

# Government 30

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Lecture 22

Judicial Politics #1

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## I. The Constitutional (Federalist) Judiciary

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A. The Case for Tenure & Irreducible Salaries

1. Tenure necessary for independence

Hamilton, *Federalist* #78: "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who holds their offices by a temporary commission."

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## I. The Constitutional (Federalist) Judiciary

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A.2. irreducible salary strengthens independence

Hamilton: #79: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

SUM: Judicial independence necessary for supremacy of Constitution.

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## I. The Constitutional (Federalist) Judiciary

### B. The Expansion of Judicial Power: Brutus' Worst Fears Realized?

#### 1. Marbury v. Madison (1803)

"The government of the United States has been emphatically termed a government of laws, and not of men." [Young, p. 284; but Fisher Ames (Mass) had said it before]

Declaring laws consistent or inconsistent w/ Constitution is "very essence of judicial duty" (Young, p. 286).

Logic: Why have judges take oath to protect the Constitution if they can't invalidate laws in contradiction of that document? If two laws conflict, it's SC's job to mediate. But isn't Constitution just the Supreme Law (Art I)?

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## I. The Constitutional (Federalist) Judiciary

### B.2. Martin v. Hunter's Lessee (1816), & Gibbons v Odgen

"It is a mistake [to believe] that the constitution was not designed to operate upon states in their corporate capacities." [Martin]

Gibbons: States can't pass regulations that regulate interstate commerce [Young, pp. 310-11].

Need S. Ct. to be able to invalidate state laws, else uniformity of law and rights is a sham.

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## II. The Power of the Court in American Society

### A. "The State of Courts and Parties" (1800s)

- Courts as regulators
- Example: antitrust law (reliance upon British common law -- Horner v. Graves)

### B. The Cult of Law in America

1. judicial authority has pretense of legitimacy
2. lawyers as "statesmen," as public leaders

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### III. The Question of Proper Interpretation

#### A. The Debate between Activism and Constructionism.

##### 1. Edwin Meese: Jurisprudence of Original Intention

"What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid the charge of incoherence and the charge of being either too conservative or too liberal."

**Problem:** Doctrine of incorporation. Does the Bill of Rights apply to the states? Meese: NO.

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### III. The Question of Proper Interpretation

#### A.2. Brennan: Judicial Activism

- (a) discovering "original intent" not possible
- (b) must read the Constitution in light of contemporary meaning

"We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

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### III.B: Yogurt v. Coffins

Both strict constructionists and activists claim the will of the Founders is on their side, but in diff ways:

Meese's is "Coffin" Argument: If the Founders were pried out of their coffins today after 200 years of sleep, they would frown upon new constructions.

- e.g., "Thomas Jefferson is probably rolling in his grave right now..."

Brennan's is a "Yogurt" Argument. If Founders had been eating yogurt all this time, they might approve.

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MARSHALL IN McCULLOUGH:  
AN EARLY FORM OF THE YOGURT ARGUMENT?

Chief Justice John Marshall in *McCulloch v. Maryland*

"In considering this question, then, we must never forget that it is a *constitution* we are expounding.

...

This provision [of government powers] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its power, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code."

"Let the end be legitimate, let it be within the scope of the constitution, and *all means* which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the *spirit* of the constitution, are constitutional...."

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WHAT ARE OUR  
CONSTITUTIONAL RIGHTS?

B. Can/Should the Court Create Additional Rules for the Protection of the Bill of Rights?

1. "Wall of Separation" btw Church and State  
A precedent in national traditions? See TJ, *Virginia Statute of Religious Liberty*.

WV Board v. Barnette (1943): No compulsory speech, affirmation, prayer, pledge.

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WHAT ARE OUR  
CONSTITUTIONAL RIGHTS?

B. Can/Should the Court Create Additional Rules for the Protection of the Bill of Rights?

2. Exclusionary Rule – fairness, but also incentives

Used not only by courts but also by police, until recently

3. "Miranda" Rights
4. "Clear and present danger" standard; Schenck v. U.S. (1919):

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## Constitutional Interpretation: The Example of *Roe v. Wade*

1. Are there *implied rights* in the Constitution?

A. INDUCTION: 4th Am and previous cases imply a right to privacy. Blackmun in *Roe v. Wade*: "The constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."

B. DEDUCTION: This privacy right invalidates abortion restrictions. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

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## SCALIA'S RESPONSE

Planned Parenthood v. Casey

"The issue is whether [a woman's claim to a constitutional right to have an abortion] is liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion...for the same reason I reach the conclusion that bigamy is not constitutionally protected – because of two simple facts: (1) the constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed...."

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## II. THE 14<sup>TH</sup> AMENDMENT QUESTION

A. Do the Restrictions of the Constitutions Apply to us as Subjects of State and Local Governments?

General Answer since WWII has been Yes. If Const prohibits a form of federal interference w/ rights, then the same rule applies to states.

B. What is the scope of the Constitution's power in the area of liberty protection?

Bowers v. Hardwick: Despite Roe, no protection given to private sexuality.

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III. PROBLEM:  
WHAT ABOUT PRIVATE THREATS TO PRIVATE RIGHTS?

A. Constitutional tradition recognizes threats to liberty only from government.

B. BUT many threats exist from private actors too

1. Employers' right to examine your e-mail, your computer
2. Employers' right to know what's in your mind
3. Privacy of health insurance records
4. Some progress made here: private citizens can be sued, prosecuted and jailed for violating civil rights of others.

Question: is freedom of contract sufficient to protect these rights?

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