-2, CITY AND COUNTY OF DENVER, CITY OF BOULDER, AND CITY OF ASPEN

◆ Amendment 2 singles out one group of people and forbids state or local government to take any action to protect that group from *any* claim of discrimination based on sexual orientation. The amendment deprives gay people of the right to participate equally in the political process and, therefore, must be subjected to strict judicial scrutiny. Even under a relaxed standard of review, Amendment 2 lacks a rational relationship to a legitimate state purpose.

◆ Amendment 2 bars only gay people from even an opportunity to seek a type of protection available to all other people in Colorado—an opportunity to seek protection from discrimination. The Fourteenth Amendment guarantees a right to equal participation in the political process for members of *all* groups, not just suspect classes.

◆ The state can provide no plausible reason to deprive gay people and only gay people of all opportunity to seek protection from discrimination on the basis of sexual orientation, while leaving all other people fully eligible to seek such protection.

***AMICUS CURIAE* BRIEFS SUPPORTING EVANS, ET AL.**

National Bar Association; joint brief of constitutional scholars Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan; joint brief of the Anti-Defamation League, Asian American Legal Defense and Education Fund, Japanese American Citizens League, NAACP Legal Defense and Educational Fund, Inc., National Counsel of La Raza, People for the American Way, and Puerto Rican Legal Defense and Education Fund; joint brief of Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns; Axios USA, Inc.; the Brethren/Mennonite Council for Lesbian and Gay Concerns; Dignity/USA; Evangelicals Concerned, Inc.; Integrity, Inc.; Lutherans Concerned/North America; Presbyterians for

Lesbian and Gay Concerns; United Church Coalition for Lesbian/Gay Concerns; the World Congress of Gay and Lesbian Jewish Organizations; American Federation of State, County and Municipal Employees, AFL-CIO; joint brief of the American Psychological Association, American Psychiatric Association, National Association of Social Workers, Inc., Colorado Psychological Association; joint brief of the American Association on Mental Retardation, American Orthopsychiatric Association, The ARC, National Association of Protection and Advocacy Systems, National Association for Rights Protection and Advocacy, and American Network of Community Options and Resources; joint brief of the National Education Association, Colorado Education Association, American Federation of Teachers, American Association of University Professors, Association for Supervision and Curriculum Development, Council of the Great City Schools, and National Association for Chicana and Chicano Studies; joint brief of Human Rights Campaign Fund, National Gay and Lesbian Task Force, National Lesbian and Gay Law Association, National Center for Lesbian Rights, Gay and Lesbian Medical Association, Union of American Hebrew Congregations, National Asian Pacific American Legal Consortium, National Organization for Women and NOW Legal Defense and Education Fund; clerk of the General Assembly of the Presbyterian Church; joint brief of the American Friends Service Committee, American Jewish Committee, Anti-Defamation League, Federation of Reconstructionist Congregations and Havurot, Interfaith Impact for Justice and Peace, The Most Reverend Edmond L. Browning, presiding bishop of the Episcopal Church, Reconstructionist Rabbinical Association, Unitarian Universalist Association, United Church of Christ Office for Church in Society, and United Synagogue of Conservative Judaism; joint brief of the NAACP Legal Defense and Education Fund, Inc., the Mexican American Legal Defense and Educational Fund and Women's Legal Defense Fund; joint brief of the Cities of Atlanta, Baltimore, Boston, Los Angeles, Madison, New York, Portland, San Francisco, Seattle, and the National Institute of Municipal Law Officers; Gay and Lesbian Lawyers of Philadelphia; joint brief of Bar Associations in Arizona, Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Maine, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, and Wisconsin; American Bar Association; joint brief of States of Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Washington, and District of Columbia.

SUPREME COURT DECISION: 6–3

KENNEDY, J.

★ One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*. Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal

Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution....

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far-reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, *Civil Rights Cases*. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes....

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law....

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment....

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government....

[W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.... We have attempted to reconcile the principle with the reality by stating that, if a law neither

burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end....

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests....

Amendment 2 confounds [the] normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence....

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense....

Amendment 2 ... in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose ... and Amendment 2 does not.

Stating

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit....

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado Cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

SCALIA AND THOMAS, J.J., AND REHNQUIST, C.J., DISSENTING

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us ... is ... a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil. I vigorously dissent....

[T]he principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection....

The Court's entire novel theory rests upon the proposition that there is something special—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids dis-

cussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers v. Hardwick*, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling *Bowers*, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct....

No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice....

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry.... The phenomenon had even appeared statewide: the Governor of Colorado had signed an executive order pronouncing that "in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form," and directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on, among other things, "sexual orientation." I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never happened before....

The Court today, announcing that Amendment 2 "defies ... conventional [constitutional] inquiry," and "confounds [the] normal process of judicial review," employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values.... I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes....

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws ... and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990.

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

The New York Times
nytimes.com

May 26, 1996

Speaking For the Majority

By LINDA GREENHOUSE

WHEN a lawyer for the state of Colorado began his Supreme Court argument defending a state constitutional provision that nullified civil rights protections for homosexuals, he was interrupted almost immediately by a Justice who was clearly troubled by the state's position.

"I've never seen a case like this," the Justice said. "Is there any precedent that you can cite to the Court where we've upheld a law such as this?"

The lawyer never quite regained his stride, and the Justice who asked that question last Oct. 10, Anthony M. Kennedy, went on to write the forceful opinion for a 6-to-3 majority that last week struck down Colorado's Amendment 2 as a violation of the constitutional guarantee of equal protection. Declaring that a state may not "deem a class of persons a stranger to its laws," Justice Kennedy said: "It is not within our constitutional tradition to enact laws of this sort."

The decision in Romer v. Evans underscored the crucial and in some respects ambiguous role its author has come to play since he arrived at the Court in early 1988 to fill the seat that the Reagan Administration had intended for Robert H. Bork. On a sharply polarized Court, Justice Kennedy's is most often the pivotal vote. Last term he voted with the majority in 5-to-4 cases more than any other Justice: 13 times in 16 cases. During the term before that, he was never in dissent in the 14 cases decided by 5-to-4 votes.

That means that Justice Kennedy's responses have become the Court's responses, and his view has become law, across a remarkable range of issues -- cases involving race, in which he has consistently voted to strike down affirmative action and race-conscious redistricting; abortion, where he wrote part of an unusual joint opinion four years ago that reaffirmed Roe v. Wade; free speech, where he joined a 5-to-4 opinion in 1989 holding that burning an American flag as a political protest is protected by the First Amendment.

A year ago, Justice Kennedy cast the deciding votes in two important federalism cases, one on each side of the Federal-state divide. He first joined one block of four Justices to place a limit, for the first time in 60 years, on Congress's assertion of authority over interstate commerce, and then joined the other four Justices in rejecting state-imposed term limits for members of Congress.

This Justice who could fairly be said, through force of circumstance, to hold the modern course of constitutional law in his hands is a most unlikely field marshal in the "culture wars" that Justice Antonin Scalia referred to in his dissent in the Colorado case. Fifty-nine years old, a one-time corporate lawyer and lobbyist on business issues before the California state legislature, Justice Kennedy is conservative in style and outlook.

A Classification Problem

He has core beliefs -- notably among them, that it is constitutionally wrong for the Government to classify people, by race or any other characteristic, a view that helps explain the apparent anomaly of his "conservative" votes in affirmative action cases and his "liberal" view in the Colorado case. He also has as protective a view of free speech as any member of the Court.

His dislike of state policies that classify people by group faces another test this term, when the Court

decides whether Virginia may exclude women from the state-supported Virginia Military Institute.

"He doesn't have an agenda," David M. O'Brien, a Supreme Court scholar at the University of Virginia, said in an interview last week. "That's why he's hard to peg. He does try to arrive at a principled rather than a compromise or pragmatic position, and that can make him rather politically incorrect."

The stakes could not have been higher when Anthony Kennedy arrived in Washington, after 12 years on the Federal appeals court in California. The Administration's first choice for the seat, Judge Robert H. Bork, had gone down to bitter defeat after a titanic, months-long confirmation battle.

From the very first, conservatives mistrusted Justice Kennedy because he was not Judge Bork, one of the judicial right wing's leading theorists and polemicists, and liberals feared that he was simply "Bork without the bite," in the phrase of the time.

As it became clear how unlike Judge Bork he was, Justice Kennedy was subject to intense, often belittling criticism from conservatives. In an Op-Ed article in The New York Times days after the 1992 abortion decision, Judge Bork himself said sarcastically that the joint opinion was "intensely popular" with the media, law school faculties, and "at least 90 percent of the people Justices may meet at Washington dinner parties."

Respect has come slowly and grudgingly, but it is coming now. "In a very thoughtful and principled way, Kennedy is quietly constructing a libertarian jurisprudence on the Court," Clint Bolick, vice president of the Institute for Justice, a conservative think tank and law firm here, said in an interview. He said Justice Kennedy's skepticism of government explains many of his votes, from abortion to property rights, First Amendment, and federalism cases. While conservatives would not always be happy with Justice Kennedy, Mr. Bolick said, "this is emphatically not a squishy moderate."

To some liberals, the Colorado case showed that Justice Kennedy's vote in the 1992 abortion case was no anomaly. "When it's really mattered, he has stepped up to bat, stood up to Scalia, and voted to preserve and protect human dignity," said Peter J. Rubin, a lawyer who clerked on the Court in the early 1990's.

Prof. Laurence H. Tribe of Harvard Law School, who drew the ire of many fellow liberals when he testified in support of Justice Kennedy's nomination, has watched him closely. "He's stuck to his guns, whether they point right or left," Mr. Tribe said, adding that he sometimes stops to think "how dramatically different the constitutional history of the country has been" with Justice Kennedy rather than a Justice Bork on the Court.

Colorado reputation took hit when state gave its support to Amendment 2

By Karen Abbott
November 30, 1999. Rocky Mountain News
http://www.denver-rmn.com/millennium/1130mile.shtml

They wouldn't drink our tea. Or our beer.

Movie stars shunned our ski slopes. Big cities coast-to-coast ordered their officials not to travel here. Conventions were cancelled. A lucrative Stephen King movie wound up being filmed in Utah.

Most painfully, Colorado was dubbed "the Hate State."

"Those were really emotional times," lawyer Tim Tymkovich recalls of the furious battle that raged nationwide over Colorado's Amendment 2 in 1992.

Now in private practice, Tymkovich then worked for the state attorney general's office. His job: defending the amendment -- "not whether it was moral, just whether it was constitutional," he notes -- before the U.S. Supreme Court.

Colorado voters approved Amendment 2 on Nov. 3, 1992, changing the state constitution to prohibit laws aimed at protecting gays and lesbians against discrimination. Denver, Boulder and Aspen already had adopted such laws.

Pollsters had predicted that Amendment 2 would fail. But it passed with almost 54 percent of the vote.

The backlash came almost immediately.

In New York, gay activists tossed replicas of Colorado-made Celestial Seasonings tea, Coors beer, Monfort meat and Holly sugar into the Hudson River, chanting, "We're here, we're queer, we won't drink Coors beer."

The U.S. Conference of Mayors, Lotus Software, the Women's Sports Federation, the National Education Association, the Latin American Studies Association, the National Organization for Women and the National Association of Social Workers cancelled meetings in Colorado. So did many other groups.

In Aspen, there was talk of seceding from the state.

"I had no idea the magnitude of what I was getting involved in," Colorado Springs car dealer Will Perkins, who chaired the group that sponsored Amendment 2, says now.

Amendment 2 never went into effect, because Denver District Judge Jeffrey Bayless stayed it, then ruled it unconstitutional, setting up a trip to the U.S. Supreme Court.

But it would take almost four years for the angry boycotting to die away -- after the nation's high court struck down Amendment 2 in 1996. The Supreme Court said the measure illegally excluded

homosexuals from the equal protection of the law granted to everyone else by the U.S. Constitution.

Perkins says he still is amazed that gays and lesbians took Amendment 2 so personally. He characterized it as a rule against unfair special protections for one group's behavior that others traditionally have viewed as wrong, often on religious grounds.

"If you don't happen to agree with or affirm what they're doing, they equate that to hating them or disliking them," says Perkins, who lost a bid for mayor of Colorado Springs last April. "That makes it very difficult to deal with."

An attorney on the other side says the boycott brouhaha has cooled.

"Most people have completely forgotten about it," says lawyer Jean Dubofsky, who successfully argued against Amendment 2 before the nation's highest court.

But the gay rights debate is far from over.

The Colorado legislature last April killed a bill to prohibit discrimination against gays and lesbians statewide.

A year ago, the U.S. Supreme Court let stand a Cincinnati city charter amendment denying gays and lesbians formal protection against discrimination.

In January, the Colorado Springs City Council refused to consider a charter amendment that would have done the same thing.

Two more Colorado communities -- Breckenridge and Telluride -- have adopted laws prohibiting discrimination against gays and lesbians. Fort Collins and Greeley decided not to.

Tymkovich says the legal impact of Amendment 2 never would have been as great as its opponents feared.

"We had a live-and-let-live state then, and we do now," he says.

Gays and lesbians hailed the high court's Amendment 2 ruling as a landmark victory, the first U.S. Supreme Court decision recognizing the rights of their community.

But Tymkovich says the ruling had little real impact and seldom is cited as a precedent in other cases.

Not so, Dubofsky says.

"It gets cited all the time," she says -- in gay rights cases and other types of equal protection disputes.

"I've been pretty gratified to see the decision popping up in other cases around the country," says Lori Girvan, executive director of Equality Colorado, an organization founded to fight Amendment 2.

"The most recent example I know of was a case in Long Island, where the judge mentioned it in awarding a discrimination claim to a police officer who had been discriminated against.

"It was also a very, very important catalyst for the civil rights movement in Colorado around issues of sexual orientation and gender identity."

Equality Colorado is growing, has new programs and still is fighting for equal rights and necessary protections for gays and lesbians, Girvan says.

Colorado for Family Values, the Colorado-Springs based group that Perkins chaired to fight for Amendment 2, still is fighting what it views as unfair "special rights" for homosexuals.

"The issue is exactly the same as it was in 1991," Perkins says.

But Dubofsky says the Amendment 2 battle changed people.

"I think that first the adoption of Amendment 2 and then the legal fight to get rid of it helped a lot of people think harder about what sorts of discrimination were all over the place," she says.

People became more sensitive to discrimination and even to nasty jokes -- "things that everyone has seen since they were children and not really questioned," she says.

Girvan says that even gays and lesbians aren't as aware of discrimination as they need to be. Many who hailed Amendment 2's death as a victory haven't realized how much of the war is still to be waged on the battlefield of public opinion.

"The reality is, we still have no civil rights protections in this state," Girvan says.

NATIONAL CONFERENCE of STATE LEGISLATURES
The Forum for America's Ideas

Same Sex Marriage

Last Update: January 2007
http://www.ncsl.org/programs/cyf/samesex.htm

Overview
In November 2003, the Massachusetts Supreme Judicial Court ruled that barring same-sex couples from civil marriage was unconstitutional. The Senate then asked the Court for an advisory opinion on the constitutionality of a proposed law that would bar same-sex couples from civil marriage but would create civil unions as a parallel institution, with all the same benefits, protections, rights and responsibilities under law. In February, the Court answered, "segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or preserve" the governmental aim of encouraging "stable adult relationships for the good of the individual and of the community, especially its children." Under this decision, the state of Massachusetts began issuing marriage licenses to same sex couples in May 2004.

This ruling is part of a larger public discussion of "marriage" and "family" that started in 1993 when the Hawaii Supreme Court ruled that laws denying same-sex couples the right to marry violated state constitutional equal protection rights unless the state could show a "compelling reason" for such discrimination. In 1996, a trial court ruled that the state had no such compelling reason and the case headed back to the Supreme Court. Voters adopted a Constitutional amendment in 1998, before the final ruling was issued, giving the Legislature the power to reserve marriage to opposite-sex couples and effectively ending the lawsuit.

In April 2000, Vermont approved landmark legislation to recognize civil unions between same-sex couples, granting them virtually all the benefits, protections and responsibilities that married couples have under Vermont law. The Vermont legislation was a result of the state Supreme Court ruling in Baker v. Vermont that said same-sex couples are entitled, under the state constitution's "Common Benefits Clause," to the same benefits and protections as married opposite-sex couples. The court ruled that the Vermont Legislature must decide how to provide these benefits and protections, either by legalizing marriage for same-sex couples or by establishing an alternative system. In April 2005, Connecticut became the first state to legalize civil unions without prompting from the courts.

The Vermont Legislature chose to preserve marriage as the "legally recognized union of one man and one woman," but at the same time create a parallel system of civil unions for same-sex couples that goes beyond existing "domestic partnership" and "reciprocal beneficiaries" laws that exist in California and Hawaii and in many localities in the U.S. today.

In October, 2006, the New Jersey Supreme Court ordered the legislature to redefine marriage to include same-sex couples or to establish a separate legsl structure, such as civil unions, to give same-sex couples the same rights as heterosexual marriage couples. In late 2006, the New Jersey legislature passed a statute allowing civil unions beginning February 19, 2007.

Defense of Marriage Act (DOMA)
Congress enacted the Defense of Marriage Act (DOMA) in 1996, which bars federal recognition of same-sex marriages and allows states to do the same. Since 1996, many states have enacted legislation prohibiting same-sex marriages or the recognition of same-sex marriages formed in another jurisdiction. States have traditionally recognized marriages solemnized in other states, even those that go against the marriage laws of that particular state. Under the full faith and credit clause of the U.S. Constitution, states

are generally required to recognize and honor the public laws of other states, unless those laws are contrary to the strong public policy of that state.

Over half of the states have passed language defining marriage between a man and a woman in their state constitutions. Arizona is the only state where a constitutional amendment on the ballot in a general election has failed (2006). Typically, constitutional amendments have passed with an overwhelming majority.

There have been several proposals before Congress to amend the federal Constitution, defining marriage as between a man and a woman and ensuring that states would not be required to recognize same-sex marriages from other jurisdictions. President Bush has announced his support for such an amendment, however, he is receptive to allowing states to "define other arrangements." This could indicate that the President does not favor enacting a federal ban on civil union or domestic partnership laws. Opponents of the amendment cite federalism concerns in addition to support for same-sex marriages. A constitutional amendment requires 2/3 of the U.S. House and Senate and 3/4 of the state legislatures for enactment. For a summary of proposed federal legislation from 2002 to present:
http://www.ncsl.org/programs/cyf/marriagesumm.htm

Defense of Marriage Acts
Forty-one states currently have statutory Defense of Marriage Acts. Three of those states have statutory language that pre-dates DOMA (enacted before 1996) defining marriage as between a man and a woman. Twenty-seven states have defined marriage in their constitutions.

For more information on same sex marriage issues, please contact Christine Nelson or Jack Tweedie in the Denver office at 303.364.7700 or cyf-info@ncsl.org or either Sheri Steisel or Lee Posey in the D.C. office at 202.624.5400 or fedhumserv-info@ncsl.org.

States with Statutes Defining Marriage	States with Constitutional Language Defining Marriage	States with No Provision Prohibiting Same-Sex Marriage	States with a Constitutional Amendment on ballot in 2006 that Did Not Pass
Alabama Alaska Arizona Arkansas California Colorado Delaware Florida Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland* Michigan Minnesota Mississippi Missouri Montana New Hampshire North Carolina North Dakota Ohio Oklahoma Pennsylvania South Carolina South Dakota Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin Wyoming *-In January 2006, a state judge found the Maryland statute unconstitutional but it remains in effect pending appeal.	Alabama Alaska Arkansas Colorado Georgia Hawaii* Idaho Kansas Kentucky Louisiana Michigan Mississippi Missouri Montana Nebraska Nevada North Dakota Ohio Oklahoma Oregon South Carolina South Dakota Tennessee Texas Utah Virginia Wisconsin *Hawaii's constitution was amended in 1998 to read "The Legislature shall have the power to reserve marriage to opposite-sex couples." The Hawaii legislature subsequently passed a law prohibiting marriage for same-sex couples.	Connecticut Massachusetts New Jersey New Mexico New York Rhode Island	Arizona
TOTAL : 41	27	6	1

Not Loving It
"Full Faith and Credit" is not the only constitutional issue in the gay-marriage debate.

Matthew J. Franck, *National Review*, March 16, 2004
http://www.nationalreview.com/comment/franck200403160942.asp

The March 9 Wall Street Journal carried an op-ed by Professor Lea Brilmayer of Yale Law School, titled "Full Faith and Credit," which urged readers to pooh-pooh the necessity of a Federal Marriage Amendment to the Constitution on grounds that there is no reason to worry about courts nationalizing the establishment of gay marriage in the United States. But Professor Brilmayer's argument was actually a clever piece of misdirection, a bit of legerdemain in which we were invited to fix our attention on the left hand while the right hand picks our pockets.

Billing herself as an expert on the "full faith and credit" clause of Article IV of the Constitution, with "dozens of technical publications on interstate jurisdiction" to her credit, Brilmayer mocked the Senate Judiciary subcommittee that had invited her to speak at a March 3 hearing on FMA. "Nobody," she sneered, had "bothered to check whether the Full Faith and Credit Clause had actually ever been read to require one state to recognize another state's marriages. It hasn't." The hearing where she appeared, therefore, "was entirely unnecessary." There will be no "full faith and credit chain reaction," she asserted — no sudden run of every state's courts feeling obliged to honor the marriage licenses that might be granted to gay couples "married" in some other state. The full-faith-and-credit clause, she noted, has always been interpreted according to the "public policy doctrine," by which state courts may hold that marriages contracted in other states will not be honored if they violate the strong statutory (or common-law) public policy of the state to which a "married" couple moves. Thus marriages contracted elsewhere that deviate from a state's laws concerning consanguinity, for instance, or the age of consent, will not necessarily be honored by that state's courts. At least no Article IV principle imposes such an obligation, Brilmayer argues.

In this age of the hyperpoliticized judiciary, I would not be as confident as she is that neither federal nor state judges will invent a new full-faith-and-credit doctrine to force the interstate honoring of gay marriages. But even if such fears are unfounded, the same result of nationalized gay marriage is more likely to be reached by another path entirely. For it does not follow at all from Brilmayer's argument, as she asserted, that "the assumption that there must be a single national definition of marriage...is mistaken and pernicious." The ticking bomb — not a "chain reaction" but a single explosion that could easily come on a single day — lies not in the recesses of Article IV but in the equal-protection and due-process clauses of the Fourteenth Amendment.

The precedent to examine is the aptly named Loving v. Virginia, the 1967 Supreme Court ruling that outlawed anti-miscegenation statutes, or laws against interracial marriage. Richard Loving, a white man, and Mildred Loving (née Jeter), a black woman, had married in the District of Columbia. Upon moving to Virginia, they were indicted on, and pleaded guilty to, a charge of violating the state's anti-miscegenation law, which carried a criminal penalty of one to five years in prison. The state judge imposed a one-year sentence, then suspended it for 25 years on condition that the Lovings leave the state and not return during that period. Moving back to D.C., the Lovings moved that their sentence be vacated in state court, and shortly thereafter instituted a class action suit in federal court on Fourteenth Amendment grounds. The federal court stood aside to let their case proceed in the Virginia courts, and when the state's highest court held against them, they appealed to the U.S. Supreme Court.

Chief Justice Warren, in a ruling for a unanimous Court, made short work of the state's anti-miscegenation law — and those on the books at the time in fifteen other states besides. To the state's argument that the law was one of "equal application" because its penalties fell equally on both races,

he replied that that fact had no effect on the "very heavy burden of justification" that was required of the state when its statutes were "drawn according to race." This much of Warren's opinion is accepted by all of us today who admire the famous "colorblind" dissent of Justice Harlan in Plessy v. Ferguson (1896). But Warren went on in language that is ripe for the picking under more recent precedents. He noted that "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." Sound familiar? Gay-marriage advocates scoff at the notion that traditional marriage laws apply equally to heterosexual and homosexual persons by forbidding anyone, regardless of "sexuality," to marry someone of the same sex. All that need be done is to convince the Supreme Court that laws "drawn according to sexuality" are as "arbitrarily and invidiously discriminatory" as those that classify by race. That may not be hard at all, as we'll see.

Turning to the claim by Virginia that its law was not so "irrational" in purpose as to merit no deference from the Court, Warren said that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." All that the law furthered was an ideology of "White Supremacy." And so it did. But this too should sound familiar. In Romer v. Evans (1996), the Court held that there was no rational justification for a Colorado state constitutional amendment, adopted by referendum, that barred the passage of any statutes or local ordinances recognizing discrimination against gays as any kind of offense. Justice Kennedy, for the Court in Romer, held that there was no way to view that amendment except to say that "the disadvantage imposed is born of animosity toward the class of persons affected." No argument of "rational basis" was given any credence in Romer, any more than it had been in Loving. It's fair to say that Justice Kennedy condemned an ideology of "Heterosexual Supremacy" in terms strikingly similar to those used by Chief Justice Warren.

For good measure, Warren threw in the due process clause as well in the Loving case. Marriage, he said, is one of the "basic civil rights of man." (Never mind that his precedents for a due-process limitation on state regulation of marriage were of dubious application to the case at hand: One was a 1923 case involving the right of parents to contract with a private teacher to instruct their son in the German language, and the other was a 1942 case involving Oklahoma's policy of sterilizing certain prison inmates.) Why not of man and man, and not just of man and woman?

All the ammunition the Court needs is contained in just three cases: Loving, Romer, and last year's Lawrence v. Texas, a due process case in which Justice Kennedy wrote of the Court's heightened solicitude for "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." The Massachusetts high court, in its recent Goodridge decision, took the Court's hint (as Justice Scalia virtually predicted), and held that the state constitution's equality clause condemned heterosexual-only marriage as "irrational," and necessitated, after Lawrence, the full recognition of gay marriage.

Now do a quick head count. Surely Justices Stevens, Souter, Ginsburg, and Breyer would all see the analogy of a gay-marriage case to Loving. They cannot be trusted to notice that "sexuality" and race are hardly in comparable categories of human attributes, and that only one of them has any connection to the historic purposes of the Fourteenth Amendment. American society's legal abandonment of marriage as we have always known it depends on the vote of Justice Kennedy and/or Justice O'Connor. I wouldn't bet against either of them joining the four just mentioned. After all, they were in the majorities in Romer and Lawrence, and Kennedy wrote the incompetent, overreaching opinions in both cases. Don't listen to the "expert" law professors who babble on about full faith and credit as though that were the only constitutional issue in the gay-marriage debate. Watch out for Loving II.

— Matthew J. Franck is a professor and chairman of political science at Radford University.

Pleading the Fourteenth
Congress already holds the power to define marriage.

The American Conservative
January 31, 2005
http://www.amconmag.com/2005_01_31/article2.html

Austin Bramwell

Despite their success in the 2004 election, gay-marriage opponents can't seem to shake their sense of doom. Eleven states may have passed constitutional amendments defining marriage as between a man and a woman, but same-sex marriage still has an apparently ineluctable logic on its side. As homosexual activists continue to advance their cause in a sympathetic judiciary, more and more states will have gay marriage imposed on them. Gay marriage will then be imported into other states, so that eventually the Supreme Court—which for the past ten years has overturned or disregarded any doctrine standing in the way of the gay-rights movement—will have an opportunity to impose same-sex marriage on the entire country. Only a constitutional amendment, therefore, can stop gay marriage. At the same time, however, a constitutional amendment has no hope of passing. In the end, the logic of events makes gay marriage inevitable.

Hogwash. It isn't true that only a constitutional amendment can stop the courts from imposing gay marriage. On the contrary, Congress can stop the gay-marriage movement cold by passing a simple statute. That statute need say nothing more than "No State shall define marriage as anything other than between a man and a woman."

Surprising as it may at first seem, Congress derives the power to pass such a statute from the Fourteenth Amendment. The argument goes as follows: Section 5 of the Fourteenth Amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article." It is well-settled that the Fourteenth Amendment protects the fundamental right to marry. States may not violate this right by redefining marriage as something other than it really is. Therefore, Congress can pass a statute underscoring the correct definition of marriage.

Let's unpack that. First, the Fourteenth Amendment protects the right to marry. Although it does not mention this right explicitly, the Fourteenth Amendment does prohibit states from abridging "the privileges or immunities of citizens of the United States," depriving "any person of life, liberty, or property, without due process of law," or denying "to any person within its jurisdiction the equal protection of the laws." The Supreme Court has long understood this broad language to protect any right that is "implicit in the concept of ordered liberty."

Furthermore, in Loving v. Virginia, the case that struck down anti-miscegenation laws, the Supreme Court recognized that one of these rights is the right to marry. Interestingly, the court in Loving cited an earlier case, Skinner v. Oklahoma, that connected the right to marry to the right to procreate. Insofar as biology prevents homosexual couples from procreating, one can assume that the Loving court had heterosexual marriage exclusively in mind.

Second, states may not violate the right to marry by redefining matrimony however they like. One way that states can violate the right to marry, as Loving recognized, is to criminalize certain categories of marriage. Surely another way that states can violate the right to marry is to redefine marriage out of existence. For example, if a state supreme court or legislature stipulated that "marriage in this state shall only be between an adult and his or her pet," that state would

effectively prevent people from getting married. Marriage, after all, has an essential nature, which states cannot ignore without doing away with the institution altogether.

Even gay-marriage proponents implicitly recognize that states may not redefine marriage out of existence. Homosexual activists would not be satisfied, after all, if states redefined marriage as "between one entity and another entity." Under such a regime, one man could "marry" another man. But so too could one hermit crab "marry" another hermit crab (or a goldfish or a fire hydrant, for that matter). Gays in that case would not benefit from the elevated social and moral status that they hope to obtain by having the government recognize their relationships as "marriages."

Similarly, if marriage were redefined to include gay relationships, straight married couples would lose the unique burdens and privileges that come with traditional matrimony. Marriage is a public act: by redefining marriage to be what it is not, states would violate the right of all persons to receive the social benefits and uphold the social expectations of being wedded to a human being of the opposite sex. Gay activists, in turn, no less than gay-marriage opponents, believe that marriage has an essential nature; they just do not believe that it must be between a man and a woman.

Third, the Fourteenth Amendment gives Congress the authority to uphold the correct definition of marriage. Section 5 of the Fourteenth Amendment states that Congress has the power to enforce its provisions by appropriate legislation. That is to say, Congress may pass legislation that prevents states from violating Fourteenth Amendment rights. Pursuant to this power, for example, Congress has passed the various civil-rights statutes.

Now, if states were to violate the Fourteenth Amendment right to marry by adopting an absurd definition of marriage, then surely Congress, under the Fourteenth Amendment, could step in and prevent states from ignoring the essential nature of the institution. Congress, therefore, has the power under the Fourteenth Amendment to make sure that all states adopt the correct definition of marriage. The only remaining question is what that correct definition really is.

There, of course, is the rub. Thus far, most courts and mainstream legal scholars would agree with the foregoing line of reasoning: there is a right to marry, states cannot violate this right by ignoring the essential nature of marriage, therefore, Congress has some discretion to impose a national definition of marriage. Where courts and scholars might differ is in how much discretion Congress actually has.

Here we move beyond legal doctrine and into the realm of politics and strategy. Let us assume that Congress did pass a statute defining marriage as between a man and a woman. Inevitably, such a statute would be challenged in the courts and the case would find its way to the Supreme Court. What is the likely result?

One cannot say for sure, but the odds favor the court upholding the statute. Certainly the justices favor such an outcome more than they favor the passing of a constitutional amendment. We can assume, of course, that the Supreme Court will continue to do everything in its power to advance the gay-rights agenda. But the court can only do so much. It cannot, for example, hand down a decision so unpopular as to produce a backlash that will undermine the court's vaunted position in public life. The court tried that in the 1970s, when it almost did away with the death penalty and quickly had to back down.

Similarly, if the court defied the political branches on the question of gay marriage, the political branches might actually begin to fight back. Congress might, for example, strip the courts of jurisdiction to hear cases relating to same-sex marriage. The people might even pass a constitutional amendment reversing the Supreme Court's decision. The justices, in sum, will not lightly traduce Congress and impose a policy as unpopular as gay marriage.

The court will therefore do whatever it can to avoid compelling the whole nation to recognize same-sex marriage. The beauty of a statute defining marriage as between a man and a woman is that it will force the issue upon the court. The justices know that they cannot impose gay marriage; they could not, however, overturn a statute defining marriage as between a man and a woman without also holding that marriage is not necessarily between a man and a woman. From the point of view of gay-marriage proponents, the court would be caught between the Scylla of upholding the traditional definition of marriage and the Charybdis of provoking an enormous popular backlash by rejecting that traditional definition.

Constitutional lawyers might recall at this point that recent Supreme Court decisions have purported to limit Congress's Fourteenth Amendment enforcement powers. In Boerne v. City of Flores, for example, the court held that Congress cannot protect Fourteenth Amendment rights in any way that it pleases. On the contrary, a majority of the justices held that there must be "congruence and proportionality between the injury to be prevented and the means adopted to that end." Thus in Boerne, the court struck down as applied to the states the bipartisan Religious Freedom Restoration Act (RFRA), which protected the right of free exercise of religion more strongly than the court would have protected it.

In contrast to RFRA, however, a statute that does nothing other than define marriage to be what it really is does not violate the court's "congruence and proportionality" test. A statute that simply underscores the correct definition of marriage is, well, by definition perfectly tailored to prevent the injury caused by false definitions of marriage. The justices might struggle to get around this argument, but to do so they would have to ignore or set aside their previous decisions.

Finally, it could be objected that the court might just roll the dice and impose gay marriage nationally. For opponents of same-sex marriage, however, this represents not a risk but an opportunity. Strategically, gay-marriage opponents' only hope is to harness the potential popular backlash caused by the courts imposing it too quickly. If, on the other hand, the courts were forced to choose tomorrow between imposing gay marriage nationally and upholding traditional marriage, gay-marriage opponents would face a win-win situation: They would either stop gay marriage outright, or else they would generate enough political momentum to strike back at the courts.

Gay marriage opponents need not despair. The people are on their side. All they need is the right strategy.

Austin Bramwell is a lawyer in New York City.

The Case of Lawrence v. Texas

http://www.streetlaw.org/content.asp?ContentID=298

The Facts

On September 17, 1998 Houston police were called to the apartment of John Lawrence based on a report from a neighbor that an armed intruder was "going crazy" in Lawrence's apartment. When police arrived, they found Lawrence and Tyrone Garner engaged in a private consensual sex act. The neighbor later admitted that his allegations were false and was convicted of filing a false report.

Lawrence and his partner were arrested for violating a Texas law prohibiting two persons of the same sex from engaging in certain intimate sexual contact. They were convicted of this misdemeanor and fined $200 each.

The Issue

Does the Texas law violate the Fourteenth Amendment right of due process and/or equal protection?

Arguments for Lawrence

- The law denied them equal protection of the law because it prohibited sexual acts among gay and lesbian people that were permitted among heterosexual couples.
- They also believed that the due process clause of the Fourteenth Amendment protected the liberty and privacy interests of same sex and opposite sex couples and prohibited a state from criminalizing private, consensual sex acts among adults.

Arguments for Texas

- The Court should not create new, unwritten rights. The right to intimate relationships does not protect every type of sexual activity, nor does the right of bodily integrity protect people from anything more than invasion of an individual's body (as in forced medical procedures).
- Fundamental liberty interests are found in "deeply rooted" tradition. In this case, there is no deeply rooted tradition that provides for a right to homosexual sodomy. There is instead a centuries old tradition of criminalizing sodomy.
- The Texas legislature's belief that homosexual sodomy is immoral provides the rational basis needed for this law.

The Precedent

Relying on the U.S. Supreme Court precedent in *Bowers v. Hardwick* (1986), which upheld the constitutionality of a similar law in Georgia, the Texas Court of Criminal Appeals (their highest state court for criminal cases) affirmed the convictions.

The Supreme Court Decision

The U.S. Supreme Court agreed to hear the case and in June of 2003 issued a 6 to 3 decision overturning the Texas law as well as its earlier precedent (*Bowers*). The Court found support for Lawrence's due process argument in earlier privacy rights cases dealing with contraception and abortion.

Writing for the majority, Justice Anthony Kennedy said, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter... (This case does not involve minors or people paying for sex but rather) two adults who with full and mutual consent ...engaged in sexual practices common to a homosexual lifestyle. (They) are entitled to respect for their private lives. The state cannot demean their existence ... by making their private sexual conduct a crime." Four other justices signed on to Justice Kennedy's opinion. Justice O'Connor agreed with the outcome but wrote in her concurrence that it was their equal protection rather than due process rights that had been violated.

The Dissent

The dissenting justices and other critics of the decision argued that this decision takes away a state's traditional authority to pass laws that set moral standards and reflect the values and views of its citizens. From this perspective, outlawing such behavior is a logical outcome of democracy, not an example of discrimination. Critics also argued that the decision undermines family values and makes the military's ban on openly homosexual behavior harder to defend.

Questions

1. What happened in this case?
2. What arguments could Lawrence and Garner make for finding the Texas law unconstitutional? What arguments could Texas make for upholding its law?
3. Do you agree with the Supreme Court's decision in this case? Give your reasons.
4. One thing that supporters and critics of the decision agreed about was its importance. Why was it considered so important?