

CALIFORNIA INSTITUTE OF TECHNOLOGY

L/H/PS 148a
The Supreme Court in U.S. History
Winter, 2015

Tue 7:30 PM, Baxter 128
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SYLLABUS

Warning: Although I am happy to have in this class any student who accepts its challenges, I should warn you that **this is a demanding and intellectually rigorous course**. Each student must

- 1) make **TWO** oral presentations and, in the week following each oral presentation, submit a paper on the topic of that oral presentation, which will be on a book or articles from the list beginning on p. 3 of this syllabus;
- 2) prepare a brief on one of the excerpted cases every week or two, depending on the number of students in the class (there will be a sign-up sheet each week, and there are instructions and an example of a brief below);
- 3) each week, one student will have to provide the class with typewritten notes on the oral argument assigned for the week (there is an example of such notes below).
- 4) There will be no mid-term, but the 3-hour, closed-book, closed-notes, closed-everything-but-your-mind essay final will cover all the material assigned from the O'Brien casebooks, the assigned oral arguments, and anything said by me or your fellow students in class.

While I encourage discussion of the topics and work of the class outside it, you should not get help on your papers without informing me. Supreme Court opinions are not easy going, and we're going to read a lot of them in a short time. Note, please that this course is ***NOT*** available on a Pass/Fail basis. You may take the winter term of this course whether or not you take the spring term (which will cover the First Amendment, privacy, voting rights, and criminal procedure). But L.148a is a prerequisite for L.148b.

The only books assigned to everyone in the class are David M. O'Brien's *Constitutional Law & Politics*, both volumes, **ninth edition**, 2014, with the chapters corresponding to volumes I and II, and the 2014 supplement to the textbook, which is called *Supreme Court Watch 2014* and is also edited by O'Brien. In addition, each week you should make an effort to listen to recordings of the assigned oral arguments, which are available at <http://www.oyez.org>. (Search for the case name, then click on the link to the oral argument.) Some have transcripts, which are more convenient. But listening to the voices, stammers, hesitations, laughter, and muttering is more fun.

Date	Topic	Reading Assignment	Oral Argument
Jan. 6	Judicial Review and Input/Output	Ch. 1 (same in both volumes)	
Jan. 13	Input/Output	Ch. 2 (same in both volumes)	<i>Hollingsworth</i>
Jan. 20	Contract Clause, Substantive Due Process	Vol. I, Ch. 9	<i>Lawrence v. TX</i>
Jan. 27	Economic Regulation, New Deal Crisis	Vol. I, Ch. 6	<i>NFIB v. Sibelius</i>
Feb. 3	Federalism	Vol. I, Ch. 7	<i>NY v. U.S.</i>
Feb. 10	Equal Protection	Vol II, Ch. 12, pp. 1412-1467	<i>Swann</i>
Feb. 17	Equal Protection	Vol. II, Ch. 12 Sections B&C	<i>Parents Involved</i>
Feb. 24	Equal Protection	Vol. II, Ch. 12, Section D	<i>Schuette</i>
Mar. 4	Voting Rights	Vol. I, 848-925	<i>Shelby County</i>
Mar. 10	Campaign Finance	Vol. I, 926-1018	<i>McCutcheon</i>

Briefs and Oral Argument reports

Many students in this course have formed informal study groups in the past, sharing their notes on cases. To formalize this, I decided some years ago to assign students to write short briefs of each case we read in O'Brien. It has worked pretty well. Each week, I'll pass around a sheet with the names of the cases for the next week on it, and students will sequentially sign up. I'll try to make sure that no one is assigned too many or too few over the quarter. The briefs should be finished **by 5 pm on Monday before the Tuesday class** and **emailed** (Word or Acrobat files) to Sinikka Elvington (<Elvington@hss.caltech.edu>). So should the outlines for the book reports and "enhanced briefs," described below. We will then print them out and put 3-hole punches in them. A set will be handed out to each student in class. You should buy a 3-ring binder to put them in. At the end of the course, everyone will have a complete set of briefs, which will be of great assistance in studying for the final exam. They will also be suitable keepsakes for the course. Briefs and book and oral report outlines will be available on the course website, which is on Moodle. The password is Kousser.

Book Reports

Students learn best actively. The "book reports" will give you the chance to "adopt" a case or era, and to investigate one of the myriad of the legal and/or political issues involved in the challenges to Section 5 and the ACA, and to inform us all about them. Each student is to read one book about a case or an era from the two lists below. For cases or eras, tell us about the people behind the cases or who sat on the courts, as well as outlining the principal legal issues, if all of these things are treated in the selections you choose. The law is a melange of people, politics, and legal ideas, not just an abstract discussion of a Platonic ideal. If you're in doubt what to talk about, email me and we'll discuss it before your presentation. Follow the Golden Rule of Presentations: present as you would like to be presented to. Keep us interested; tell us about people, not just legalities; above all, help us understand. It has become customary (and now mandatory) for each oral report to be accompanied by a **typed and photocopied outline of your oral report for the other class members**. The class may have questions to ask you, as I may.

Be prepared. A week after the oral report, you should hand in to me a written report of about 8-10 double-spaced pages on the material. Write well; I read closely.

Because we have had difficulty in the past in finishing all of the oral reports (Caltech students are a talkative lot), I've decided that for the books on cases, you should file an "enhanced brief" (my term) for the week in which we discuss the case, **and then, you should complete a more conventional report on the book for the written report a week later.** I include an example of an "enhanced brief" in the handout packet. The basic idea is that you should tell us about the larger factual and theoretical contexts of the case and its short- and long-term consequences. It may be useful for the enhanced briefer to read the whole original opinion (available on Oyez or Lexis), instead of just the excerpt in O'Brien.

In giving oral reports on the briefs, the enhanced briefs, and the biographies, please TALK your reports; don't READ them. You can and should refer to notes, but don't just read what you've handed out: we can read, and though I'm pretty tolerant, other students get bored. Besides, it's good practice for pitching film scripts, scientific experiments, or yourself.

The following is a list of books, their call numbers, the number of pages in each book, and the week when the oral report should be presented. If there are two books or articles with one listing number (e.g., 3 has both the Kens and Bernstein books), then the student should read BOTH books or articles and do both oral and written reports on BOTH.

Cases (Enhanced Briefs)

1. KF4575.C554.1989 Robert L. Clinton, *Marbury vs. Madison & Judicial Review* 225 pp. Jan. 13
2. KF4575.A965.2005 Mark Tushnet, ed., *Arguing Marbury v. Madison* 165 pp. Jan. 13
3. KF228.L63.K46.1990 Paul Kens, *Judicial Power & Reform Politics: The Anatomy of Lochner v. N.Y.* 150 pp. Jan. 20
KF228.L63.B47.2011 David E. Bernstein, *Rehabilitating Lochner* 129 pp. Jan. 20
4. KF228.S545.L33. 2000 Ronald M. Labbe, *The Slaughterhouse Cases: Regulation, Reconstruction, and the 14th Amendment* 250 pp. Jan. 20
5. KF2355.A4.M5 George H. Miller, *Railroads and the Granger Laws* 200 pp. Jan. 20
(on *Munn*)

6. KF2344.C67.1993 Richard C. Cortner, *The Iron Horse and the Constitution: The Railroads and the Transformation of the 14th Amendment* 200 pp. Jan. 20
7. KF1414.H68.1991 Herbert Hovenkamp, *Enterprise and American Law, 1836-1937*, pp. 1-206 Jan. 20
8. KF4606.B38 Maurice Baxter, *The Steamboat Monopoly: Gibbons v. Ogden* 130 pp. Jan. 27
9. KF3552.W6 Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor & the Law* (on *Hammer v. Dagenhart*) 300 pp. Jan. 27
10. (see me) Richard C. Cortner, *The Jones and Laughlin Case* 170 pp. Jan. 27
11. KF1322.J3 Clyde E. Jacobs, *The 11th Amendment and Sovereign Immunity* 160 pp. Jan. 27
12. KF8742.A5.S7.1996 Daniel J. Meltzer, "The Seminole Decision and State Sovereign Immunity," *Supreme Court Review*, 1-66 (on *Seminole Tribe*) Jan. 27
- KF8742.A5.S7.1997 Evan H. Carminker, "Printz, State Sovereignty, and the Limits of Formalism," *Supreme Court Review*, 199-248 Jan. 27
- KF8742.A5.S7.1998 Matthew P. Adler and Seth F. Kreimer, "The New Etiquette of Federalism: *New York, Printz, and Yeskey*," *Supreme Court Review*, 71-144 Jan. 27
13. KF1322.N66.2002 John T. Noonan, *Narrowing the Nation's Power* (on *City of Boerne*) 150 pp. Jan. 27
- KF8742.A5.S7.1997 David Cole, "The Value of Seeing Things Differently: *Boerne v. Flores* and Congressional Enforcement of the Bill of Rights," *Supreme Court Review*, 31-78. Jan. 27
14. KF8742.A5.S7.1999 Ernest A. Young, "State Sovereign Immunity and the Future of Federalism," *Supreme Court Review*, 1-80

- KF8742.A5.S7.1999 Mark R. Killenbeck, "Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic," *Supreme Court Review*, 81-140 Jan. 27
15. KF8742.A5.S7.2003 Suzanna Sherry, "The Unmaking of a Precedent," *Supreme Court Review*, 231-67 (on *Hibbs*)
- KF8742.A5.S7.2005 Ernest A. Young, "Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After *Gonzales v. Raich*," *Supreme Court Review*, 1-50 Jan. 27
16. KF4545.S5.F432 Don Ferenbacher, *Slavery, Law, & Politics: The Dred Scott Case* 300 pp. Feb. 10
17. KF4155.C68.2003 Robert Cottrol *et al.*, *Brown v. Board* 250 pp. Feb. 10
18. KF4155.R46.1992 Mark Whitman, ed., *Removing a Badge of Slavery: The Record of Brown v. Board of Education* 345 pp. Feb. 10
19. LC 214.23.C43.D68.1995 Davison M. Douglas, *Reading, Writing, and Race: The Desegregation of the Charlotte Schools* (on *Swann*) 250 pp. Feb. 17
20. KF228.S9.S39.1986 Benjamin Schwartz, *Swann's Way: The School Busing Case and the Supreme Court* 200 pp. Feb. 17
21. KF228.B34.B35.2000 Howard Ball, *The Bakke Case* 206 pp. Feb. 17
22. LC213.52.S26.2012 Richard Sander, *Mismatch* 348 pp. Feb. 24
23. KF228.S553.Z45.2004 Charles Zelden, *The Battle for the Black Ballot: Smith v. Allwright and the Defeat of Texas All-White Primary*, with Bernard Taper, *Gomillion v. Lightfoot* 150 pp. Mar. 3
- JK1348.A2.Z5.1960 Bernard Taper, *Gomillion v. Lightfoot* Mar. 3
24. E185.93.M6.P37.1990 Frank Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 210 pp. Mar. 3
25. JK1929.A2.L3 Steven Lawson, *Black Ballots: Voting Rights in the South, 1944-69* 350 pp. Mar. 3
26. See me Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 245 pp. Mar. 3
- 27 and 28 Selected articles on campaign finance issues Mar. 3

Eras and Biographies

29. KF8742.H368.2008 Matthew P. Harrington, Jay and Ellsworth, *The First Courts*, pp. 1-203 Jan. 13
30. KF8742.S47.1998 Scott Douglas Gerber, ed., *Seriatim: The Supreme Court Before John Marshall*, 1-154, 198-230, 292-350 Jan. 13
31. KF8745.M3.J64.1997 Herbert A. Johnson, *The Chief Justiceship of John Marshall* 315 pp. Jan. 13
32. KF8745.M3.N49.2001 R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (concentrate on pp. 146-385) Jan. 13
33. KF8744.W5.HUM G. Edward White, *The American Judicial Tradition*:400 pp. Jan. 13
Profiles of Leading American Judges (compare several)
34. KF8745.T3.L4 Walker Lewis, *Without Fear or Favor, A Biography of Chief Justice Roger Brooke Taney* 500 pp. Jan. 20
35. KF8742.K46.2010 Paul Kens, *The Supreme Court Under Morrison Waite, 1874-1888* 172 pp., Jan. 20
36. KF8745.T3.M3.1965 Alpheus T. Mason, *William Howard Taft* 305 pp. Jan. 20
37. KF4541.C873.1998 Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*, 225 pp., Jan. 27
38. KF8742.L48.1995 William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age Of Roosevelt* 250 pp., Jan. 27
39. KF8744.H63.1996 Jeffrey D. Dockett, *New Deal Justice: the Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, And Robert H. Jackson* 300 pp., Jan. 27
40. KF8744.F45.2010 Noah Feldman, *Scorpions: The Battles and Triumphs Of FDR's Great Supreme Court Justices*, 433 pp., Jan. 27
41. KF8742.U76.1997 Melvin Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-53*, 250 pp., Jan. 27
42. KF8745.F7.U76.1991 Melvin Urofsky, *Felix Frankfurter* 179 pp. Jan. 27

43. KF8745.B55.B298.1996 Howard Ball, *Hugo L. Black* 251 pp. Jan. 27
44. KF8748.K43.2004 Thomas M Keck, *The Most Activist Supreme Court In History: The Road to Modern Judicial Conservatism* (Burger and Rehnquist Courts) 295 pp., Feb. 3
45. KF8742.S28.1992 David Savage, *Turning Right: The Making of the Rehnquist Supreme Court*, pp. 3-148, 305-422 Feb. 3
46. KF8742.R475.203 Earl Maltz, ed., *Rehnquist Justice* (essays on each justice) 290 pp., Feb. 3
47. KF8742.H78.2007 David L. Hudson, Jr., *The Rehnquist Court: Understanding Its Impact and Legacy* 150 pp., Feb. 3
48. KF8742.R467.2006 Craig Bradley, ed., *The Rehnquist Legacy*, Pp. 1-80, 187-204, 301-82 Feb. 3
49. KF8748.T66.2007 Jeffrey Toobin, *The Nine* (Rehnquist Court) 340 pp. Feb. 3
50. KF8745.W3.W45.1982 Edward White, *Earl Warren* 370 pp. Feb. 10
51. KF8742.B427.2004 Michal Belknap, *The Supreme Court Under Earl Warren, 1953-1969* 315 pp., Feb. 10
- 52-53. KF8742.P678.2009 L. Scot Powe, *The Warren Court and American Politics*, (2 reports: 1-208, 209-502 – there's an online copy) Feb. 10
54. KF8742.A5.W367.1994 Bernard Schwartz, *The Warren Court*, 21-158, 195-284, Feb. 10
- 55-56. KF8745.W3.S37.1983 Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* (2 reports, split at 336) Feb. 10
57. KF8745.B68.M37.1997 David E. Marion, *The Jurisprudence of William J. Brennan, Jr.* 175 pp. Feb. 10
58. KF4755.M34. T87.1997 Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court*, 200 pp. Feb. 10
59. KF8742.M353.2011 Kevin J. McMahon, *Nixon's Court* 256 pp. Feb. 17
60. KF8742.B76.1991 Charles M. Lamb and Stephen C. Halpern, *The Burger Court: Political and Judicial Profiles*, 1-34, 63-162, 238-374, Feb. 17
61. KF8742.S29.1990 Bernard Schwartz, *The Ascent of Pragmatism* (Burger Court) 400 pp. Feb. 17
62. KF8742.W66 Bob Woodward and Scott Armstrong,

- The Brethren* (on the Burger Court) 440 pp., Feb. 17
63. KF8742.Y36.2000 Tinsley Yarbrough, *The Rehnquist Court and the Constitution* 269 pp., Feb. 24
64. KF8745.O25.B57.2005 Joan Biskupic, *Sandra Day O'Connor* 400 pp. Mar. 3
65. KF8745.S33 B57 2009 Joan Biskupic, *American Original: Scalia* 400 pp. Mar.
66. KF8745.S68.Y37.2005 Tinsley Yarbrough, *David Hackett Souter* 300 pp. Mar. 3
67. KF8745.B555.Y37.2008 Tinsley Yarbrough, *Harry A. Blackmun* 350 pp. Mar. 3
68. KF8745.T48.M47.2007 Kevin Merida and Michael A. Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas* 380 pp. Mar. 3

(Sample Brief) *Griswold v. CT* (1965), from O'Brien

Facts: Griswold was exec. Dir. of CT Planned Parenthood League, arrested with Medical director of League for distributing info, instruction, and advice about contraceptives to married persons, against CT law. She and Drs in CT had been trying to test the 1879 anti-contraceptive law since 1940s, when they failed to get it repealed. In *Tilston v. Ullman*, 381 U.S. 44 (1943), CT ruled drs had no standing. In *Poe v. Ullman*, 367 U.S. 497 (1961), 5-4 majority ruled no standing because law largely unenforced. So they opened a public clinic and got themselves arrested. (Oral argument says law was enforced and arrests made before Griswold and that full range of constitutional provisions had been asserted below – they certainly were in oral arg before SCOTUS.)

(Quoting from Brennan's papers, O'Brien shows that at first Douglas was going to rest opinion wholly on 1st free assn clause. Brennan then suggested penumbra approach.)

Op Ct, Douglas (Brennan, Clark, Goldberg, Harlan, Warren, White) [note that White dissented in *Roe*.]

I. Professional relationship gives appellants standing to raise const rights of married clients.

II. First Amend creates penumbra of privacy, citing *NAACP v. AL* (1958)

II. So do other of the first 9 amendments. "Various guarantees create zones of privacy." Note inclusion of 9th.

IV. Right of privacy in marriage is fundamental, older than U.S. govt

Concur Goldberg (joined by Warren and Brennan)

I. Besides joining op ct, he addressed Black specifically, saying he didn't accept what might be called the "strict incorporation" theory. "Liberty" meant more than that.

II. And unless the 9th is meaningless, it buttresses the right to privacy.

Concurring in judgment, Harlan

I. Refused to join op ct, because of incorporationist overtones of Douglas's op

II. Proper way to tell what's fundamental is to look at history, search for fundamental values, and consider federalism-and-separate-powers structure of govt.

Dissent Black, joined by Stewart

I. The phrase "right to privacy" doesn't appear in Const, derives from 1890 Harv LR article by Warren and Brandeis recommending common law expansion of right of privacy for tort relief, not as part of Const.

II. To substitute vague phrases like "privacy" for specific guarantees mentioned in specific amendments weakens the specific guarantees, such as protection against unreasonable searches.

III. The due process clause, as used here, just gives judges the right to invalidate any law that they consider 'irrational, unreasonable or offensive . . . arbitrary, capricious, . . . or oppressive . . .' This is essentially a legislative power.

(Sample Enhanced Brief) *McCulloch v. MD* (1819), from original text

Factual Context

From the earliest days of the Republic, two issues were fundamental to controversies over the limits of the power of the national government: slavery and banking. The Northwest Ordinance prohibiting slavery in the territories north of the Ohio River was passed in the Continental Congress simultaneously with the holding of the Constitutional Convention in 1787. The controversy over the Bank of the United States (B.U.S.) began before its establishment in 1791.

Before the Civil War, the national government did not issue paper currency (fiat money), and the currency in circulation was issued by state-chartered banks and the B.U.S. These banks would accept deposits of specie (gold or gold coins) and issue paper money or other forms of credit on the basis of the “real money,” as the idiotic commercials on tv often call it today. But there was little regulation of the amount of specie each bank had to hold, and except for the B.U.S., there was no central body to decide exactly what each bank’s paper currency was worth (to “discount” the bank’s notes). State banks tended to inflate the currency and contribute to speculation. “Runs” on banks – demands by depositors for their specie back – caused crashes. Compared to even the weak regulation that contributed to the crash of 2008, the early 19th century regulation was puerile, indeed.

Although the 20-year charter of the B.U.S. was allowed to lapse in 1811, it was rechartered for another 20 years in 1816 because of the financial disorganization that an unregulated system in the midst of a damaging war (Washington, D.C. was burned during the War of 1812 and President James Madison had to flee in disarray) caused. When the B.U.S. required state banks to resume meeting depositors’ demands for specie (called “resumption”), the economy crashed.

The B.U.S. was a semi-public corporation, the largest corporation in the country at the time, with a capital of \$35 million, and it made heavy contributions to politicians in Congress. Several states at this time tried to tax the B.U.S. out of existence. Maryland levied a tax of \$15,000 a year, Ohio, \$50,000, and Kentucky, \$120,000. Indiana and Illinois prohibited it from opening offices in their states. There were 18 branches of the B.U.S. around the nation.

Theoretical Context

From the struggle of the Anti-Federalists against the adoption of the constitution through the present day, there have been battles over the often-competing powers of the national and state governments that have often turned on vague and open-ended clauses of the constitution. There were two clauses at issue in *McCulloch*, the “necessary and proper” clause and the “supremacy” clause, which read (Article I, Section 8, Clause 18) “That Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.” And (Article VI, Paragraph 2): “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which

shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Did the necessary and proper clause constrain or expand the powers of Congress? Could Congress pass only those laws that were absolutely necessary to carry out the powers laid out in Article I or elsewhere? How much discretion did Congress have? If courts regulated the amount of discretion, was Congress impotent? And how much discretion did courts, state and federal, have to rule on whether congressional or presidential actions had been made “in pursuance” of the constitution? Could a state court in effect rule a law of Congress unconstitutional? Nearly every issue concerning the balance of state and national powers could be considered under the rubrics of these two clauses.

Facts

James McCulloch, the “cashier” (principal officer) of the Baltimore branch of the B.U.S. refused to pay the tax to Maryland, and an agreed-upon case was arranged to test the constitutionality of the B.U.S. Interestingly, McCulloch and certain directors of the branch were later found to have been looting the B.U.S. for years, though they later escaped conviction on a technicality.

McCulloch was sued in state court by an executive of the State, lost, appealed, lost again, and appealed to the U.S. Supreme Court.

Oral Argument (this is not always important)

Beginning on Feb. 22, 1819, five days after the House of Representatives had passed the Tallmadge Amendment banning slavery in the new state of Missouri – the opening round of the constitutional and political crisis that led to the Missouri Compromise in 1820 –, the oral argument lasted nine days! It involved six of the most prominent attorneys in the country: William Pinkney, Daniel Webster, and Attorney General William Wirt, for the Bank; Maryland Attorney General Luther Martin, Joseph Hopkinson, and Walter Jones for Maryland. Pinkney held the floor for three days, and Justice Joseph Story (the second most prominent justice on the Marshall Court) wrote of Pinkney’s argument: “I never, in my whole life, heard a greater speech; it was worth a journey from Salem [Massachusetts, Story’s home] to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures [of speech], his arguments were most brilliant and sparkling. He spoke like a great statesman, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom [broom]. We have had a crowded audience of ladies and gentlemen; the hall was full almost to suffocation.” During the oral argument, the House of Representatives held a heated debate on a bill to repeal the charter of the Bank, which might have rendered the case moot.

Opinion of the Court, 7-0, by Chief Justice John Marshall (There were only 7 members of the

Court at that time.)

Preface: Recognized the importance of the case, which Marshall said “may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.” [Note the passive voices in essential parts of this paragraph.]

I. Does Congress have the power to incorporate a bank?

A. No precedents [He cites only one state case and no federal cases.], but

1. The power has been exercised since 1791, and many contracts, etc. are dependent on the legitimacy of the BUS.

2. B.U.S. was chartered after vigorous debate.

3. Allowed to expire, it was rechartered after more debate.

B. Maryland insists that the Const was a compact of sovereign states

1. The concon was called by the states, and the document was ratified by conventions in each state, but

2. “It is true, they assembled in their several States -- and where else should they have assembled?”

3. “The government proceeds directly from the people . . .” not the states, which lacked veto power over its adoption.

C. Maryland contends that the national government has only enumerated powers.

1. But within its sphere, it is supreme, quoting supremacy clause.

2. True, creating a bank isn't one of the powers enumerated in the const, but

3. Even the 10th Amendment omits the word “expressly,” which had been in the Articles of Confederation and had embarrassed that govt.

4. So an answer depends on considering the general nature of the const.

a. A constitution must be a short outline: “A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . .we must never forget that it is *a Constitution* we are expounding.”

b. The limits of congressional power in Art. I, Sec. 9 imply that other powers can be exercised.

c. Congress has great powers: taxation, borrowing money, war, commerce. Nothing in the const denies it the “choice of means.”

d. Why is the establishment of a bank different from choice of any other means on any other subject?

e. MD contends that the necessary and proper clause is a restriction on powers, meaning Cong can pass only those laws that are “indispensable” to the exercise of its powers.

f. But in common speech [no dictionary citation], necessary only means “convenient, or useful, or essential to another.” “Necessary” can be modified to strengthen or weaken its meaning: “absolutely necessary,” which is used elsewhere in the const.

g. Logically, the Framers couldn’t have denied Cong the choice of means: “To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”

h. The necessary and proper clause appears in Art. I, Sec. 8, enumerating the powers of Cong, not its limitations.

i. In summary, the necessary and proper clause means: “ 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 spirit of the Constitution, are Constitutional.”

II. May MD tax the Bank?

A. The national govt may restrict state taxing powers, for const prohibits states from taxing imports or exports except where “absolutely necessary” to fund inspections.

B. If Cong can create a bank, it can preserve it.

C. If states can tax a bank, they might destroy it, for “ the power to tax involves the power to destroy . . . ”

D. If states could tax the bank, they may tax any of the operations of the national govt, and they, not it, would be supreme, contrary to the supremacy clause.

Immediate Reaction

Many newspapers reprinted the whole opinion, and editorials in the North praised it, while most in the South and West, particularly Ohio (which was then in “the west”) condemned it. Thomas Jefferson, James Madison, and Spencer Roane (a judge on the highest court in Virginia) denounced it in newspaper columns and more or less open letters, Madison condemning Marshall for propounding an abstract doctrine not necessary to a decision in the case. Marshall responded in a series of anonymous newspaper articles.

Paradoxically, the Jeffersonians excoriated the Court for not declaring the Bank Charter unconstitutional, contradicting their position on *Marbury*. The Virginia Legislature passed a resolution attacking *McCulloch* as “eminently calculated to undermine the pillars of the Constitution itself, and to sap the foundations and rights of the State Governments” on the same day that it passed a resolution on the Missouri Compromise, Feb. 12, 1820.

The most violent reaction was in Ohio, where the legislature had passed a tax of \$50,000 per year on the B.U.S. Completely ignoring the Supreme Court decision in *McCulloch*, as well as an injunction against collecting the tax issued by a federal judge, State Auditor Osborn ordered his assistant to enter the vaults of the local branch of the B.U.S. and seize all of the specie (gold) and notes (paper) found there. He did, about six months after the decision in *McCulloch*, taking a total of \$120,475. Outside of Ohio, the seizure was almost universally condemned, and two years later, a federal judge ordered Osborn to return the money, with interest. Osborn refused. Commissioners appointed by the federal court then entered the Ohio State Treasury and seized \$98,000. Ohio then appealed the federal court decision to the U.S. Supreme Court, where it lost. The state legislature then passed a resolution denying the right of the U.S. Supreme Court to consider the constitutionality of an act ruled constitutional by its state supreme court, and the legislature in 1821 passed a statute “outlawing” the B.U.S. and calling on all the other states to disagree with every aspect of the *McCulloch* decision. In 1824, Marshall ruled against Ohio in the *Osborn* case, including a long disquisition on federal court jurisdiction.

Of the controversy, the leading Ohio newspaper, the *Western Herald and Steubenville Gazette*, wrote: “From the formation of the Constitution of the United States until the present time, there have been frequent contests between the Legislative power and the Courts and Judges, in almost all of which the Judges, contrary to the wishes of large majorities of the people, have succeeded in maintaining not only all the power respecting the grant of which there remained doubts, but have also arrogated to themselves an authority as well above the laws as above the Constitution itself.”

Substantive Long-term Consequences

In 1832, President Andrew Jackson vetoed a bill rechartering the B.U.S., holding that regardless of Marshall’s opinion in *McCulloch*, the B.U.S. was unconstitutional. In the midst of the ensuing “Bank War,” state banks again went wild and the economy collapsed in the worst recession since 1819. Regulation of the economy continued to be a major issue throughout the antebellum era. In 1863, in the midst of the Civil War, Congress passed a law setting up nationally-chartered banks and taxing state-chartered banks almost out of existence, and it issued “greenbacks” to pay for the War. The greenbacks were “retired” in 1878, and bitter controversies began about monetizing silver, as well as gold. There are too many other controversies about financial regulation to detail here.

Theoretical Long-term Consequences

Those who wish to justify or expand the national government’s powers have repeatedly returned to Marshall’s opinion and language. Those who wish to constrain such power have largely ignored it.

Sample Oral Argument Notes, *Dickerson v. U.S.*

Chief questions: Was the process outlined in *Miranda* a constitutional necessity, or could it be replaced by a law of Congress? If it could be replaced, did Section 3501 of the U.S. Code satisfy the requirements of the 14th Amendment? Has the Court so undermined *Miranda* that its language is no longer controlling?

Attorneys: Paul G. Cassell, amicus, supporting Section 3501, because the Clinton Administration would not

James W. Hundley, for Dickerson

Seth P. Waxman, Solicitor General, opposing Section 3501 and supporting *Miranda*

Hundley

Can Congress overrule *Miranda* (hereinafter Mir.)? 4th Circuit ruled that Mir. was just a ct-ordered procedure, not one based on the Const. He says Mir represents a “constitutional threshold,” but that its requirements aren’t “constitutionally mandated.” Scalia asks him whether a cop who beat a confession out of a suspect could be charged with a violation of 5th Am? Yes. Then Scalia asks whether a cop who didn’t Mirandize a suspect and used his confession cd be similarly charged. After some hesitation, H. answers yes, again (meaning it’s a constitutional requirement).

H. says 3501 reverts back to the question of voluntariness and to the totality of the circumstances mode of evaluating evidence, which is what Mir. overturned as unworkable.

Ginsburg says Mir. took what had been a general due process right and put it under the 5th Am., making it a right to notice, not a negative right to be free from the third degree.

Rehnquist says they’ve had 50 cases on Mir., and to say it’s easily applied is “just a myth.” H. disagrees, saying there are fewer cases after than before Mir.

Scalia says Mir. is a rule applied to state and fed cts mandating certain procedures. H. replies that SCOTUS can’t mandate procedures for state cts unless a fed law or a U.S. Const provision is involved.

Waxman

1. Mir. is a const rule, as revealed by its application to the states. It allowed Cong or state legs to create other procedures, but only if they served same function as Mir. rules. Scalia asserts that the statement in Mir. that it’s a const rule is *dictum*, that it only needed to formulate a procedural rule.

2. 3501 is not a sufficient exercise of Cong power and wd require SCOTUS to overturn Mir. to uphold 3501.

3. Mir. shdn’t be overruled. Why?

- A. Stability in law. Totality of circumstances approach didn't protect the voluntariness of confessions
- B. Mir is workable and has benefits for admin of justice, including clear rules for cops.
- C. SCOTUS post-Mir has reaffirmed that custodial situation requires safeguards
- D. In 30 yrs before 1966, cts in 36 cases cdn't agree on a standard.

Cassell

For 25 yrs, SCOTUS has held that Mir. isn't a const requirement – e.g., *OR v. Elstad*. Rehnquist then asks how it can not be a const right if it's been applied to the states? Cassell says it "relates to" or "stems from" the const. It represents the Ct's "provisional, interim judgment about how to go about enforcing 5th Amend rights." SOC says the case boils down to whether 3501 is an "adequate alternative" to the Mir. procedure. Cassell says yes.

3 arguments: 1. Ct must defer to Cong. 2. 3501 is an adequate procedure. 3. 3501 in some respects goes beyond Mir.: more warnings, tort remedies. It changes an automatic, rigid system to a more nuanced totality of the circumstances approach.

Ginsburg: adequate to do what? Mir. said procedure had to apprise accused of right to remain silent throughout. Cassell says this was *dictim*. Ginsburg says Mir. says that custody is the same, for 5th purposes, as a ct. Cassell says ct proceedings are different. Ginsburg says magistrate must advise of right to silence, that Mir's whole pt is that 5th Amend applies to police stations. Cassell cites a parole officer case as proving that right to silence hasn't always been protected. Ginsburg says a police officer is different from a parole officer.

Souter says that pre-Mir. there was a totality of circumstances inquiry into voluntariness. Mir. applied a new system, starting at the police station, not focusing on voluntariness, but on a "knowing waiver" of right of silence. Did 3501 keep the protection of "knowing waiver"? If not, then it isn't a substitute for Mir. Cassell says that we're already back to voluntariness. The dist ct judge in this case, after finding that no Mir. warnings were given, asked next about voluntariness.

Breyer quotes the last words of Mir, which say very explicitly that it's based on the Const, and that no state laws or legislative rulemaking can abrogate const rights. Cassell and later Rehnquist say this is *dictim*, because rulemaking wasn't before the Ct in Mir..

2. On adequate procedure. Cassell says 3501 gives incentives to cops to advise of rights. Souter replies that an incentive isn't a requirement. Stevens asks whether Cassell thinks 3501 provides a substitute for Mir-warnings or overrules Mir? Cassell says it's a substitute. Cassell states his view of what Mir. held: in the absence of adequate action by Cong or the state leg's, the following procedures are prerequisites to the admissibility of confessions. The adequate action, Cassell thinks, doesn't have to match Mir precisely, as subsequent rulings have shown. Stevens then asks whether Sen's Ervin and McClelland, in speeches on floor, indicated a desire to overturn Mir using 3501. Cassell says this was just posturing. Stevens replies that there's nothing in the leg hist to support Cassell's reading. When Cassell responds by reading from the Senate Rept, Stevens counters that the language just quoted can be read as saying Mir. went too far. Cassell says we shdn't look at what Cong said, but what it did.

Ginsburg quotes more language from Mir that can't be read as endorsing voluntariness standard. Cassel says 25 yrs of judicial decisions have undermined that language. Ginsburg asks whether Cong cd abolish exclusionary rule under 4th Amend and substitute tort action? Cassell says it could.