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Peter Irons received his B.A. in sociology from Antioch College and an M.A. and Ph.D. in political science from Boston University. He earned a J.D. from Harvard Law School in 1978, where he served as senior editor of the *Harvard Civil Rights-Civil Liberties Law Review*.

Professor Irons is widely respected as an authority on the Supreme Court and constitutional litigation. He has taught at Boston College Law School, the University of Massachusetts, and the University of California, San Diego (UCSD), where he joined the political science faculty in 1982. At UCSD, he founded the Law and Society Program and the Earl Warren Bill of Rights Project, which he has directed since 1990, producing innovative curricular materials for high school and college courses. He has been a visiting professor at several law schools and universities and served as the Raoul Wallenberg Distinguished Visiting Professor of Human Rights at Rutgers University in 1988.

A prolific author, Professor Irons has written and edited 12 books, including *The New Deal Lawyers; Justice at War: The Story of the Japanese American Internment Cases; The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court; Brennan Vs. Rehnquist: The Battle for the Constitution;* and *A People’s History of the Supreme Court*, on which this course is based. He also edited and narrated four sets of audiotapes of Supreme Court oral arguments in the *May It Please the Court* series, which is used in hundreds of colleges and law schools. His most recent book is *Jim Crow’s Children: The Broken Promise of the Brown Decision*, published in 2002. His books have won an unprecedented five Silver Gavel awards from the American Bar Association for their contributions to “public understanding of the American legal system.”

Professor Irons has lectured widely on the Supreme Court, including in the law schools at Harvard, Yale, Berkeley, and Stanford. He is also an active civil rights and liberties lawyer and belongs to several state and federal bars, including the Supreme Judicial Court of Massachusetts, the U.S. District Court for the Northern District of California, the U.S. Court of Appeals for the Ninth Circuit, and the United States Supreme Court. During the 1980s, he initiated the successful campaign to reverse the criminal
convictions of Japanese Americans who resisted military curfew and evacuation orders during World War II. Professor Irons has served two terms on the national board of the American Civil Liberties Union.

Professor Irons has received Outstanding Teaching Awards from three of the UCSD colleges. He lives in San Diego, California, with his wife, Bonnie Fox, and their two daughters, Haley and Maya.
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The History of the Supreme Court

Scope:

Over the years since its first session in 1790, the United States Supreme Court has risen from a body with little power and prestige to become the most powerful and prestigious judicial institution in the world. Its decisions have profoundly shaped not only American law but also our society, as the nation has grown dramatically in population, geographical expanse, racial and ethnic diversity, and technology.

This course on the Supreme Court in American history will trace the Court’s development from its founding to the present, with a focus on the landmark cases that have reflected conflicts in American society. We will examine cases in such areas as federal and state power, economic regulation, slavery and segregation, political protest, religion, and such “privacy” issues as abortion and gay rights. Our discussion of each case will look at the parties on both sides, the justices who decided it, and the social and political context that affected the Court’s ruling.

Over the course of 36 lectures, we will encounter dozens of people—most of them very ordinary Americans—whose cases wound up in the Supreme Court. Among these people are Dred Scott, Homer Plessy, Charles Schenck, Elsie Parrish, Joseph Schechter, Lillian Gobitis, Fred Korematsu, Carol Brown, Ernesto Miranda, Mary Beth Tinker, and Michael Hardwick. Different in age, race, gender, and religion, they all placed their names on landmark Supreme Court decisions. We will also encounter many of the 109 justices—all but two of them men and all but two white—who have sat on the Supreme Court bench over the past two centuries. They include such eminent and influential justices as John Marshall, Roger Taney, Oliver Wendell Holmes, Louis Brandeis, Charles Evans Hughes, Hugo Black, Felix Frankfurter, Earl Warren, and Thurgood Marshall.

These lectures are divided into three sections of 12 lectures each, corresponding to important periods in the Court’s history. The first section covers the period from the American Revolution to the end of World War I. We begin with the framing of the Constitution and the Bill of Rights and look at the Court’s structure and powers as it was shaped at the Constitutional Convention in 1787. We then examine the Court’s first—and most ineffective—decade, during which its only significant decision was overturned by the Eleventh Amendment. During much of this first period,
two chief justices with very different views, John Marshall and Roger Taney, dominated the Court, serving for 63 years between them. The landmark cases during this period include *Marbury v. Madison*, *McCulloch v. Maryland*, *Dred Scott v. Sandford*, and *Plessy v. Ferguson*, which dealt with such issues as judicial review, congressional power, slavery, and segregation.

Our second set of 12 lectures covers the period from the 1920s through the 1960s. The Court was led, during the 1920s, by Chief Justice William Howard Taft and followed his conservative, pro-business views in economic regulation cases. But the Court shifted course during the economic and social upheaval of the Great Depression. After striking down the twin pillars of President Franklin Roosevelt’s New Deal program, the Court launched the “Constitutional Revolution” of 1937 by upholding state minimum-wage laws and federal labor regulation. The Court’s adoption of the *strict scrutiny* test in 1938 paved the way for decisions that struck down local and state limitations on the rights of political, religious, and racial minorities. The major figure in this section is Earl Warren, who served as chief justice from 1953 until his retirement in 1969. These were momentous years in American history, marked by the civil rights movement, the campaign against Jim Crow schools, and conflict over the Vietnam War. The landmark cases during this period include *Brown v. Board of Education*, *Miranda v. Arizona*, and *Tinker v. Des Moines*. The Warren Court was “activist” in protecting and expanding civil rights and liberties, just as the Court between 1890 and 1937 was “activist” in protecting business from government regulation.

The final set of 12 lectures will deal with the Court under the leadership of Chief Justices Warren Burger and William Rehnquist, judicial conservatives who were both named by Republican presidents. Burger replaced Earl Warren in 1969 and retired in 1986, and Rehnquist became the first sitting justice to head the Court since Harlan Stone in 1941. Burger and Rehnquist both had “law and order” credentials, and both made clear their desire to reverse many of the Warren Court’s “activist” decisions in criminal law and First Amendment rights. They were largely frustrated in this goal, because Justices William Brennan and Thurgood Marshall persuaded the Court’s moderate justices to trim but not topple the Warren landmarks. During this period, the abortion ruling in *Roe v. Wade* provoked heated conflict, some of it violent, but Chief Justice Rehnquist fell one vote short in his campaign to reverse the *Roe* decision. Decisions on such issues
as affirmative action, flag burning, and the presidential election in 2000 also divided the Court and sparked debate on the left and right. The course ends with a retrospective look at the Court’s impact on American law and society over the past two centuries and its role as a model for judicial systems around the world.

**Part I: The Constitutional Convention to World War I**

The first 12 lectures in this course cover the longest period, from the Constitutional Convention in 1787 through the end of World War I. We begin with the origins of the Constitution, which stemmed from widespread feeling that the Articles of Confederation had created a weak and fractured government for the 13 states that had been British colonies before the American Revolution.

Spurred by James Madison of Virginia, the delegates to the convention in Philadelphia framed a charter for a strong national government of divided powers, with a Supreme Court to resolve disputes within its broad jurisdiction. During its first decade, from 1790 through 1800, the Court was an ineffective body, whose only major decision was overturned through a constitutional amendment. But the Court achieved real power under the leadership of Chief Justice John Marshall, who served from 1801 until his death in 1835. The Marshall Court reflected the chief’s strong Federalist views and his philosophy of *judicial nationalism*, through which the Court enforced federal supremacy over the states. After Marshall’s death, Chief Justice Roger Taney presided over a Court dominated by southerners who believed in states’ rights and slavery. The Taney Court’s ruling in the *Dred Scott* case in 1857 held that no black person, free or slave, was a citizen. We will look closely at the *Dred Scott* decision and the heated debates that followed, culminating in the Civil War. After Taney’s death in 1864, the Court turned a deaf ear to the demands of former slaves for the “equal protection of the laws” that had been promised by the Fourteenth Amendment. The Court listened intently, however, to claims of business owners that the Fourteenth Amendment protected the “freedom of contract” from government regulation. Advocates of laissez-faire economics dominated the Court through the first three decades of the 20th century. The lectures in this section address such issues as federal power over the states, slavery and segregation, economic regulation, and free speech during wartime.
Part II: From the Taft Court to the Warren Court

The lectures in this middle section of the course deal with the Supreme Court from the 1920s, under the leadership of Chief Justice William Howard Taft, through the 1960s, when the Court was led by Chief Justice Earl Warren. These were eventful years in American history, marked by the Great Depression of the 1930s, World War II, and the civil rights revolution that was led by the National Association for the Advancement of Colored People and its brilliant legal director, Thurgood Marshall. In these lectures, we will examine the Court’s role in striking down the New Deal program of President Franklin Roosevelt and the “Constitutional Revolution” of 1937, in which the Court abruptly shifted course and upheld state and federal laws that set minimum wages and protected labor’s right to organize unions. We will also look at the Court’s adoption in 1938 of the strict scrutiny test, under which laws that abridged First Amendment rights and discriminated against racial and religious minorities were stripped of the presumption of constitutionality. Among the issues that came before the Court during this period were the internment of Japanese Americans during World War II, the government’s prosecution of Communist Party leaders for their advocacy of revolution, and racial segregation in public schools. The lectures in this section examine such landmark cases as Minersville School District v. Gobitis, Korematsu v. United States, Dennis v. United States, and Brown v. Board of Education.

Part III: From the Warren Court to the Rehnquist Court

The lectures in this final section of the course examine the Court’s rulings in landmark cases that reflect the sharp divisions in American society over such issues as religion, race, crime, and abortion. Several lectures in this section take a topical approach to these issues, looking back at cases the Court decided in the 19th century and the first half of the 20th. These earlier cases provide historical context for judicial debates that still divide the Court on these issues.

We begin with cases from the 1940s that involved public aid to religious activities in schools and move to rulings in the 1960s on classroom prayer in public schools, decisions that provoked much criticism. The Warren Court was also criticized for its rulings on the rights of criminal defendants, especially for the Miranda decision in 1966 that protected the “right to remain silent” during police questioning. After Chief Justice Warren retired in 1969, he was replaced by Warren Burger, a conservative nominee of
President Richard Nixon. But the Burger Court’s most notable decision, in \textit{Roe v. Wade} (1973), struck down state laws that made abortion a criminal offense. The Burger Court also ruled against the Nixon administration in the \textit{Pentagon Papers} case and upheld busing as a means of integrating public schools. This section, and the course, concludes with the Court’s recent decisions on school prayer, abortion, and the disputed presidential election of 2000.
Lecture One
Personality and Principle

Scope: This lecture provides an overview of the role of the Supreme Court in American law, politics, and history. It outlines the Court’s development as an institution, from the framing of the Constitution to the present. We discuss the themes that recur during the entire course: continuity and change, consensus and conflict, and the diversity in American society that prompts many of the cases the Court has decided over the past two centuries. A major focus of the course will be the Court’s bold assertion of the power of judicial review under Chief Justice John Marshall and its use of that power during the Court’s history to strike down state and federal laws over the past two centuries. This lecture briefly discusses some of the most important justices who have sat on the Court during its history, including John Marshall, Roger Taney, Oliver Wendell Holmes, Felix Frankfurter, Earl Warren, and William Rehnquist. Our approach is to show how these justices—in very different ways—looked at the Constitution and their role as judges in interpreting the Constitution. The lecture also introduces some of the Court’s landmark decisions: Marbury, Dred Scott, Plessy, Schenck, Gobitis, Brown, and Roe. This introduction discusses the Court’s impact on American government and society as the institution with the power, as John Marshall put it, “to say what the law is.”

Outline

I. This lecture introduces the major themes and topics of the course.
   A. The first theme is that of continuity and change in the Supreme Court’s history.
      1. The Court has endured for more than two centuries without significant change in its structure and functions.
      2. However, both the Court and the nation have undergone much change over the years.
   B. The second major theme is that of consensus and conflict.
      1. One example of consensus is the Court’s unanimous decision in the 1803 case of Marbury v. Madison, in which Chief
Justice John Marshall asserted the Court’s power of judicial review of legislation.

2. Marshall was a strong and effective leader on the Court.
3. The Court also displayed consensus in its unanimous decision in *Brown v. Board of Education* in 1954, under the leadership of Chief Justice Earl Warren.
4. But the Court has also shown much conflict in many five-to-four decisions in landmark cases we will discuss.

C. Our third major theme is that of diversity.
   1. The preamble to the Constitution reflects the common goals of its Framers and of the American people throughout our history.
   2. But Americans are also a people with greatly differing values and interests.

D. The primary example of diversity is the issue of race.
   1. Slavery began in this country in 1619. In 1860, there were four million slaves.
   2. There are now some 35 million African Americans and an equal number of Americans of Hispanic descent.
   3. We will see the effects of racial diversity in our discussion of such cases as *Dred Scott*, *Plessy v. Ferguson*, and *Brown v. Board of Education*.

E. There is also great diversity in religion.
   1. The Puritan settlers were intolerant of religious dissenters.
   2. We will discuss several cases that reflect religious diversity and conflict, over such issues as school prayer and government aid to religious groups.

F. There is also diversity in gender, wealth, sexual orientation, and politics, which have brought many cases to the Court.

II. The Court itself has shown little diversity over its history. Of the 109 justices who have served between 1790 and 2003, there have been only seven Jews, two blacks, and two women.

III. This course will introduce many important justices.

A. Chief Justice John Marshall served from 1801 to 1835 and was a forceful leader.

B. Roger Taney succeeded Marshall in 1836, defending slavery and states’ rights until his death in 1864.
C. Other influential chief justices include Charles Evans Hughes, Earl Warren, and William Rehnquist.

IV. We will also explore the contrasting approaches of judicial restraint and judicial activism.
   A. Judicial restraint is often associated with conservative views, and activism is associated with liberalism, but these are often misleading labels.
   B. During the 1930s, the “Four Horsemen of Reaction” were activist in striking down New Deal laws.

V. We will examine three periods in the Court’s history.
   A. The first period begins with the Constitution’s framing and ends with World War I.
      1. This period was marked by rapid growth in the nation’s population, size, and economy.
      2. During this period, the Court dealt with issues of federal-state power, slavery and segregation, economic regulation, and free speech.
   B. The second period extends from the 1920s through the 1950s.
      1. The nation faced the crises of the Great Depression, World War II, the Cold War, and the civil rights revolution.
      2. The Court made a major shift during the 1930s in the “Constitutional Revolution.”
   C. The third period runs from the 1960s until the present.
      1. We will examine the Warren Court’s landmark rulings on issues of religion, criminal law, and free speech.
      2. Warren retired in 1969 and was followed by Chief Justices Warren Burger and William Rehnquist.
      3. During this period, the Court decided several controversial issues, including abortion, affirmative action, and flag burning.

VI. This course will also introduce many people whose cases reached the Supreme Court.
   A. They include Dred Scott, Homer Plessy, Lillian Gobitis, Fred Korematsu, Linda Brown, and Norma “Jane Roe” McCovey.
   B. We will also hear the personal stories of several of these people, who talked with me about their cases and experiences.
C. In the later parts of this course, we will listen to the lawyers who argued landmark cases before the Court.

VII. This lecture ends with a personal note.
   A. My own background includes participation in the civil rights and antiwar movements.
   B. As a lawyer, I have been active in civil liberties cases and the ACLU.
   C. But my liberal views have never affected my deep respect for the Supreme Court, even when I disagree with its decisions.

Suggested Readings:

Questions to Consider:
1. Do you think an unelected body of judges should have the power to overrule laws passed by elected lawmakers?
2. Given the vast changes in American society since the Constitution was adopted in 1787, would it be a good idea to hold a second Constitutional Convention to draft a new charter of government?
Lecture Two
Shaping the Constitution and the Court

Scope: This lecture discusses the factors that led to the drafting of a new Constitution to replace the ineffective Articles of Confederation, under which the 13 states were governed after the American Revolution. We will look at the Constitutional Convention that opened in Philadelphia in May of 1787 and discuss the debates over the shape of a strong national government. We will examine the “Great Compromise” that recognized slavery, the powers given to Congress and the president under Articles I and II, and the establishment of the Court in Article III and its powers under the supremacy clause. The major figures in this lecture include James Madison, Alexander Hamilton, and Edmund Randolph. Our analysis focuses on the contrast between the sweeping powers conferred on Congress by the Constitution and the view of Hamilton and others that the Court would have a limited role in the federal system. The short-term effect of these events was to create a strong national government, with Congress at the helm, but the long-term effects, particularly in the recognition of slavery in the Constitution, would create national conflict and eventually lead to a bloody Civil War.

Outline

I. This lecture examines the drafting of the Constitution as a charter for a strong national government.
   A. The colonial settlers brought with them English law and rule by Parliament.
   B. After the American Revolution, the 13 states were governed by the Articles of Confederation.
      1. The Articles set up a “firm league of friendship” among the “sovereign” states.
      2. The Articles established a Congress but no executive or judicial body.
      3. Each state had a veto over any revisions to the Articles.
II. A loosely organized group of Federalists pushed for a new Constitution to replace the Articles of Confederation.

A. James Madison of Virginia took the lead in drafting the Constitution.

B. In 1785, Madison tried to mediate the “Oyster War” over fishing rights between the states that bordered the Potomac River and Chesapeake Bay.
   1. He called a meeting at George Washington’s Mount Vernon estate, but this failed to settle the dispute.
   2. A second meeting at Annapolis, Maryland, also failed.
   3. Madison called a third meeting of state delegates in Philadelphia, in May 1787.

III. Madison drafted the “Virginia Plan” for a new Constitution.

A. This plan was based on a strong national government with three branches: a Congress of two houses, a president, and a Supreme Court.

B. The Constitutional Convention met in secrecy for four months.

C. Other influential delegates included Alexander Hamilton of New York and Benjamin Franklin of Pennsylvania.

D. Several delegates feared that a strong national government would not protect citizens and would reduce the power of the states.

IV. There was much debate over the structure and powers of the Congress.

A. The delegates finally agreed on a House of Representatives, with members elected on the basis of each state’s population.

B. They also established a Senate with two members from each state.

V. The delegates were deeply split over the issue of slavery.

A. Southern delegates threatened to leave the Convention if slavery was not recognized as lawful in the Constitution.

B. Madison brokered the “Great Compromise” over slavery, with three provisions in the Constitution.
   1. Slaves would be counted as three-fifths of a person in apportioning House seats.
   2. States would be required to return fugitive slaves to their owners.
3. Congress could not ban the further importation of slaves until 1808.

VI. The Constitution invested great powers in Congress in Article I.
   A. Congress had the power to “lay and collect taxes,” to provide for defense, and to regulate “commerce among the several states.”
   B. Article I also gave Congress the power to pass “necessary and proper” laws to implement its enumerated powers.

VII. The Constitution set up an executive branch in Article II.
   A. There was much debate over the process of electing a president. The delegates agreed to the provision of an electoral college to select the president, with electors initially chosen by state legislatures.
   B. Article II invested the “executive power” in a president with a term of four years.
   C. Aside from his powers as commander in chief of the Army and Navy, the president’s power to execute the laws passed by Congress was the only one not shared with that body, including the power to negotiate treaties and to nominate Supreme Court justices.

VIII. There was little debate about the Supreme Court, which was established in Article III.
   A. State courts then handled most cases, which largely involved contract and property disputes and criminal prosecutions.
   B. The “judicial power” of the Supreme Court extends to cases “arising” under the Constitution and federal law.
   C. Article VI made the Constitution the “supreme law of the land.”
   D. It is important to note that the delegates in Philadelphia had no idea that the Supreme Court would wield its power to strike down hundreds of state and federal laws.
      1. They did not anticipate that states would pass laws that violated the federal Constitution.
      2. Most of the delegates voiced their support for the doctrine of judicial review of legislation.
IX. The delegates finally agreed to submit the Constitution for ratification by state conventions.

A. It would take nine states to ratify the Constitution.

B. Three delegates refused to sign the Constitution: Elbridge Gerry of Massachusetts and George Mason and Edmund Randolph of Virginia.

C. The delegates completed their work in September 1787.

Suggested Readings:

Questions to Consider:
1. Should the delegates to the Constitutional Convention have agreed to the Great Compromise that recognized slavery?
2. Do you think the President should be elected by popular vote, rather than by an electoral college?
Lecture Three
Ratification and the Bill of Rights

Scope: This lecture begins with a review of the ratification debates in state conventions and the debates between the Federalists, who supported the Constitution, and the anti-Federalists, who opposed its ratification. The adoption of the Constitution in 1789 was achieved by very small margins in such key states as Massachusetts, New York, and Virginia. We will also look at the addition of the Bill of Rights to the Constitution in 1791. Finally, we will examine the Court’s first decade, from its first session in 1790. We will see that the Court decided very few cases during its first decade and that many justices complained about the circuit-riding duties imposed on them, which led to several resignations. During this first decade, the Court was led by three men who served as chief justice: John Jay, John Rutledge, and Oliver Ellsworth. All three, and the justices who served with them, were staunch Federalists. The Court’s only significant decision, *Chisholm v. Georgia*, held that a South Carolina resident could sue Georgia to recover money owed by the state. This decision prompted a political backlash that led to adoption of the Eleventh Amendment. We will analyze the factors that led the Court to make the *Chisholm* ruling and the damaging effect it had on the Court’s power and prestige.

Outline

I. The debates over ratification of the Constitution began with its submission to state conventions in September 1787.
   A. Ratification was not a foregone conclusion.
   B. If any one of the largest states failed to ratify, the Constitution would most likely not have survived.

II. There were two major factions in the ratification debates.
   A. The Federalists had drafted and signed the Constitution.
      1. This group included many influential men, with Alexander Hamilton, Benjamin Franklin, and James Madison among them.
2. The Federalists had an advantage in their control of most of the influential newspapers in Boston, New York, Philadelphia, and other major cities.

3. The Federalists also had a concrete proposal in the Constitution.

B. The opposition to ratification was led by the anti-Federalists.
   1. With the exception of Elbridge Gerry and Edmund Randolph, few opponents had any national stature.
   2. The anti-Federalists were mostly from rural areas and did not control the major newspapers.
   3. They also had no alternative to the Constitution but the discredited Articles of Confederation.

III. The Federalists gained some early victories.

   A. Three small states—Delaware, New Jersey, and Georgia—quickly voted to ratify the Constitution.

   B. Pennsylvania was the first major test for the Federalists.
      1. They needed a two-thirds quorum of the state legislature to call a ratification convention.
      2. Several anti-Federalists boycotted the legislative session.
      3. Federalists used strong-arm tactics to gain a quorum, forcibly dragging two anti-Federalists into the State House.
      4. Pennsylvania voted to ratify in December 1787.

   C. Massachusetts was a stronghold of anti-Federalists.
      1. Elbridge Gerry and the renowned patriot Sam Adams were the leading opponents.
      2. Federalists agreed to instruct the state’s congressmen to push for a federal Bill of Rights.
      3. The state convention ratified the Constitution by a narrow margin.

   D. Three more small states voted to ratify: Connecticut, Maryland, and South Carolina.

   E. Virginia was the next big state to vote.
      1. Patrick Henry was a vocal opponent of ratification, arguing that the Constitution would leave the states with little power.
      2. Madison persuaded Edmund Randolph to back the Constitution by promising to introduce a Bill of Rights in Congress.
3. Ratification passed by a 10-vote margin.

F. Nine states had ratified before New York voted, but its support was essential, and the margin for ratification was again very narrow.
   1. Fearing defeat, New York anti-Federalists adopted the strategy of their Massachusetts and Virginia compatriots and pushed for adding a Bill of Rights to the Constitution.
   2. The Federalists agreed, and New York voted by a margin of 30 to 27 to ratify the Constitution.

G. The Constitution’s journey to ratification, over nine months in 1787 and 1788, was a perilous one. The switch of 10 votes in Massachusetts, or 6 in Virginia, or 2 in New York, would have defeated the Constitution in those crucial states.

IV. Madison carried out his pledge and introduced a Bill of Rights in the first Congress in 1789.

   A. Madison actually had little enthusiasm for what he called the “nauseous project of amendments.”
      1. In his opinion, the people had little to fear from Congress, whose powers were “circumscribed” and did not extend to regulation of such matters as religion, speech, and the press.
      2. Madison told his fellow congressmen that the real dangers to the people’s rights came from local and state governments “operating by the majority against the minority.”

   B. Congress submitted 12 proposed amendments to the states.
      1. The first two proposed amendments—dealing with procedures for dividing House seats among the states and methods for setting salaries of congressmen—failed to gain enough votes for ratification.
      2. The amendment guaranteeing rights of religion, speech, press, and assembly against congressional abridgment—which we now think of as the First Amendment—was actually Madison’s third amendment.

   C. Ratification required three-fourths of the states to approve; 10 of the 12 amendments were added to the Constitution in 1791.

   D. The Court decided very few cases under the Bill of Rights until the 20th century and did not rule on a First Amendment case until 1919.
V. The Supreme Court held its first session in New York City on February 1, 1790.
   A. Congress set the number of justices at 6; the number has been as low as five and as high as ten over the Court’s history.
   B. The Court adjourned its first session for lack of a quorum and no cases to decide.
   C. The first ten justices were all loyal Federalists and believed in a strong national government, with little power reserved for formerly “sovereign” states.
   D. The Court had three chief justices during its first decade.
      1. John Jay was the first; he resigned in 1795 to run for governor of New York.
      2. John Rutledge of South Carolina was the second; he served only a few months before the Senate rejected his nomination.
      3. Oliver Ellsworth of Connecticut was the third and served until 1800.
   E. The justices spent much of their time on circuit-riding duty in lower federal courts around the country.
      1. The Supreme Court actually had very few cases to decide in its early years.
      2. Most justices resented the long travel and bad accommodations on circuit-riding sessions.
      3. Several justices resigned because they spent too much time away from their families.

VI. The only important case during the Court’s first decade was *Chisholm v. Georgia* in 1793.
   A. A citizen of South Carolina sued Georgia over a Revolutionary War debt.
   B. Article III gave the Court jurisdiction over suits “between a state and citizens of another state.”
   C. The Court ruled that Georgia was not a “sovereign” state and could be sued.
   D. The reaction to *Chisholm* was fierce, and led to adoption of the Eleventh Amendment, barring suits like that in *Chisholm*.
   E. The Court ended its first decade as a weak and leaderless institution.
Suggested Readings:

Questions to Consider:
1. Should James Madison have insisted that the Bill of Rights apply to the states, as well as the federal government?
2. Was the Court correct in the *Chisholm* ruling that states could be sued by citizens of other states?
Lecture Four

John Marshall Takes Control

Scope: This lecture focuses on John Marshall, who served as chief justice from 1801 until his death in 1835. The context stems from President John Adams’s determination to maintain Federalist control of the Court after he lost the presidency to Thomas Jefferson in 1800. We will look at Marshall’s career, from his work as a lawyer in Virginia through his service in Congress, his role in the XYZ Affair that led to popular acclaim, and his long tenure as chief justice. Other people who figure in this lecture include Adams, Jefferson, and James Madison. We will examine and analyze, as Marshall’s most important decision, the case of Marbury v. Madison in 1803, in which Marshall asserted the Court’s power of judicial review in striking down an act of Congress but, at the same time, averting a direct clash with President Jefferson. The impact of Marshall’s tenure as chief justice, supporting a strong national government and a powerful Court, has been significant and long-lasting.

Outline

I. This lecture begins with the election of President John Adams in 1796.
   A. Adams was a Federalist and narrowly defeated his personal and political rival, Thomas Jefferson.
      1. Jefferson was a Republican, and his party advocated states’ rights.
      2. Under the Constitution at the time, Jefferson became vice president; he frequently clashed with Adams.
   B. Adams placed three justices on the Supreme Court.
      1. Justice Bushrod Washington was a nephew of George Washington, and he served for 30 years on the Court.
      2. Alfred Moore of North Carolina served for four years without distinction.
      3. Chief Justice Oliver Ellsworth resigned in October 1800, one month before Adams lost the presidential election to Jefferson.
II. Adams named John Marshall of Virginia to replace Ellsworth as chief justice.

A. Marshall was born into an influential family; his father was a planter and a friend of George Washington.
   1. Marshall served in the Revolutionary War as a captain and suffered at Valley Forge with Washington.
   2. He studied law for one year, practiced in Richmond, and served in the Virginia legislature.

B. Adams named Marshall as an envoy to arrange a treaty with France.
   1. Marshall rejected the French demand for a bribe to high officials, in what became known as the XYZ Affair.
   2. He returned to national acclaim.

C. Adams named Marshall as secretary of state; he served in this position at the same time he was acting as chief justice.

III. Marshall was personally involved in the famous case of *Marbury v. Madison* in 1803.

A. The case began when the Federalist Congress created new judicial positions in 1801, just before Jefferson replaced Adams as president.
   1. Congress also cut the Court’s membership to five, to prevent Jefferson from replacing an aged Federalist justice.
   2. Congress created 45 positions as justice of the peace in the District of Columbia.

B. After the Senate confirmed the new judges, Marshall was required as secretary of state to sign and deliver their commissions.

C. During the last day of Adams’s term, Marshall failed to complete the signing and delivery of the commissions.

D. Marshall was succeeded as secretary of state by James Madison, who followed Jefferson’s orders and refused to deliver 17 of the commissions.

E. William Marbury was one of the justices of the peace who did not receive his commission, and he sued Madison to deliver it.

IV. Marbury’s lawyer filed his suit with the Supreme Court, seeking a *writ of mandamus* to order Madison to deliver the commission.
A. *Writs of mandamus* are judicial orders that compel a government official to perform a duty required by law.

B. Congress had authorized the Supreme Court to issue mandamus writs in the Judiciary Act of 1789.

V. Marshall wrote for a unanimous Court in the *Marbury* case.
   A. He said that Marbury had a legal right to his commission.
   B. Marshall ruled that Madison had a legal duty to deliver the commission.
   C. The question was, did the Supreme Court have the power to issue the mandamus writ to Madison?

VI. Marshall struck down the mandamus section of the Judiciary Act as an unconstitutional grant of jurisdiction to the Court.
   A. Marshall posed the question: Who decides if laws are constitutional or not?
   B. He said it was the “province and duty” of the Court “to say what the law is.”
   C. Marshall asserted the doctrine of *judicial review* of legislation in the *Marbury* case, giving the Court power to declare laws unconstitutional.
   D. Marshall avoided a direct conflict with the Jefferson administration by ruling against *Marbury*.

VII. The *Marbury* case illustrates the problem that the Court has little power to enforce its rulings, although that was not an issue in the case.
   A. The case of *Worcester v. Georgia* raised the enforcement question in 1831.
   B. The Court ruled that Indian tribes had rights to their land under federal treaties.
   C. President Andrew Jackson refused to obey the Court’s order in the *Worcester* case; he reportedly said, “John Marshall has made his decision; now let him enforce it.”

**Suggested Readings:**
Questions to Consider:

1. If Chief Justice Marshall was responsible for failing to deliver Marbury’s judicial commission, should he have written the Court’s opinion in the case?

2. Was Marshall correct in ruling that the Court has the power to “say what the law is” in deciding whether Congress has exceeded its powers?
Lecture Five
Impeachment, Contract, and Federal Power

Scope: This lecture begins with congressional passage of the Sedition Act in 1798 and the prosecutions of politicians and newspaper editors who supported Thomas Jefferson. These prosecutions, and the caustic criticism of President Jefferson by Supreme Court Justice Samuel Chase, led to the only impeachment trial in the Court’s history. Justice Chase was acquitted, but this experience persuaded the justices to remain out of partisan political battles in future years. This lecture also covers several landmark cases that grew out of the rapid growth of the nation’s population and economy during the first third of the 19th century. This growth produced conflicts between the states and the federal government over their respective powers. The most important figures in this lecture are Chief Justice John Marshall and Daniel Webster, who argued many important cases during this period. We will examine the case of *Fletcher v. Peck*, which stemmed from the so-called Yazoo land scandals, and the important case of *McCulloch v. Maryland*, in which Marshall ruled that states could not impose taxes on the operations of the Bank of the United States, which had been chartered by Congress. We will also examine the case of *Cohens v. Virginia*, in which Marshall asserted the supremacy of the Supreme Court over the decisions of state courts.

Outline

I. This lecture begins with congressional passage of the Sedition Act in 1798.

A. This law was directed by the Federalists against supporters of Thomas Jefferson and reflected disputes over foreign policies toward England and France.

B. The Sedition Act made it a crime to publish “false, scandalous, and malicious” statements about Congress or the president.

C. One victim of the law was Republican Congressman Matthew Lyon of Vermont, a Jeffersonian.

1. Lyon had criticized the “pomp” and “avarice” of President Adams.
2. He was convicted in a trial before Supreme Court Justice William Paterson, who sent Lyon to jail for four months.
3. Lyon was reelected to Congress from his jail cell.

II. Supreme Court Justice Samuel Chase also presided at several Sedition Act trials.
   A. Chase campaigned against Jefferson and accused him of leading a “mobocracy.”
   B. Jefferson persuaded the Republican Congress to impeach Chase in 1804.
   C. The Constitution provides for impeachment for “high crimes and misdemeanors,” but this term is undefined in the Constitution.
   D. Chase was tried in a Senate controlled by Republicans.
      1. Chief Justice Marshall privately proposed a deal to avoid Chase’s impeachment by giving Congress power to override Supreme Court decisions.
      2. This would have undermined the Court’s powers, but Marshall’s proposal never became public.
   E. Chase was acquitted because several Republican senators wanted to avoid a partisan battle over the Court.

III. Another Supreme Court justice had serious personal troubles.
    A. Justice James Wilson had invested in a Georgia land scheme.
    B. The Georgia legislature had been bribed to make land grants in what became known as the Yazoo scheme.
    C. Justice Wilson wound up in debtors prison and died in disgrace.
    D. The Yazoo scheme came before the Court in 1810, in the case of *Fletcher v. Peck*.
       1. The issue in this case was whether a subsequent legislature could annul the fraudulent acts of its predecessor.
       2. Chief Justice Marshall ruled that even if grants were “infected with fraud,” that did not invalidate the land grants.
       3. Marshall stressed that the Constitution was designed to protect property from the “sudden and strong passions” of the voters.

IV. The Court made a landmark ruling on the powers of Congress in *McCulloch v. Maryland* in 1819.
A. This case involved the national Bank of the United States, which Congress had chartered in 1791 and again in 1812.

B. Maryland had imposed a tax of $15,000 on the national bank’s operations.

C. Daniel Webster argued for the national bank in the Supreme Court.
   1. Webster was the leading lawyer of the 19th century; he argued 168 cases before the Court.
   2. Webster relied on the “necessary and proper” clause of the Constitution, arguing that Congress had an “implied” power to charter a national bank.

D. Marshall agreed with Webster, ruling that Congress had power under the necessary and proper clause to promote “legitimate” aims of the national government.

V. Marshall also wrote an important opinion in *Cohens v. Virginia* in 1819.

   A. This case involved two brothers named Cohen, who sold District of Columbia lottery tickets in Virginia.

   B. Virginia law banned the sale of lottery tickets, and Congress had prohibited their sale outside the District.

   C. The Virginia supreme court upheld the conviction of the Cohens, and the state’s lawyer argued that the Supreme Court had no power to review its decisions.

   D. Marshall upheld the convictions but also ruled that the Court had the power to review state court decisions that involved the Constitution or federal laws.

**Suggested Readings:**


**Questions to Consider:**

1. Do you think Chief Justice Marshall was correct in holding that Congress had an “implied” power to create a national bank?

2. If a Supreme Court justice publicly attacks the president, should he or she be subject to impeachment?
Lecture Six
Roger Taney Takes Control

Scope: This lecture begins with two of the Court’s most important rulings during the years of John Marshall’s leadership. We will examine *Dartmouth College v. Woodward* and *Gibbons v. Ogden*, which raised issues under the contract and commerce clauses of the Constitution. The context of this lecture stems from John Marshall’s death in 1835 and his replacement as chief justice by Roger Taney, who served from 1836 to 1864. Although both men were southerners and owned slaves, Marshall had deplored slavery and defended strong federal powers, while Taney was a fervent advocate of states’ rights and slavery. The rise of the Jacksonian movement and of the Democratic Party also forms the historical context of this lecture. We take a biographical look at Taney’s career and his political and judicial views, along with the shift of the Court to control by southern justices and states’ rights doctrines. We also examine two other important cases: *Prigg v. Pennsylvania*, which upheld the power of Congress to enforce the federal fugitive slave clause, and the *Charles River Bridge* case, in which the Taney Court allowed states to promote economic competition. Our analysis focuses on the differences between the Marshall and Taney courts in reading the Constitution, and we explore the impact of the states’ rights doctrine on growing national divisions over slavery.

Outline

I. This lecture focuses on two landmark Supreme Court decisions on state powers. It also discusses the Court’s change of leadership after the death of Chief Justice John Marshall and his replacement by Roger Taney.
   
   A. The Court decided the important case of *Dartmouth College v. Woodward* in 1819.
   
   B. The college began in 1754 as an “Indian charity school” and later educated many sons of New Hampshire’s leading families.
   
   C. The college received a royal charter from King George.
      
      1. It had a self-perpetuating board of trustees.
2. The New Hampshire legislature, controlled by Republican supporters of Thomas Jefferson, revised the charter and added a board of overseers.

3. The original trustees sued to rescind the charter revisions.

II. Daniel Webster, a Dartmouth graduate, argued for the college in the Supreme Court.

   A. He cited the constitutional provision against “impairment of contracts” by the states.
   
   B. Webster argued that it was dangerous to subject contracts to “the fluctuations of public opinion.”
   
   C. There is a story, perhaps apocryphal, that Webster made a tearful plea to the Court to save this “small college” from destruction.

III. The Supreme Court ruled for the college in 1819.

   A. Chief Justice Marshall held that the royal charter had “every ingredient of a complete and legitimate contract.”
   
   B. He also said that the trustees were “one immortal being” whose powers continued forever and could not be abridged by legislative acts.

IV. The Court made another landmark ruling in Gibbons v. Ogden in 1824.

   A. In 1798, New York granted an exclusive charter to Gibbons and Ogden to operate steamboats across the Hudson River to New Jersey.
   
   B. The company’s partners had a falling out. Gibbons obtained a federal license to operate a competing steamboat company.
   
   C. Marshall ruled that the case came within congressional power to regulate “commerce among the several states.”
   
   D. Marshall said that the commerce power is “complete in itself” and cannot be invaded by the states.

V. Marshall dealt with the slavery issue in only one case.

   A. The case involved a ship called The Antelope, which stole slaves from other ships in the Atlantic.
   
   B. The Antelope was seized by an American naval patrol in 1825, and the slaves were placed in federal custody.
C. The question was whether the slaves should be returned to their Spanish and Portuguese claimants.

D. Marshall had advocated the return of blacks to Africa, although he deplored the institution of slavery.

   1. He said that the case was governed by international law, which recognized slavery in those countries in which it was legal.
   2. Marshall said “feelings of humanity” must yield to the “law of nations.”

VI. Marshall died in 1835 at the age of 79.

A. His death was lamented by almost everyone, including his critics.

B. President Andrew Jackson named Roger Brooke Taney of Maryland to replace Marshall as chief justice.

C. Taney had been attorney general of Maryland and the United States.

D. Daniel Webster led the Senate opposition to Taney, but he was confirmed by a vote of 29 to 15.

E. Taney was a slave owner and defender of states’ rights.

F. He had ruled as attorney general that blacks were “a degraded class” and had no rights as citizens when the Constitution was adopted.

VII. One of the first major decisions of the Taney Court was the case of *Charles River Bridge Co. v. Warren Bridge Co.* in 1837.

A. In 1785, the Massachusetts legislature chartered a bridge across the Charles River, with a monopoly until 1855.

B. The legislature chartered a competing bridge in 1828; the Charles River Bridge Co. sued and appealed to the Supreme Court.

C. The case was first heard by the Marshall Court in 1831 but was put off until after Marshall’s death.

D. The case was argued again by Daniel Webster in 1837; he claimed the competing charter would “destroy” property rights.

E. Taney ruled that the legislature had the power to charter a competing company.
1. He said, “the community also have rights” in the use of private property that is regulated by states.
2. He also said that the original charter did not grant an “exclusive privilege” against future competition.

VIII. The Taney Court made its first major slavery decision in the case of *Prigg v. Pennsylvania* in 1842.

A. The Framers had included a fugitive slave clause in the Constitution, which required northern states to return slaves to their owners.

B. A slave named Margaret Morgan escaped from Maryland to Pennsylvania.

C. She was seized by a slave catcher named Edward Prigg.
   1. Pennsylvania had a law requiring a judge to issue a certificate for the return of fugitive slaves.
   2. Prigg did not obtain a certificate and returned Morgan to Maryland. He was later convicted in Pennsylvania of kidnapping.

D. The Supreme Court ruled that Pennsylvania’s law violated the Constitution and federal law.

E. Taney said in a concurring opinion that northern states should be required by federal law to obey the fugitive slave clause.

F. The *Prigg* case set the stage for the later case of *Dred Scott v. Sandford*.

Suggested Readings:

Questions to Consider:
1. Should states be allowed to create monopolies to operate public functions, such as transportation, communications, or power?
2. Was the Court correct in ruling that northern states could not interfere with the return of fugitive slaves to southern states?
Lecture Seven
“A Small, Pleasant-Looking Negro”

Scope: This lecture follows the last in drawing its historical context from bitter conflicts over slavery. It looks at the Missouri Compromise of 1820, the growth of the abolitionist movement, and arguments that the Constitution’s recognition of slavery must yield to a “higher law” of human freedom. The primary figures in this lecture are Chief Justice Taney and Dred Scott, a slave who sued to obtain his freedom. We look at Dred Scott’s life, his family, his owners, and the landmark case involving him that reached the Supreme Court in 1857. Our analysis focuses on Chief Justice Taney’s opinion in the Dred Scott case, holding that no black person was a citizen and that a black person had “no rights which the white man was bound to respect.” The impact of this decision, of course, inflamed passions on both sides of the slavery dispute that culminated in the Civil War and the “self-inflicted wound” on the Supreme Court.

Outline

I. This lecture discusses the famous case of Dred Scott v. Sandford, which the Supreme Court decided in 1857.
   A. We will look at Dred Scott, a slave who sued to gain his freedom, and Chief Justice Roger Taney, as fellow human beings.
   B. Taney defended slavery and white supremacy, but he did not reflect the views of all whites in his social class.
      1. Such men as John Quincy Adams and Charles Sumner, who both served in Congress, opposed slavery as immoral and illegal.
      2. Taney’s view of blacks was warped and distorted by racism.
   C. We know very little about the background of Dred Scott.
      1. He was born around 1800 and was taken by his owner from Alabama to Missouri in 1830.
      2. He was sold to Dr. John Emerson after his owner’s death in 1832.
D. Emerson was an Army doctor who was posted to a fort in Illinois and took Scott with him. Illinois was a free state, and Scott resided there about two years.

E. Emerson was later posted to the Wisconsin Territory, where Congress had banned slavery in the Northwest Ordinance of 1787.

F. Emerson was dismissed from the Army in 1842 and died the next year. Scott became the property of Emerson’s widow.

II. In 1846, Scott filed a “suit for freedom” in Missouri state court.

A. The suit alleged that Scott was a “free person” because of his residence in Illinois and Wisconsin Territory.

B. Missouri courts then applied the doctrine of once free, always free in suits for freedom. A jury ruled in 1850 that Scott was free.

C. Emerson’s widow appealed, and the Missouri supreme court ruled in her favor.
   1. Missouri judges were elected, and pro-slavery Democrats then controlled the court.
   2. The state judges based their decision on an 1851 ruling of the Supreme Court in the case of Strader v. Graham.
   3. In this case, Chief Justice Taney had rejected the once free, always free doctrine, ruling that the status of slaves was governed by the state laws of their owners’ residence.

III. Scott then filed suit in federal court in Missouri.

A. He named Mrs. Emerson’s brother, John Sanford (misspelled by the Supreme Court as Sandford), as defendant.
   1. Sanford was supposedly a resident of New York, although the record is unclear, and he died in an insane asylum.
   2. The Constitution gives federal courts jurisdiction over suits between citizens of different states that are based on federal law or the Constitution.

B. The federal judge relied on the Strader case in ruling against Scott, but he did not decide whether Scott was a citizen with standing to bring a suit against Sanford.

C. Scott’s lawyer filed an appeal with the Supreme Court in 1854.
   1. Sanford had an eminent lawyer, a senator who was a friend of Chief Justice Taney.
2. Scott secured the services of Montgomery Blair, a noted lawyer, with no fee.

IV. The Supreme Court heard arguments in *Dred Scott v. Sanford* in February 1856.

A. The Court had a majority of five southerners, including Chief Justice Taney; all five owned slaves or came from slave-owning families.

B. Montgomery Blair argued that Scott’s residence in Illinois and Wisconsin Territory had made him free, and that the *Strader* case did not apply.

C. Sanford’s lawyers argued that Scott had no standing to sue, because he was not a citizen of Missouri.

D. They also attacked the constitutionality of the Missouri Compromise of 1820, in which Congress banned slavery in territories north of Missouri.

E. The Court put off a decision and scheduled new arguments in December 1856.

1. The most likely reason was to delay a decision until after the presidential election in November 1856.

2. James Buchanan, a Democrat whose party had a strong pro-slavery faction, was elected.

F. The second round of arguments largely repeated those in the first.

V. The Court handed down its decision in March 1857, ruling against Scott by a margin of seven to two.

A. Chief Justice Taney posed this question: Were blacks citizens with standing to sue in federal court?

B. He ruled that no black person, free or slave, was a citizen.

C. Taney based his ruling on “public opinion” in England and Europe at the time the Constitution was adopted.

D. He said that blacks were considered “beings of an inferior order” with “no rights that the white man was bound to respect.”

E. Taney also ruled that the Missouri Compromise was unconstitutional and that Congress had no power to ban slavery in the territories.
F. The *Dred Scott* decision set the stage for heated political battles over slavery.

**Suggested Readings:**


**Questions to Consider:**
1. Under the doctrine of once free, always free, would a slave who escaped to a free state be automatically emancipated?
2. Should there be any distinction between state and national citizenship, and if so, what should it be?
Lecture Eight
The Civil War Amendments

Scope: This lecture begins with the debates that followed the Court’s decision in the *Dred Scott* case, particularly the famous Lincoln-Douglas debates in 1858, during the senatorial contest in Illinois between Abraham Lincoln and Senator Stephen Douglas. We then look at the Civil War and the Reconstruction period that followed the Union victory over the Confederate states. The assassination of President Lincoln, and his replacement by Andrew Johnson, radically changed the nation’s political outlook. Before his death, Lincoln had named Salmon Chase, who supported voting rights for blacks, to head the Supreme Court after Chief Justice Taney died in 1864. But the Court retained its conservative majority. In this lecture, we examine the Civil War Amendments, especially the Fourteenth Amendment, which conferred national and state citizenship on the former slaves and promised them “the equal protection of the laws.” We analyze two major cases decided by the Court during the postwar years. In the Slaughterhouse Case, the Court limited the “privileges and immunities” of citizens against state deprivation. In the case of *Cruikshank v. United States*, the Court threw out indictments of whites in Louisiana who massacred some 200 blacks.

Outline

I. This lecture discusses the political reaction to the *Dred Scott* decision and the Court’s major decisions in civil rights cases over the next two decades.
   A. Republicans denounced the “detestable hypocrisy” of Chief Justice Taney’s ruling.
   B. Defenders of slavery praised its support of “southern opinion.”
   C. Political debate centered on the pro-slavery constitution of Kansas, which petitioned Congress for statehood in 1858.

II. The *Dred Scott* decision became the central issue in the 1858 Senate race between Abraham Lincoln and Senator Stephen Douglas.
A. Douglas advocated “popular sovereignty” in allowing territorial residents to vote on slavery.

B. Lincoln denounced *Dred Scott* as an effort to “nationalize” slavery.

C. Douglas won the Senate election, but the two men faced each other again in the 1860 presidential election.

D. Two Democrats split their party’s vote, and Lincoln was elected with less than 40 percent of the popular vote.

III. Lincoln appealed for sectional peace in his 1861 inaugural address, but the slavery issue inflamed public opinion.

A. Southerners fired on Fort Sumter, South Carolina, in April 1861, after that state declared its secession from the Union.

B. The Civil War raged until the Union victory in April 1865.

C. Chief Justice Taney died in October 1864.

D. Lincoln replaced him with Salmon Chase of Ohio, who opposed slavery and was allied with Radical Republicans in Congress.

IV. Lincoln was assassinated in April 1865. Vice President Andrew Johnson of Tennessee, a former slave owner, became president.

A. Congress enacted the Thirteenth Amendment to abolish slavery, which was ratified in December 1865.

B. Congress passed a strong civil rights act in 1866 and enacted the Fourteenth Amendment.
   1. The amendment overruled the *Dred Scott* case by conferring citizenship on “all persons born or naturalized in the United States.”
   2. It also said that no state could abridge the “privileges and immunities” of citizens.
   3. States could not “deprive any person of life, liberty, or property without due process of law.”
   4. States were barred from denying any person the “equal protection of the laws.”
   5. It also gave Congress the power to enforce its provisions.

C. Ten of eleven former Confederate states refused to ratify the Fourteenth Amendment.
D. Congress responded by imposing Reconstruction governments on southern states and protecting black voting rights in the Fifteenth Amendment.

E. Black and white Republicans voted to ratify the amendment in 1868.

V. The Supreme Court made an important Fourteenth Amendment ruling in the Slaughterhouse Case in 1873.
   A. The Louisiana legislature had created a monopoly for favored butchers in a state-owned slaughterhouse in New Orleans.
   B. Butchers who were excluded sued under the Fourteenth Amendment.
   C. The Supreme Court upheld the monopoly in a five-to-four decision, based on the privileges and immunities clause.
      1. The Court held that state and national citizenship were not synonymous and that states were not required to provide their citizens with all the rights of national citizenship.
      2. The Court ruled that only “state action” came within the provisions of the Fourteenth Amendment.
      3. The case did not involve blacks, but its holdings would affect their rights in later cases.

VI. The Court addressed the rights of blacks in *Cruikshank v. United States* in 1875.
   A. This case involved the single greatest massacre of blacks in American history. It began with an 1872 election dispute in Grant Parish, Louisiana, in which black Republicans and white Democrats both claimed victory.
   B. Armed whites gathered to remove blacks from the parish courthouse in April 1873.
   C. They set the courthouse on fire and killed the blacks who escaped; the death toll was around 200.
   D. Federal officials prosecuted nine whites, and three were convicted under the Enforcement Acts passed by Congress, making it a federal crime to deprive any person of his or her constitutional rights.
   E. The Supreme Court reversed the convictions, holding that whites had not engaged in “state action” during the massacre.
F. The *Cruikshank* decision encouraged southern whites that Reconstruction and federal law enforcement would soon end.

**Suggested Readings:**

**Questions to Consider:**
1. Was Abraham Lincoln correct in charging that Taney intended his *Dred Scott* opinion to “nationalize” slavery?
2. Was the Court correct in ruling in the Slaughterhouse Case that federal courts cannot enforce the “property” rights of state citizens under the due process clause?
Lecture Nine
“Separate but Equal”

Scope: This lecture begins with the Court’s role in the so-called “stolen election” of 1876, in which Justice Joseph Bradley cast the deciding vote that put Republican President Rutherford Hayes in the White House. Hayes had pledged to end the military occupation of the former Confederate states and to press for congressional repeal of the Reconstruction laws that Congress had passed to protect the former slaves from violence and intimidation by whites. After Chief Justice Salmon Chase died in 1873, his two successors—Morrison Waite and Melville Fuller—headed a Court that had little sympathy for the plight of blacks. The primary judicial figures in this lecture are Waite and Fuller, both corporate lawyers, and Justice John Marshall Harlan, a Kentucky lawyer who came from a slave-owning family but who supported the civil rights of blacks. We examine the Civil Rights Cases of 1883, banning Congress from protecting the rights of blacks to use “public accommodations,” such as hotels and restaurants. This lecture also looks at a New Orleans resident named Homer Plessy, who was one-eighth black but who was arrested for sitting in a railroad car reserved for whites. Plessy’s challenge to Louisiana’s “separate cars” law resulted in the Court’s decision in 1896 that the “customs and traditions” of the state’s white citizens outweighed the Fourteenth Amendment’s guarantee of “equal protection of the laws” for all citizens.

Outline

I. This lecture covers the Supreme Court’s role in ending Reconstruction and examines three landmark Civil Rights Cases from the period 1883–1896.

A. The background is the presidential election of 1876. President Grant supported Reconstruction, but his administration was marked by scandals.

B. The Republicans dumped Grant for Rutherford Hayes of Ohio; the Democrats nominated New York Governor Samuel Tilden.
C. Tilden won the popular vote, but the electoral votes in three southern states were disputed.

D. Congress set up a commission to decide the electoral votes, with five members from the Supreme Court. Justice Joseph Bradley, a Republican, cast the deciding vote to elect Hayes.

II. Hayes had assured southern whites that he would end Reconstruction, which he did in 1877.

A. Hayes named John Harlan of Kentucky to the Supreme Court in 1877. He came from a slave-owning family but fought for the Union in the Civil War.

B. Congress passed a strong Civil Rights Act in 1875. This was the last gasp of Radical Republicans, who lost the House to Democrats in 1874.

C. The law provided equal access to public accommodations for blacks, including restaurants, theaters, hotels, and railroads. It was based on the enforcement provision of the Fourteenth Amendment.

III. Five cases reached the Court in 1883, under the caption of the Civil Rights Cases.

A. These cases began in New York, Tennessee, Missouri, Kansas, and California and involved discrimination against blacks in public accommodations.

B. The Court struck down the Civil Rights Act by a vote of eight to one. Justice Joseph Bradley wrote for the majority.

1. He said that state laws did not require segregation in places of public accommodation. In the absence of “state action,” there was no federal jurisdiction.

2. Bradley also said that former slaves were no longer “the special favorite of the laws.”

C. Justice Harlan dissented, calling the state action doctrine “narrow and artificial.”

1. He noted that states regulated many aspects of private businesses that served the public.

2. He also warned that “some other race” would soon “fall under the ban of race discrimination.”
IV. The Court ruled on a case involving another race in *Yick Wo v. Hopkins* in 1886.

A. San Francisco passed a law requiring laundry owners to get a certificate from the fire marshal. All but one white owner received a certificate, but none of the 200 Chinese owners did.

B. A Chinese laundryman named Yick Wo challenged the discrimination, and the Court upheld his claim under the Fourteenth Amendment.
   1. The San Francisco law and the fire marshal’s actions were clearly “state action.”
   2. The Court said that even if a law was “fair on its face” and did not use racial categories, it was unconstitutional if it was applied with “an evil eye and an unequal hand.”

V. The Court did not follow the *Yick Wo* precedent in its next major civil rights case, *Plessy v. Ferguson*.

A. The case began with an 1890 Louisiana law that required “equal but separate” railroad cars for different races. This was one of many *Jim Crow* laws passed in southern states.

B. The law was challenged by Homer Plessy in 1892. He was an *octrooon*, the term for persons who were one-eighth black, and he passed for white.

C. Plessy was convicted in state court and sued Judge John Ferguson for denying his constitutional claim under the Fourteenth Amendment.

D. The state courts upheld the law as a “reasonable” exercise of “police powers” to protect the public health, safety, welfare, and morals.

VI. The Supreme Court upheld the law by an eight-to-one margin.

A. Justice Henry Brown wrote for the majority.
   1. He said that state lawmakers could base Jim Crow laws on the “established usages, customs, and traditions” of the people.
   2. Brown relied for precedent on cases that upheld school segregation in Massachusetts and other northern states.

B. Justice John Harlan dissented in the *Plessy* case.
   1. He said that the Fourteenth Amendment was designed to protect the civil rights of all citizens, regardless of race.
2. Harlan wrote a famous sentence: “Our Constitution is color-blind and neither knows nor tolerates classes among citizens.”

C. Plessy established the “separate but equal” doctrine that survived for another six decades, until the Brown decision in 1954.

Suggested Readings:
Peter Irons, A People’s History of the Supreme Court, chapters 17–18 (1999).

Questions to Consider:
1. Do you agree that Congress should have the power to prohibit racial discrimination by the operators of private businesses that serve the public?

2. Does Justice Harlan’s statement in his Plessy dissent that the Constitution is “color-blind” mean that affirmative action plans violate the Constitution?
Lecture Ten
Two Justices from Boston

Scope: This lecture is primarily biographical in nature. It looks at the backgrounds, legal careers, and judicial approaches of two Supreme Court justices who differed in many ways but who shared a devotion to the First Amendment. Oliver Wendell Holmes, who joined the Court in 1902 and served until 1932, was a Boston Brahmin who had been gravely wounded in the Civil War and later served on the Massachusetts supreme court. Holmes believed in upholding laws that regulated economic matters and in striking down laws that regulated free speech. Brandeis, the first Jewish justice, had defended workers and consumers as the “people’s lawyer” before he joined the Court in 1916, serving until 1939. He survived a bitter confirmation battle in the Senate, prompted both by anti-Semitism and fear of his “radical” views. We will analyze the divergent approaches to constitutional interpretation that brought Holmes and Brandeis to the same decisions, and we examine their lasting impact on American law.

Outline

I. This lecture takes a biographical approach, examining the backgrounds and careers of two of the Supreme Court’s most influential justices, Oliver Wendell Holmes and Louis Brandeis.
   A. As background, justices were given life tenure by the Constitution and can remain on the Court until they die, resign, or retire.
   B. From 1790 until the present, 38 of 109 justices have served for 20 years or more. Thirteen have served for at least 30 years.
   C. Many justices have strong philosophical views, both liberal and conservative. Others have never articulated a consistent judicial philosophy.

II. Oliver Wendell Holmes was indisputably a great justice.
   A. He was born in 1841 into a prominent Boston family; his father was a doctor and a noted essayist.
   B. Holmes attended Harvard College, but he left to serve in the Union army during the Civil War; he was wounded three times in battle.
C. His war experiences made Holmes a skeptic and fatalist in his views about human nature and the law.

D. Holmes attended Harvard law school and later practiced and taught law at Harvard before he was named to the Massachusetts supreme court in 1882.

E. He wrote an influential book, *The Common Law*, in 1881. Holmes attacked legal *formalism* and said that judges should look to the “felt necessities of the times” in deciding cases.

III. Holmes was named to the Supreme Court by President Theodore Roosevelt in 1902, at the age of 61.

A. He adopted the view of *judicial deference* to elected lawmakers in cases of economic regulation.

B. Holmes expressed this view in his dissent in *Lochner v. New York* in 1905.

C. The New York legislature had set maximum hours for bakers, and the Court’s majority struck down the law under the *liberty of contract* doctrine.

D. Holmes wrote in dissent that the Constitution was not intended to embody “a particular economic theory” but had been designed “for people of fundamentally differing views.”

IV. Holmes followed his judicial deference position in upholding the Espionage Act in a landmark free speech case during World War I.

A. In *Schenck v. United States* in 1919, Holmes sustained a conviction for distributing leaflets against the draft. He announced the “clear and present danger” test in this case.

B. But he changed his position in later free speech cases. In 1929, he wrote in dissent, in *Schwimmer v. United States*, that a pacifist should not be disqualified from U.S. citizenship.

C. One of Holmes’s greatest mistakes was upholding a state law that allowed the forced sterilization of supposedly “feeble-minded” persons. In *Buck v. Bell* in 1927, he said that states can prevent “those who are manifestly unfit from continuing their kind.”

V. Louis Brandeis was another great justice.

A. He was born in 1856 to a non-observant Jewish family, but he remained an active Zionist as an adult.
B. Brandeis attended Harvard law school and practiced law in Boston.

C. He based his legal philosophy on the facts of cases and their social implications.

D. An example of this philosophy was his role in *Muller v. Oregon* in 1908.
1. Brandeis argued in the Supreme Court, defending a law that set maximum hours for women workers.
2. He submitted a brief with 2 pages of legal citation and 100 pages of reports about the health conditions of women workers.
3. Brandeis won this case, and his “Brandeis brief” was widely emulated.

E. He became known as the “people’s lawyer.” President Wilson named him to the Court in 1916.
1. William Howard Taft, a former Republican president, led the opposition to his confirmation as a dangerous radical.
2. Anti-Semitism also affected the nomination, but the Senate confirmed Brandeis, who became the first Jewish justice.

VI. Brandeis opposed big business and big government and wrote books called *Other People’s Money* and *The Curse of Bigness*.

A. During the Great Depression, he voted against New Deal laws that gave business power to set prices.

B. Brandeis also developed the right to privacy, writing an influential law review article with that title in 1890. He said that people had “the right to be let alone” by government.

C. He also wrote in one opinion that “the greatest dangers to liberty” come from “men of zeal, well-meaning but without understanding.”

VII. Holmes and Brandeis differed in several ways.

A. Holmes was the last great common-law judge, while Brandeis was the first great statutory-law judge.

B. Holmes distrusted the common man, while Brandeis had faith in his fellow citizens.

C. Holmes rarely discussed facts in his opinions, while Brandeis put great stress on them.
D. But both justices had real passion for the law and boldness of mind.

Suggested Readings:

Questions to Consider:
1. Justice Holmes stated that the Court should respond to the “felt necessities” of the times. Does this mean that the Court should pay attention to public opinion on controversial issues, such as school prayer or abortion?
2. Justice Brandeis believed that “the right to be let alone” by government is the central meaning of *liberty* under the due process clause. Do you agree?
Lecture Eleven
The Laissez-Faire Court

Scope: Like our lecture on the Marshall Court in the early 19th century, the context of this lecture stems from rapid growth in the nation’s population and economy in the latter part of that century. Factory jobs lured millions of immigrants, many of whom practiced radical politics and joined unions, facing hostility from employers. Farmers turned out bumper crops, but railroads and banks charged high rates and high interest. In this lecture, we look at two contrasting pairs of economic regulation cases decided by the Supreme Court between 1877 and 1908. They include *Munn v. Illinois*, upholding state power to set the prices charged by owners of grain elevators; *United States v. E.C. Knight Co.*, limiting the scope of federal antitrust laws; *Lochner v. New York*, striking down a state maximum-hours law for bakers; and *Muller v. Oregon*, upholding a maximum-hours law for women laundry workers. We analyze the conflict within the Court over the notion of a laissez-faire Constitution based on the liberty of contract doctrine and the effect of the Court’s decisions on later rulings during the New Deal period.

Outline

I. This lecture examines the Court’s landmark rulings in economic regulation cases from 1877 to 1908.
   A. The nation underwent rapid economic growth during this period, but workers and farmers suffered from low wages and farm prices.
   B. These cases raise the question of interpreting the due process clause of the Fourteenth Amendment, which protects “liberty” and “property” against state deprivation.

II. Beginning in the 1860s, legal scholars and judges debated the meaning of the due process clause.
   A. Some argued that judges should look only at the “process” by which laws were adopted.
      1. Judges should uphold laws that were a “reasonable” exercise of the states’ “police powers.”
2. This doctrine became known as *procedural due process*.

B. Others were advocates of *substantive due process*.
   1. Judges were free to examine the “substance” of laws to determine if they deprived any person of liberty or property.
   2. This doctrine allowed judges to substitute their views for those of elected lawmakers.

C. An influential advocate of substantive due process was Thomas Cooley, a judge and law professor.
   1. He wrote a “Treatise on Constitutional Limitations” in 1868.
   2. Cooley attacked “arbitrary interference” with private property and established the doctrine of *liberty of contract* that conservative judges applied to economic regulation.

III. The first major Supreme Court battle over liberty of contract came in *Munn v. Illinois* in 1877.

   A. Farmers were forced to pay high prices for grain storage by a Chicago monopoly.

   B. State lawmakers set maximum rates for grain storage. The Court upheld the law, holding that private property “affected with a public interest” was subject to regulation.
      1. Justice Stephen Field denounced the ruling as “subversive of the rights of private property” and denied that any business was subject to state regulation of its prices or rates.
      2. Justice Field lost this first skirmish over substantive due process but gained a partial victory 10 years later, in a case that arose out of the temperance crusade led by Carrie Nation.

   C. The Court upheld state regulation of the liquor industry in *Mugler v. Kansas* in 1887.
      1. Justice John Harlan said that society has the right to protect itself against the “injurious consequences” of the liquor trade.
      2. But he also said that judges have a duty to look at the “substance” of laws to determine whether they exceed legislative powers.

IV. The Court was dominated by conservative justices during this period, most of them former corporate lawyers.

   A. The Court struck down state regulation of railroad rates in 1890, marking the triumph of substantive due process.
B. The Court also struck down major provisions of the Sherman Antitrust Act in *United States v. E.C. Knight Co.*; this case involved the “sugar trust” that controlled 98 percent of the market.

C. In 1895, the Court ruled against the federal income tax in *Pollock v. Farmers Loan and Trust Co.*; in 1916, the Sixteenth Amendment overruled this decision.

D. The Court also upheld in 1895 the conviction of Eugene Debs for leading a national railway strike, on grounds that it disrupted mail service and impeded interstate commerce.

V. The Court decided the landmark case of *Lochner v. New York* in 1905.

A. New York passed a law setting maximum hours for bakers at ten per day and 60 per week.

B. Joseph Lochner owned a bakery and challenged his conviction for violating the law.

C. The Court struck down the law by a five-to-four margin.
   1. The majority said that the law was not a health measure and that the “limits of the police power” had been exceeded. They applied the liberty of contract doctrine in this case.
   2. Justice Holmes dissented; he said that the Constitution was not designed to “embody a particular economic theory” and was made “for people of fundamentally differing views.”

VI. In 1908, the Court made an exception to the *Lochner* decision and the liberty of contract doctrine in *Muller v. Oregon*.

A. The justices unanimously upheld a law setting maximum hours for women workers.

B. They based the ruling on preserving the “physical well-being” of women and the need for “healthy mothers.”

C. But the liberty of contract doctrine remained dominant in the Court during this period.

**Suggested Readings:**
Questions to Consider:

1. Do you agree with the *Munn* case ruling that private property “affected with a public interest” should be subject to state regulation of its prices?

2. Should employees have the right to make contracts with their employers over wages, hours, and working conditions on terms suitable to each party?
Lecture Twelve
“Clear and Present Danger”

Scope: The historical context of this lecture stems from American involvement in World War I and opposition to that war from political radicals who saw it as a “capitalist conflict.” The primary judicial figures in this lecture are Justices Oliver Wendell Holmes and Louis Brandeis, whose constitutional philosophies we discussed earlier. We will also look at Charles Schenck, a socialist leader in Philadelphia, and at Jacob Abrams and four other Russian anarchists in New York City. Schenck was convicted for violating a wartime “sedition” law by distributing leaflets that denounced the military draft. Abrams and his fellow radicals were convicted for tossing out of tenement windows leaflets that opposed American intervention in the Soviet civil war. Justice Holmes wrote for the Court in 1919, upholding Schenck’s conviction as posing a “clear and present danger” to military recruiting. Nine months later, Holmes dissented with Brandeis in the Abrams case, arguing that only “incitement” to law breaking could be punished. We analyze the factors that led Holmes to change his mind and examine the impact of the “clear and present danger” test on later free speech cases.

Outline

I. This lecture examines the Court’s rulings in free speech cases that came out of World War I.
   A. The First Amendment provides that Congress shall pass “no law” that abridges “freedom of speech, or of the press.”
   B. Supreme Court justices have taken sharply opposing views in First Amendment cases.
      1. On one side are absolutists, such as Justice Hugo Black, who argued that “no law means no law.”
      2. On the other side are those such as Chief Justice Fred Vinson, who argued that government has the power to protect itself and the public against dangerous speech.
      3. In between are those who believe in balancing free speech rights with public interest based on the facts of each case.
II. Free speech cases did not reach the Court until 1919.
   A. Congress passed a Sedition Act in 1798, but it expired in 1801 and never reached the Court.
   B. In 1917, after the nation entered World War I, Congress passed the Espionage Act.
      1. The law made it a crime to obstruct military recruiting.
      2. It was aimed at war opponents who urged men to resist the draft.
   C. World War I was unpopular with many groups, including those of German and Irish ancestry, religious pacifists, and political radicals. The Socialist Party led the opposition to the war.
   D. The military draft led to widespread opposition and violations of the draft law.
      1. More than 300,000 men were classified as draft evaders.
      2. The Justice Department brought 2,000 prosecutions under the Espionage Act.

III. The first test of the Espionage Act reached the Court in 1919 in *Schenck v. United States*.
   A. Charles Schenck was secretary of the Socialist Party in Philadelphia.
      1. He prepared leaflets with the text of the Thirteenth Amendment on one side.
      2. The other side denounced American participation in the war and said the draft was “involuntary servitude.”
      3. The leaflet asked for signatures on a petition to Congress to repeal the draft law.
   B. Schenck was convicted under the Espionage Act and sentenced to jail.
   C. The Supreme Court upheld his conviction in a unanimous opinion by Justice Oliver Wendell Holmes.
      1. Holmes said that “in ordinary times,” Schenck’s leaflet would have been protected by the First Amendment.
      2. He added that wartime is different, and speech that is a “hindrance” to the war effort is not protected.
      3. Holmes used the metaphor of “falsely shouting ‘fire’ in a crowded theater” as an example of unprotected speech.
4. He also said that speech could be punished if it created a “clear and present danger” to the government.

D. The Court also upheld the conviction of Socialist Party leader Eugene Debs for giving a speech that criticized the war effort.
   1. Holmes said the “natural and intended effect” of Debs’s speech was to obstruct military recruiting.
   2. Debs got a 10-year prison term and ran for president in 1912 and 1920, winning close to a million votes each time.

IV. The Court decided another Espionage Act case in 1919, eight months after the Schenck decision.
   A. The case of Abrams v. United States involved five Russian immigrants who were anarchists.
   B. They objected to President Wilson’s sending American troops to intervene in the Russian civil war against the Bolshevik regime.
   C. The anarchists distributed leaflets in the Lower East Side of Manhattan.
      1. They dropped the leaflets from rooftops and tenement windows.
      2. The leaflets appealed for a “general strike” of munitions workers.
   D. The anarchists were convicted and sentenced to 20-year prison terms.

V. The Court upheld the convictions by a margin of seven to two.
   A. The majority said that the leaflets were aimed at “revolution” and defeating the government’s war plans in Europe.
   B. Justice Holmes had changed his mind about the “clear and present danger” test, influenced by criticism from federal judges and law professors.
   C. Holmes said the leaflets were not likely to “impede” the war effort.
   D. He advocated the “free market of ideas” as the best way to deal with war critics.
   E. The anarchists were later deported to the Soviet Union, where they were persecuted.
Suggested Readings:

Questions to Consider:
1. Do you think the First Amendment protects a person who directly incites others to violate the law?
2. Should there be different legal standards during wartime for speech that hinders the government’s war policies?
Lecture Thirteen
The Taft Court and the Twenties

Scope: The context of this lecture is the conservative reaction in the country that followed World War I. The wave of strikes that broke out in 1919, and fears that American sympathizers of the Bolshevik Revolution in Russia would foment revolution here, prompted voters to place Republicans in the White House from 1921 to 1933. President Warren Harding named former President William Howard Taft to lead the Supreme Court in 1921, replacing Edward White, a onetime Confederate officer. Under Taft, who served until 1930, the Court was staunchly conservative in economic regulation cases, striking down a minimum-wage law for women in *Adkins v. Children’s Hospital*. The Taft Court also upheld state “sedition” laws in *Gitlow v. New York* and *Whitney v. California*. But it also upheld the rights of schools to teach the German language in *Meyer v. Nebraska* and of parents to send their children to parochial schools in *Pierce v. Society of Sisters*. We will analyze the reasons the Court issued these seemingly conflicting decisions and examine their impact on constitutional law in later cases.

Outline

I. This lecture examines the Court’s major decisions in the decade of the 1920s.

   A. The American people enjoyed much prosperity during these years, and voters elected three Republican presidents: Warren Harding, Calvin Coolidge, and Herbert Hoover.

   B. These presidents named eight Supreme Court justices. The most influential was William Howard Taft, who led the Court from 1921 to 1930.

      1. Taft was a former president, who had named six justices himself, including his predecessor, Chief Justice Edward White.

      2. Taft was a staunch conservative and had a forceful personality.
3. The Court had other forceful justices, including Oliver Wendell Holmes and Louis Brandeis. They were joined in most cases by Harlan Fiske Stone, a former U.S. attorney general.

4. But the Court was dominated by Taft and four conservative justices who later became known as the “Four Horsemen of Reaction.”

II. The Taft Court made two landmark rulings in free speech cases, both of which involved members of Communist parties.

A. One Communist leader was Benjamin Gitlow of New York.
   1. He was convicted under state law of criminal anarchy, defined as “advocating the overthrow of government by force.”
   2. Gitlow had distributed a “Left-Wing Manifesto” that called for “revolutionary mass action” but disavowed “immediate revolution.”

B. Another Communist was Charlotte Whitney in California.
   1. She was from a prominent family and a niece of a former Supreme Court justice.
   2. She joined the Communist Labor Party and was convicted under California’s criminal syndicalism law for advocating “crime or sabotage” to bring about political change.

III. Appeals in the Gitlow and Whitney cases reached the Court in 1925.

A. The justices decided the Gitlow case but sent Whitney back for further hearings.

B. Gitlow’s lawyers did not rely on the First Amendment; the Court had ruled in 1833 that it did not apply to the states. They based their arguments on the liberty provision in the Fourteenth Amendment.

IV. The Court upheld Gitlow’s conviction by a seven-to-two margin.

A. The majority did not rely on the clear and present danger test in Justice Holmes’s 1919 Schenck opinion.
   1. They relied on the state’s “police powers” to protect public safety.
   2. They held that revolutionary speech could be punished without evidence of its effect on readers or listeners.
3. The opinion said that a “single revolutionary spark” might start a “conflagration,” and states had power to stamp out those sparks.

B. Justice Holmes dissented in Gitlow; he said, “every idea is an incitement,” but Gitlow’s speech had “no chance” of sparking a revolution.

C. The majority opinion made a significant doctrinal change.
   1. It said speech and press rights were protected from state abridgment by the Fourteenth Amendment.
   2. This statement began the process of “incorporating” the Bill of Rights into the Fourteenth Amendment and applying it to the states.

D. The Court decided the Whitney case in 1927, upholding her conviction.
   1. It said she belonged to a “criminal conspiracy” that was dangerous to the government.
   2. The ruling said that membership alone in a revolutionary group could be punished.
   3. In reluctantly joining the Court’s opinion, Justice Brandeis voiced his own position on freedom of speech, writing that “fear of serious injury cannot alone justify suppression of free speech…the remedy to be applied is more speech.”

E. The Court later unanimously overruled the Whitney decision, ruling in Brandenburg v. Ohio in 1969 that only evidence of “imminent lawless action” could justify restrictions on speech.

V. The Taft Court decided an important case on workers’ rights in Adkins v. Children’s Hospital in 1923.

A. Congress had created a board to set minimum wages for women in the District of Columbia.

B. The hospital challenged the law, arguing that it was not a health measure, as the maximum-hours law upheld in the Muller case had been.

C. The Court struck down the law by a vote of five to four.
   1. The majority said that women now had the vote and differences with men had neared the “vanishing point.”
   2. The ruling was so reactionary that even Chief Justice Taft dissented.
3. Justice Holmes said in dissent that the Constitution “does not speak of freedom of contract” and that government has power to regulate wages.

VI. The Taft Court decided two cases involving rights of parents and teachers to educate children.
   A. *Meyer v. Nebraska* involved a state law banning the teaching of foreign languages in private and public schools; it reflected anti-German sentiment in World War I.
   B. The Court struck down the law as a violation of the liberty to “acquire useful knowledge.”
   C. The Court also struck down an Oregon law requiring all children to attend public schools, in *Pierce v. Society of Sisters*.
      1. The law was backed by the Ku Klux Klan and other anti-Catholic groups and was challenged by the Society of Sisters, which operated parochial schools.
      2. The Court said the state could not “standardize” its children by forcing them into public schools only.

VII. The fact that the decisions in the *Gitlow, Whitney,* and *Adkins* cases can be viewed as conservative, while the rulings in the *Meyer* and *Pierce* cases can fairly be called liberal, raises several key questions.
   A. How can we decide whether particular rulings, or individual justices, fit the labels of “liberal” and “conservative”?
   B. How can we apply the terms *judicial restraint* and *judicial activism* to judicial decisions and philosophies?

Suggested Readings:

Questions to Consider:
1. Should the government be allowed to prosecute persons who advocate the commission of violent acts?
2. Do you think parents and school boards should be able to decide that certain topics should not be discussed in classrooms, such as witchcraft or homosexuality?
Lecture Fourteen
Wins and Losses for New Deal Laws

Scope: The context of this lecture is the Great Depression that followed the stock market crash of 1929, and Franklin Roosevelt’s presidential victory in 1932 with a promise of a “New Deal” for the American people. The major figures in this lecture are Roosevelt and Charles Evans Hughes, who succeeded William Howard Taft as chief justice in 1930. We will also look at four conservative justices who became known as the “Four Horsemen of Reaction.” Early in the New Deal period, Hughes and Justice Owen Roberts joined the Court’s liberals, known as the “Three Musketeers,” to uphold state laws that protected homeowners from mortgage defaults and that fixed milk prices, in the Blaisdell and Nebbia cases. However, in 1935 and 1936, the Court struck down the twin pillars of the New Deal economic recovery program, the National Industrial Recovery Act and the Agricultural Adjustment Act, in the Schechter and Butler cases. We will analyze the reasons the Court took differing positions on state and federal efforts to deal with the Depression and the impact of these decisions on American politics and society.

Outline

I. This lecture discusses the Court’s major rulings during the first administration of President Franklin D. Roosevelt, from 1933 to 1937.
   A. Roosevelt ended 12 years of Republican control of the White House with his 1932 victory over Herbert Hoover.
   B. Roosevelt pledged a “New Deal” for the American people, saying the country needed “bold, persistent experimentation” to recover from the Great Depression.
   C. During its “Hundred Days” session in 1933, Congress created two important new agencies.
      1. The National Recovery Administration, called the “Blue Eagle,” allowed business groups to establish “codes of fair competition” that set prices and production quotas.
2. The Agricultural Adjustment Administration imposed taxes on agricultural processors that were paid to farmers who agreed to cut their production.

D. The New Deal lawyers who drafted these laws, and many of the congressmen who voted for them, admitted that they stood on shaky constitutional ground.

II. Chief Justice Taft died in 1930, and President Hoover replaced him with Charles Evans Hughes.

A. Hughes was a former Supreme Court justice who had resigned in 1916 to run for president against Woodrow Wilson.

B. Hoover also placed Owen Roberts and Benjamin Cardozo on the Court.
   1. Roberts was a corporate lawyer who replaced Edward Sanford.
   2. Cardozo was a New York state judge who replaced Oliver Wendell Holmes.

C. The Court was dominated by the Four Horsemen of Reaction, with Hughes and Roberts as swing votes in the center.

D. Cardozo joined Louis Brandeis and Harlan Fiske Stone as a liberal bloc, known as the “Three Musketeers.”

III. The Court decided two cases in 1934 that involved “Little New Deal” laws passed by state legislatures.

A. The first case was Home Building & Loan Co. v. Blaisdell.
   1. The Minnesota legislature passed a mortgage-moratorium law that extended the time for redeeming mortgages by two years.
   2. The loan company had foreclosed the mortgage of John Blaisdell, and state courts upheld the law.

B. The company’s lawyers argued that the law violated the impairment of contracts provision in the Constitution.

C. The Court upheld the law in a five-to-four decision. Chief Justice Hughes conceded that the law impaired the mortgage contract but said it was not a permanent change. He cited the economic “emergency” to justify the law.

D. The Court also upheld New York’s law setting minimum retail prices for milk, to deal with overproduction and falling prices.
1. A grocery store owner, Leo Nebbia, challenged his conviction for violating the law.
2. The Court also upheld this law by a five-to-four vote; the majority said that prices could be regulated in the “common interest.”

IV. The Court struck down a congressional New Deal law in January 1935 in *Panama Refining Co. v. Ryan*.
   A. Congress had banned the shipment of “hot oil” that was produced in excess of state quotas that were set by federal officials.
   B. The Court ruled that Congress could not delegate its power to set oil quotas to executive officials.

V. The Court made a major ruling in 1935, striking down the National Industrial Recovery Act (NRA) in *Schechter Poultry Co. v. United States*.
   A. This case involved the kosher poultry business in New York City.
      1. The NRA code for the poultry industry set prices, wages, and sanitary regulations.
      2. The Schechter firm was convicted for selling “sick chickens” and for other code violations.
   B. The Court unanimously ruled against the NRA.
      1. It said that the Schechers’ poultry, which was shipped from other states, had “come to rest” in New York and was not part of interstate commerce.
      2. The Court also ruled, on delegation grounds, that Congress could not give business groups power to make legislative decisions.
   C. President Roosevelt denounced the Court’s “horse-and-buggy” approach to interstate commerce, leading to speculation about possible efforts to curb the Court’s powers.

VI. The Court also struck down the Agricultural Adjustment Act (AAA) law in January 1936 in *United States v. Butler*.
   A. This case involved the government’s claim for processing taxes from a bankrupt textile mill.
   B. Government lawyers defended the law under the Constitution’s general welfare clause, asking the Court to read it broadly.
C. The Court ruled by a six-to-three vote that agriculture was a “local” affair and that the Constitution gave Congress no power to regulate it.

D. President Roosevelt did not make a public response to the AAA decision, but the dissenters said that Congress could use its taxing powers to alleviate “a nation-wide maladjustment” of the economy.

Suggested Readings:

Questions to Consider:
1. Do you think that conditions during times of severe economic depression justify laws that allow a moratorium on mortgage and other contract payments?
2. Under what circumstances should the government have the power to fix maximum and minimum prices for food, housing, and other essential goods?
Lecture Fifteen
“Court Packing” and Constitutional Revolution

Scope: This lecture follows the last in looking at President Roosevelt’s reaction to the Supreme Court’s rejection of his New Deal programs in the Schechter and Butler decisions. We will focus on FDR’s famous “court-packing” plan, his dramatic proposal to add up to six new justices to the Court. Shortly after Roosevelt announced his plan in February 1937, the Court surprised the nation by reversing a decision made just the year before, when it struck down a state law setting minimum wages for women in the Morehead case. Ruling in March 1937, the justices upheld a virtually identical law in the West Coast Hotel case by a five-to-four margin, with Justice Owen Roberts shifting his vote from the Morehead decision. A month later, Roberts again joined the majority to uphold the power of Congress to protect workers’ rights to join unions in the Jones & Laughlin case. We will analyze the factors that led to what was called “the switch in time that saved nine,” seeing how Roberts’s shift actually followed FDR’s sweeping election victory in 1936 and preceded the court-packing plan. We will also look at the short-term and long-term effects of the Constitutional Revolution of 1937 on both the Court and the course of constitutional law.

Outline

I. This lecture discusses the Court’s major rulings during the crucial years of 1936 and 1937 and the “court-packing” plan of President Franklin Roosevelt.
   A. These years were marked by widespread labor unrest and sit-down strikes in many factories.
   B. After the Court struck down the NRA in 1935, Congress passed the Bituminous Coal Conservation Act with the same labor provisions as the NRA.
      1. The law was challenged in Carter v. Carter Coal Co. The Court struck it down by a vote of six to three.
      2. The majority said that strikes were “local evils” that Congress could not regulate.
3. The dissenters said that labor violence blocked the stream of interstate commerce.

II. The Court made a major ruling in Morehead v. Tipaldo in June 1936.
   A. New York had set minimum wages for women workers.
   B. The case was rushed to the Supreme Court for a decision before its term ended.
   C. The facts of this case were virtually identical to those in Adkins v. Children’s Hospital in 1923.
   D. The Court struck down the New York law by a five-to-four vote.
      1. The majority said, “the Adkins case controls this one,” citing the liberty of contract doctrine.
      2. The dissenters said there was a “grim irony” in speaking of freedom of contract during the Great Depression.
      3. A respected newspaper columnist said that the Court’s decision was based on the fact that “five is a larger number than four” and for no other reason.

III. The 1936 presidential election pitted Roosevelt against Kansas governor Alf Landon.
   A. FDR did not directly attack the Court during his campaign.
   B. The Republican platform criticized the Morehead decision and suggested a constitutional amendment to overturn it.
   C. FDR won a sweeping victory, taking every state but two in the election.

IV. In February 1937, FDR announced his court-packing plan.
   A. The plan would allow Congress to add up to 50 new federal judges, including six on the Supreme Court, for every justice over 70 who did not retire; six justices were then over 70.
   B. Congressional leaders were reluctant to back the plan; one said, “here’s where I cash in my chips.”
   C. Chief Justice Hughes told the Senate that the Court had no need for additional justices and was “fully abreast” of its workload.
   D. FDR responded to criticism by making a national radio speech; he said the Court had become a “super-legislature” that frustrated the will of the people and of Congress.
V. Two months later, the Court abruptly shifted course in the case of West Coast Hotel v. Parrish.

A. Washington State lawmakers had passed a law setting minimum wages for women workers.

B. The state courts had upheld the law, saying that Adkins and Morehead did not control this case.

C. Justice Owen Roberts shifted his vote from Morehead to West Coast Hotel, giving the Court a five-to-four majority to uphold the Washington law.

D. Chief Justice Hughes wrote for the majority in this case.
   1. He said the Court needed to make a “reexamination of the Adkins case.”
   2. Hughes said the “exploitation” of women workers required a law to protect them from “unconscionable employers.”
   3. He also said the Constitution “does not speak of freedom of contract.” He added that economic regulation that is reasonable and is adopted “in the interests of the community is due process” and does not violate the Constitution.
   4. The Court’s ruling ended the doctrine of substantive due process in economic regulation cases.

E. The question of which side was right in this debate, the old majority or the new majority, clearly depends on how one reads the due process clause.

VI. The Court made another major ruling in National Labor Relations Board v. Jones & Laughlin Steel Co. in April 1937.

A. Congress had passed the Wagner Act to protect the right of workers to organize unions and bargain with employers over wages, hours, and working conditions.

B. The Jones & Laughlin company had fired workers for union activities, and the Labor Board had ordered it to rehire them.

C. The Court upheld the Wagner Act by a five-to-four vote.
   1. Chief Justice Hughes wrote for the majority, saying that labor strife disrupted the “stream of commerce” between states and was subject to federal regulation.
   2. The Four Horsemen of Reaction dissented, claiming that “the right to contract is fundamental” and that companies could hire and fire their workers at will.
VII. The Court handed down the *West Coast Hotel* and *NLRB* decisions after FDR announced his court-packing plan.

A. But the Court had actually decided *West Coast Hotel* before the plan was sent to Congress.

B. Justice Roberts had switched his vote from *Morehead* to *West Coast Hotel* in December 1936, a month after FDR’s presidential victory. It seems clear that the election results had affected his vote in the *West Coast Hotel* case.

C. These two decisions signaled the Constitutional Revolution of 1937, paving the way for state and federal regulation of economic matters and ending the liberty of contract doctrine.

**Suggested Readings:**


**Questions to Consider:**

1. Do you think Congress should be allowed to override Supreme Court decisions by a two-thirds vote in each house?

2. Should the Constitution be amended to set the Supreme Court’s membership at nine, or should Congress have the power to set the number?
Lecture Sixteen
The New Dealers Take Control

Scope: The context of this lecture is the aftermath of the Constitutional Revolution of 1937 and the rapid change on the Court between 1937 and 1940. The retirement and death of five justices during those years gave President Roosevelt the chance to name justices who backed his New Deal policies, supporting broad state and federal powers to regulate the economy. This lecture, which is largely biographical, focuses on three justices who remained on the Court into the 1960s and 1970s: Hugo Black, Felix Frankfurter, and William O. Douglas. We will look at their backgrounds and their judicial philosophies, which varied in many ways. Black was a former senator and Klan member who became the Court’s most fervent absolutist in free speech cases; Frankfurter was a Harvard law professor who became the apostle of judicial restraint on the Court; and Douglas was a New Deal official who used the bench as a pulpit for his liberal views. We will also discuss an important shift in the Court’s doctrine, with the adoption in 1938 of the strict scrutiny test in Footnote Four of Justice Harlan Fiske Stone’s opinion in *United States v. Carolene Products Co.*

Outline

I. This lecture covers the aftermath of the Constitutional Revolution of 1937 and the major change in the Court’s membership between 1937 and 1941.
   A. President Franklin Roosevelt had not placed any justice on the Court during his first term, but he added five during his second term.
   B. He achieved the objective of his court-packing plan by reshaping the Court into a body that supported his New Deal program.

II. Roosevelt first replaced Justice Willis Van Devanter, who retired in May 1937.
A. FDR named Senator Hugo Black of Alabama to the Court.
   1. Black had been a county prosecutor and a municipal court judge before his election to the Senate in 1927 and was a staunch New Dealer.
   2. After his nomination, the press reported that Black had belonged to the Ku Klux Klan as a young politician.
   3. Black said he resigned from the Klan and had fought for the civil rights of “all Americans, without regard to race or creed.”

B. During his long tenure on the Court, Black was a consistent liberal on civil rights and First Amendment issues.

III. Roosevelt next replaced Justice George Sutherland with Stanley Reed of Kentucky in 1938.
   A. Reed was a former corporate lawyer who later served as U.S. solicitor general.
   B. He moved to the right on the Court and left in 1957 with no landmark opinions on his record.

IV. The death of Justice Benjamin Cardozo in July 1938 gave Roosevelt his third chance to reshape the Court.
   A. He named Felix Frankfurter, who had worked with Roosevelt during World War I and was a noted Harvard law professor.
   B. Frankfurter was born in Austria and came to the United States at the age of 12; he became a highly patriotic and assimilated American.
   C. As a Harvard professor, Frankfurter placed many of his students, known as the “Happy Hot Dogs,” in New Deal agencies.
   D. On the Court, Frankfurter became an apostle of the judicial restraint philosophy, voting in many cases to uphold the acts of elected lawmakers against challenges by religious and political minorities.

V. Justice Louis Brandeis retired in 1939, and Roosevelt named William O. Douglas to replace him.
   A. Douglas taught at Columbia and Yale law schools and served as chairman of the Securities and Exchange Commission.
B. He remained on the Court until 1975, the longest tenure of any justice, and took a consistently liberal position in civil rights and liberties cases.

C. The animating principle behind the 1,200 judicial opinions Douglas wrote over three decades is exemplified in a statement he made in 1958: “Our starting point has always been the individual, not the state.”

VI. Justice Pierce Butler died in 1939, and Roosevelt replaced him with Frank Murphy of Michigan.
   A. Murphy had served as Detroit’s mayor and governor of Michigan but lost that position in 1938.
   B. Roosevelt named Murphy as attorney general, and he pressed for enforcement of federal civil rights laws.
   C. Murphy was perhaps the most consistently liberal justice in the Court’s history; he served until his death in 1949.

VII. The Court made two rulings in 1937 that upheld New Deal laws after the Constitutional Revolution.
   A. In the *Stewart Machine Company* case, the Court upheld a federal unemployment benefits law by a vote of five to four.
      1. The law returned unemployment taxes from the federal government to the states for benefit payments.
      2. The majority said that jobless workers needed federal help “if people were not to starve.”
   B. The Court also upheld the federal Social Security Act in *Helvering v. Davis* in a unanimous decision.
      1. The Court said that old-age benefits were needed to save the elderly from “the rigors of the poor house.”
      2. This ruling showed the Court’s willingness to apply the general welfare clause of the Constitution.

VIII. The Court made a landmark ruling in the *Carolene Products* case in 1938.
   A. This case upheld a federal law that banned the addition of vegetable oils to milk products.
   B. The Court applied the *rational basis* test to uphold the law; under this test, the Court will uphold economic regulation if lawmakers have any plausible reason for the statute.
C. But Justice Harlan Stone added the significant Footnote Four to his opinion.

1. Stone was concerned about the treatment of Jews in Nazi Germany and blacks in the American South.
2. Footnote Four said that the Court would apply “more exacting judicial scrutiny” to laws that affected the provisions of the Bill of Rights.
3. Stone also applied this test to laws that discriminated against racial or religious minorities.
4. What became known as the strict scrutiny test made a great impact on the Court’s later rulings in civil rights and liberties cases.

Suggested Readings:

Peter Irons, A People’s History of the Supreme Court, chapter 26 (1999).

Questions to Consider:

1. Do you think President Roosevelt was justified in filling Supreme Court positions with justices who supported his New Deal policies, even though none of them had served as judges?

2. Do you agree with Justice Stone that courts should not give government the “presumption of constitutionality” in cases involving the Bill of Rights?
Lecture Seventeen
“Beyond the Reach of Majorities”

Scope: This lecture focuses on several landmark cases that involved members of an unpopular religious minority, the Jehovah’s Witnesses. We look at two important and dramatic cases that involved the refusal of school children to salute the American flag on religious grounds, the *Gobitis* and *Barnette* cases. The primary judicial figures in this lecture are Justices Felix Frankfurter and Robert Jackson, who wrote opinions in these cases that starkly posed the conflict between the judicial restraint philosophy of Frankfurter and the insistence of Jackson that constitutional rights are “beyond the reach of majorities.” We will also hear the first-person story of Lillian Gobitis, a 12-year-old girl in Minersville, Pennsylvania, whose refusal to salute the flag was a gesture of solidarity with Witnesses who were imprisoned in Germany for refusal to salute the Nazi flag. Frankfurter’s 1940 opinion in the *Gobitis* case, upholding her expulsion from school, led to a wave of attacks on Witnesses that shocked the Court and led to its reversal in 1943 in the *Barnette* case. The long-term impact of the *Barnette* decision has greatly affected judicial support for the free speech rights of minorities and dissidents.

Outline

I. This lecture discusses the Court’s major rulings between 1938 and 1943 in cases that involved members of the Jehovah’s Witnesses religious denomination.
   A. The Witnesses were founded in Pennsylvania in the 1880s. They preach an apocalyptic doctrine that foresees a final Battle of Armageddon between the forces of Satan and Jehovah’s Witnesses.
   B. The Witnesses spread their beliefs through door-to-door and street-corner preaching. Their literature attacks other religions, especially the Roman Catholic Church.
   C. Many communities in the 1930s passed laws to restrict Witnesses from distributing literature or preaching in public places.
II. The Court decided two cases in 1938 and 1939 that involved local ordinances that required Witnesses to obtain licenses to distribute religious literature.

A. In *Lovell v. City of Griffin, Georgia*, the Court struck down a law that banned the distribution of “literature of any kind” without a city permit.

B. The Court said that law “strikes at the very foundation” of freedom of the press “by subjecting it to license and censorship.”

C. The Court also struck down a licensing ordinance in *Schneider v. Irvington, New Jersey*.

D. This law was challenged by a Witness who was convicted for “annoying” residents by knocking on their doors to offer literature.

E. The law also gave police officials discretion to issue permits for distributing literature; the Court said that this “strikes at the very heart” of the First Amendment.

III. The Court made another major ruling in 1940 in the case of *Cantwell v. Connecticut*.

A. Witnesses were convicted under a state law that required a permit from an official who was required to determine whether the cause “is a religious one.”

B. The Court unanimously struck down the law, holding that it was a “censorship of religion” and violated the First and Fourteenth Amendments.

C. The *Cantwell* case marked the Court’s “incorporation” of the religion clauses of the First Amendment into the liberty provision of the Fourteenth, applying those clauses to the states for the first time.

IV. The Court made another landmark ruling in a Jehovah’s Witness’s case in 1940, in *Minersville School Board v. Gobitis*.

A. This case involved two children, Lillian and William Gobitis, who refused to salute the American flag in their public school classrooms in 1935.

B. They were acting in sympathy with German Witnesses who were persecuted for refusing to salute the Nazi flag.
C. School officials in Minersville, Pennsylvania, adopted a regulation subjecting students who refused to salute the flag to expulsion.

D. The Gobitis children were expelled from school and sued the local board; they won favorable rulings in lower federal courts.

V. The Court upheld the school board in an eight-to-one vote.

A. Justice Felix Frankfurter wrote for the majority that “national unity is the basis of national security.” He said, “training children in patriotic impulses” was important and that religious “dissidents” could be expelled for refusing to salute the flag.

B. Justice Harlan Stone dissented, citing his Footnote Four in Carolene Products to support the rights “of this small and helpless minority” to express their religious beliefs.

VI. The Court’s ruling in the Gobitis case provoked a wave of hostile and violent attacks on Witnesses across the country.

A. Church buildings were burned, Witnesses were attacked by mobs, and one Witness in Nebraska was dragged from his home and castrated.

B. Justice Department officials attributed this wave of attacks to the Gobitis opinion.

C. Three Supreme Court justices said in 1942 that the Gobitis case had been “wrongly decided.”

VII. In 1941, Chief Justice Hughes retired, and President Roosevelt named Justice Stone to replace him.

A. Roosevelt filled Stone’s seat with Robert Jackson of New York, who was serving as attorney general.

B. Justice James McReynolds also retired in 1941. Roosevelt replaced him with James Byrnes of South Carolina, but he left the Court after one year.

C. Roosevelt replaced Byrnes with Wiley Rutledge, a former law professor and federal judge. Rutledge served until 1949 and was a consistent liberal on the Court.

VIII. The Court reversed the Gobitis ruling in 1943, in the case of West Virginia Board of Education v. Barnette.

A. This case also involved the expulsion of Jehovah’s Witnesses from public schools for refusing to salute the American flag.
B. The Court struck down the state law in a six-to-three decision.

C. Justice Jackson wrote for the majority. He said that the Bill of Rights was designed to place constitutional rights “beyond the reach of majorities” and that they “may not be submitted to vote; they depend on the outcome of no elections.”

D. Justice Frankfurter wrote a bitter dissent, saying the Court should not bend to “the pressures of the day, and the shifting winds of doctrine.”

E. The *Gobitis* and *Barnette* cases vividly illustrate the enduring conflict between liberty and authority in the Court’s rulings.

Suggested Readings:

Questions to Consider:
1. Should local governments be allowed to require people who solicit money for charity to show that they represent a bona fide charitable group?

2. Do you think children should have to show a religious objection if they decline to participate in saluting the flag and reciting the Pledge of Allegiance?
Lecture Eighteen
Pearl Harbor and Panic

Scope: The context of this lecture is American involvement in World War II after the Japanese attack on Pearl Harbor in December 1941. After an initial period of tolerance, calls for the mass internment of all Japanese Americans on the West Coast led President Franklin Roosevelt to issue an executive order in February 1942. The order authorized military officials to impose curfews and place “all persons of Japanese ancestry” in “relocation centers” in remote areas. The major figures in this lecture are three young Japanese Americans—Gordon Hirabayashi, Min Yasui, and Fred Korematsu—who were convicted of violating these orders and whose cases reached the Supreme Court in 1943 and 1944. We will examine the Court’s decisions in the Hirabayashi and Korematsu cases and analyze the reasons the Court ruled for the government in the Korematsu case, over the dissent of Justice Frank Murphy that the ruling approved “the legalization of racism.” We will also look at the historic and dramatic reopening of these cases in the 1980s and their reversal on grounds of governmental misconduct and hear the first-person stories of Gordon Hirabayashi and Fred Korematsu, who received the Presidential Medal of Freedom in 1998.

Outline

I. This lecture discusses the Court’s rulings in cases that arose from the mass evacuation and internment of Japanese Americans from the West Coast during World War II.
   A. The background to these cases begins with public hostility toward Orientals during the 19th century.
   B. The federal census of 1890 counted only 2,000 persons of Japanese ancestry, but there were more than 100,000 by 1920, almost all on the West Coast.
   C. Congress banned further immigration from Japan in 1924 and had earlier barred Japanese immigrants from American citizenship.
D. California and other states also passed laws barring “alien” Japanese from owning land or practicing many professions.

II. The Japanese attack on Pearl Harbor in December 1941 created pressure for the removal of Japanese Americans from the West Coast.

A. Newspapers and politicians urged their “immediate removal” and their detention in “concentration camps.”

B. General John DeWitt, the West Coast military commander, said he had “no confidence in their loyalty at all.” He called Japanese Americans “potential enemies” who posed dangers of espionage and sabotage.

C. President Franklin Roosevelt signed an executive order in February 1942, authorizing the removal of Japanese Americans from the West Coast.

D. Congress also passed a law making violation of military orders a crime.


A. DeWitt then issued orders for all Japanese Americans to report to “assembly centers” in racetracks and fairgrounds.

B. Japanese Americans were then removed to ten “relocation centers,” mostly in desert and mountain areas.

IV. Three young Japanese Americans decided to resist the curfew and evacuation orders.

A. Fred Korematsu was a shipyard worker in the Bay area of California, who had volunteered for military service but was turned down on medical grounds.

1. He wanted to remain with his Caucasian girlfriend and changed his identity.

2. Korematsu was recognized and was arrested for violating the evacuation order. He accepted an offer by the ACLU to challenge his arrest.

B. Gordon Hirabayashi was a university student in Seattle, Washington.

1. He was a Quaker pacifist, who objected to the military orders on religious and constitutional grounds.
2. He turned himself in to FBI agents and was charged with violating the curfew and evacuation orders.

C. Minoru Yasui was a lawyer in Portland, Oregon.
   1. He was an Army Reserve officer and was turned away when he reported for duty after the Pearl Harbor attack.
   2. Yasui was charged with curfew violation and held in solitary confinement for nine months before his trial.

D. All three young men were tried and convicted, in proceedings that took less than one day.

V. The Supreme Court unanimously upheld the convictions of Hirabayashi and Yasui in June 1943 but sent the *Korematsu* case back for further hearings.

A. Chief Justice Harlan Stone limited the Court’s ruling to the curfew issue.
   1. He said that discrimination against Japanese Americans had “intensified their solidarity” and prevented their “assimilation” with the “white population.”
   2. Stone conceded that racial discrimination was “odious to a free people,” but that a curfew on Japanese Americans had a “rational basis” in fears of espionage and sabotage.

B. Justice Frank Murphy issued a concurring opinion, saying that the curfew went to “the very brink” of constitutional power.

VI. The Court decided the *Korematsu* case in December 1944 by a six-to-three margin.

A. Justice Hugo Black wrote for the majority, relying on the *Hirabayashi* ruling for precedent.
   1. Black said racial discrimination must be subject to “rigid scrutiny,” but he denied that racial prejudice had prompted the internment of Japanese Americans.
   2. He said that “military urgency” had required the mass evacuation.

B. Justice Murphy said, “I dissent from this legalization of racism.”

C. Justice Owen Roberts called the relocation centers “a euphemism for concentration camps.”
D. Justice Robert Jackson said the Court’s decision could become a “loaded weapon” against other racial and ethnic minorities during wartime.

VII. In the 1970s, Japanese Americans began a campaign for “redress and reparations.”

A. Congress set up a blue-ribbon commission that found the internment was based on “race prejudice, war hysteria, and a failure of political leadership.” Congress later approved compensation of $20,000 to internment survivors and a national apology.

B. Korematsu, Hirabayashi, and Yasui asked federal judges in the 1980s to reverse their convictions.
   1. They cited government documents that showed the “suppression of evidence” to the Supreme Court in their cases.
   2. Federal judges reversed the convictions of all three men.
   3. In 1998, President Bill Clinton awarded the Presidential Medal of Freedom to Fred Korematsu at a White House ceremony.

Suggested Readings:
———, A People’s History of the Supreme Court, chapter 27 (1999).

Questions to Consider:
1. Do you think the government was justified in evacuating Japanese Americans from the West Coast after the Japanese attack on Pearl Harbor?
2. During the war on terrorism, should the government be allowed to ban meetings of groups that have been found to support terrorist acts?
Lecture Nineteen
The Supreme Court and the Communist Party

Scope: This lecture covers the Court’s rulings in cases that involved the Communist Party, which most Americans considered a dangerous threat because of its support of the Stalinist regime of the Soviet Union. We begin with two cases the Court decided in the 1930s, which struck down the convictions under state laws of Communist organizers Dirk de Jonge and Angelo Herndon. We will then look at an important case that stemmed from the Cold War between the United States and the Soviet Union that began shortly after the Allied victory in World War II. Although the American Communist Party had supported the war effort, the party’s support of Soviet takeovers in Eastern Europe and opposition to President Truman’s foreign policy led to fears of communist subversion in the United States. The federal government’s prosecution of Communist Party leaders in 1948 led to the Supreme Court decision in 1950 upholding their convictions in Dennis v. United States. After the death of Chief Justice Harlan Fiske Stone in 1946, Truman replaced him with a personal crony and political supporter, Fred Vinson, who was totally ineffective in leading a Court that was badly divided by clashing personalities and philosophies. We will also look at President Truman’s other Supreme Court nominees, who were all men with little distinction as justices.

Outline

I. This lecture discusses the Court’s rulings in cases that involved Communist Party members during the period from 1937 to 1951.
   A. The party was organized in 1919 by supporters of the Bolshevik regime in the Soviet Union; many of its members were Russian immigrants.
   B. The Court had upheld the convictions of Communist leaders in the Gitlow and Whitney cases in the 1920s.
   C. During the 1920s, the party lost about 90 percent of its members, but it grew in membership and influence during the Great Depression of the 1930s.
II. Congress launched several investigations of Communists during the 1930s.

A. In 1930, a congressional committee recommended laws to outlaw the party and ban its publications from the mail, but these were not enacted.

B. In 1934, another committee recommended a law to make advocacy of violent revolution a federal crime.

C. The sweeping reelection of President Franklin Roosevelt in 1936 diminished fears of a Communist-led revolutionary effort, and the party gained some public sympathy for its opposition to Nazis in Germany and Spain.

III. The Court made two important rulings in cases that involved Communist organizers in 1937.

A. Dirk De Jonge was arrested for speaking at a Communist meeting in Portland, Oregon.
   1. He was charged under the state’s criminal syndicalism law and sentenced to seven years in prison.
   2. The Supreme Court unanimously reversed his conviction. Chief Justice Hughes wrote, “peaceable assembly for lawful discussion cannot be made a crime.”

B. Angelo Herndon was a black Communist organizer in Georgia, who held meetings of jobless workers.
   1. Herndon was charged with insurrection under Georgia law and sentenced to 18 years in prison.
   2. The Court reversed his conviction by a five-to-four vote. The majority said that making membership in a political party a criminal offense “is an unwarranted invasion of freedom of speech.”
   3. The Four Horsemen of Reaction dissented, arguing that the Communist Party’s advocacy of an independent black nation in the South could be achieved only by “resort to force and violence.”

IV. Public sympathy for the Communist Party ended abruptly with the Hitler-Stalin Pact in August 1939, just before Germany invaded Poland.
A. Congress passed a new Sedition Act in 1940, known as the Smith Act for its House sponsor, making it a crime to advocate the violent overthrow of the government.

B. The Smith Act was first used in 1942 to prosecute members of the Socialist Workers Party, a rival of the Communist Party, which applauded the prosecutions.

C. During World War II, the Communist Party supported the war effort and changed its name to the Communist Political Association.

V. After the Allied victory and the death of President Roosevelt in 1945, the Communist Party followed the Soviet Union in denouncing American policies in Europe.

A. By 1946, the Cold War had begun, and the party was seen by many people as a “fifth column” threat to national security.

B. President Harry Truman faced opposition from both left and right during his election campaign in 1948. The Communists backed the Progressive Party candidate, Henry Wallace, and South Carolina Governor Strom Thurmond ran a segregationist campaign.

C. In July 1948, the government charged 12 Communist leaders, including Eugene Dennis, the party’s head, with violating the Smith Act.

D. The charges were largely based on the party’s distribution of writings by such Communists as Marx, Lenin, and Stalin.

E. During the trial in 1949, government witnesses testified that the party’s disavowal of revolution was “window-dressing” to avoid prosecution.

F. The Communist leaders were convicted and sentenced to five-year prison terms.

VI. Between 1945 and 1949, President Truman had added four Supreme Court justices.

A. Justice Owen Roberts retired in 1945, and Truman replaced him with former Republican Senator Harold Burton of Ohio. Burton served until 1958 and was ranked as a judicial failure by legal scholars.
B. Chief Justice Harlan Stone died in 1946, and Truman replaced him with Fred Vinson of Kentucky.
   1. Vinson was a former congressman, federal judge, and member of Truman’s cabinet.
   2. But he was a weak chief justice, who could not unify a Court of strong-minded justices who had clashing personalities. Vinson served until his death in 1953.

C. Justice Frank Murphy died in 1949, and Truman replaced him with Attorney General Tom Clark of Texas.
   1. Clark consistently supported civil rights but took a conservative position on First Amendment and criminal law issues.
   2. He resigned in 1967, when his son was named as attorney general by President Lyndon Johnson.

D. Justice Wiley Rutledge died in 1949, and Truman replaced him with a former Senate crony, Sherman Minton of Indiana. He was also later ranked as a judicial failure by legal scholars.

VII. The Supreme Court upheld the convictions of the Communist leaders in *Dennis v. United States* in June 1951 by a six-to-two vote; Justice Clark had authorized the prosecutions and did not participate in the case.

A. Chief Justice Vinson wrote for the majority, applying the clear and present danger test.
   1. He said that the Communist Party’s advocacy of revolution, even if it did not pose an immediate threat of action, was “a sufficient evil for Congress to prevent.”
   2. Vinson also said, “certain kinds of speech are so undesirable as to warrant criminal sanction.”

B. Justice Hugo Black wrote in dissent that the Smith Act was “a virulent form of prior censorship of speech and press” that violated the First Amendment.
   1. He noted that the Communist leaders were not charged with “any overt acts” to prepare for revolution but were convicted solely for their speech.
   2. Black expressed hope that when “present pressures, passions, and fears subside,” the Court would restore the First Amendment to its “high preferred place” in the Constitution.
VIII. In 1957, the Court reversed the Smith Act convictions of lower-ranking Communists in *Yates v. United States*, holding that the law was directed at “the advocacy of action, not ideas.”

**Suggested Readings:**

**Questions to Consider:**
1. The Smith Act made it a crime to “advocate” the violent overthrow of the government. Did this law violate the First Amendment?
2. Was the government justified in prosecuting Communist Party leaders without evidence they had organized any acts that might lead to revolutionary efforts?
Lecture Twenty
Thurgood Marshall—Lawyer and Justice

Scope: The context of this lecture is the dramatic movement for civil rights that black Americans mounted against racial discrimination in schools, jobs, and housing. We briefly recount this struggle through a focus on Thurgood Marshall, the lawyer who led the NAACP campaign to strike down Jim Crow laws. Largely biographical in nature, this lecture traces Marshall’s life and career from the 1930s until his retirement in 1991. During these years, he served as the NAACP’s general counsel, as U.S. solicitor general, as a federal appellate judge, and as the first black Supreme Court justice, serving from 1967 until his retirement in 1991. We will also look at the legal strategy that Marshall adopted to challenge racial segregation in education, beginning with graduate and law schools in such border states as Missouri, Oklahoma, and Texas. We discuss three important cases that Marshall brought before the Court in the late 1940s and recount the stories of the three black students who started these cases: Ada Lois Sipuel, Heman Sweatt, and George McLaurin. The Court’s decisions in these cases paved the way for Marshall’s final legal assault on Jim Crow elementary and high schools.

Outline

I. This lecture discusses the background and career of Thurgood Marshall and the cases he brought in the 1930s and 1940s to challenge segregation in graduate and law schools.
   A. The background to this lecture is the national conflict over civil rights and the role of the National Association for the Advancement of Colored People (NAACP) in the campaign against segregation and discrimination.
   B. The NAACP was founded in 1909 and became the nation’s leading civil rights organization.

II. Thurgood Marshall was a remarkable lawyer, who became known as “Mr. Civil Rights” during his long career.
   A. He was born in Baltimore, Maryland, in 1908.
B. His paternal grandfather had been a slave in Virginia but escaped and settled in Baltimore.

C. Marshall attended Colored High School in Baltimore and became a debate captain.

D. He graduated from all-black Lincoln University in Pennsylvania.

III. Marshall wanted to attend the University of Maryland law school, but it was all white and he did not apply.

A. He attended Howard University law school in Washington, DC.

B. The Howard dean, Charles Houston, trained almost all the black civil rights lawyers in the country.

C. Marshall worked closely with Houston; in one case, they spared a black defendant from the death penalty in Virginia, feeling they achieved a victory with a life sentence for murdering a white person.

D. Marshall filed a suit against the University of Maryland law school in 1935.
   1. He won the admission of a black applicant, Donald Murray.
   2. The state’s lawyers did not appeal to the Supreme Court, and Murray v. Maryland did not set a precedent in school segregation cases.

IV. Marshall joined the NAACP legal staff in New York City in 1936 and was named as general counsel in 1938.

A. He framed a campaign against school segregation, based on the Margold Report.
   1. Nathan Margold had prepared a report for the NAACP in 1931.
   2. Margold proposed two approaches to deal with the separate but equal doctrine of the Plessy case of 1896, which upheld segregation on railroad cars.
   3. One approach was to file suits that would force the equalization of black and white schools.
   4. The other approach would make a frontal assault on the Plessy doctrine under the equal protection clause of the Fourteenth Amendment.
B. Marshall decided on a strategy of “encirclement and attrition,” beginning with suits against segregated graduate and law schools in border states.

V. The first case was *Gaines v. Canada* in 1938.
   A. Lloyd Gaines was a black applicant to the all-white University of Missouri law school, who was rejected on racial grounds.
   B. The state offered to pay Gaines’s tuition to an integrated law school in another state; the Missouri supreme court upheld this plan.
   C. The U.S. Supreme Court ruled the state could provide “equal facilities in separate schools” for black law students. The state established a separate law school, but Gaines never attended it.

VI. After World War II, Marshall resumed his legal campaign and filed suit in 1946 on behalf of Ada Sipuel for admission to the all-white University of Oklahoma law school.
   A. The Supreme Court ordered Oklahoma to provide Sipuel with a legal education “as soon as it does for applicants of any other group.”
   B. The state set up a segregated law school for blacks, but Marshall asked the Court to rule that it was unequal in quality.
   C. Before the Court ruled on this challenge, the state admitted Sipuel to its all-white law school in 1949.

VII. Marshall filed two other suits in 1949, against graduate and law schools in Oklahoma and Texas.
   A. After the University of Oklahoma admitted Ada Sipuel, it admitted George McLaurin to its graduate education school.
      1. The school required McLaurin to sit outside the classrooms and to study and eat in segregated libraries and cafeterias.
      2. After state judges upheld this policy, Marshall filed an appeal with the Supreme Court.
   B. In 1946, the all-white University of Texas law school rejected a black applicant, Heman Sweatt.
      1. Texas state judges gave the university six months to offer Sweatt a legal education “substantially equivalent” to its school for whites.
2. The university set up a separate black law school that was far inferior in quality, and Marshall appealed to the Supreme Court.

C. In June 1950, the Court unanimously ruled for both Sweatt and McLaurin.
   1. The Court said in the *Sweatt* case that the university’s all-white law school was far superior in quality and ordered his admission to that school.
   2. The Court also said that forcing McLaurin to use segregated facilities would “impair and inhibit” his ability to obtain an equal education; the university dropped these policies.

D. But the Court did not abandon the separate but equal doctrine in these cases.

E. Marshall’s victories in the *Sipuel*, *McLaurin*, and *Sweatt* cases paved the way for his final assault on segregated public schools in the South.

**Suggested Readings:**

**Questions to Consider:**
1. Do you think the Supreme Court would have ruled differently in the graduate and law school cases if the schools for blacks were equal or superior to those for whites?
2. Do you think that separate public schools for boys and girls could be justified as building self-esteem and reducing competition based on gender?
Lecture Twenty-One
Five Jim Crow Schools and Five Cases

Scope: The context of this lecture is Thurgood Marshall’s strategy in mounting the final legal assault on Jim Crow education in public schools, following his earlier victories in cases that challenged segregation in graduate and law schools in the *McLaurin* and *Sweatt* cases. The primary figure, again, is Marshall, but we will look also at the lawyers who worked with him, including Jack Greenberg and Robert Carter, and at federal judges who decided the school segregation cases that reached the Supreme Court and were decided together in 1954 with the *Brown* case. We will see how these five cases—from South Carolina, Virginia, the District of Columbia, Delaware, and Kansas—began and look at some of the black parents and children who joined these cases as plaintiffs. Our primary focus is on the first case to be filed, *Briggs v. Elliott*, in Clarendon County, South Carolina, where Harry Briggs and other black parents lost their jobs and homes for challenging Jim Crow schools. We will also see how the federal judges in the *Briggs* case relied on *Plessy v. Ferguson* for precedent, over the impassioned dissent of Judge J. Waties Waring of South Carolina, who argued that “segregation is per se unconstitutional.” This lecture follows the five school segregation cases as they reached the Supreme Court in 1952.

Outline

I. This lecture discusses the five cases Thurgood Marshall filed to challenge public school segregation in states that separated black and white students by law.

A. We will focus on these cases in the lower state and federal courts to see how the cases began, to look at the black parents and children who challenged segregated education, and to examine the rulings of the lower-court judges.

B. This lecture is designed to dispel the *stork theory* of Supreme Court cases, which looks only at the Court’s deliberations and decisions after the cases reach the justices. Every case the Court decides has a history and record that affects the final outcome.
II. We will look most closely at the first case Marshall filed against school segregation in the Deep South, in Clarendon County, South Carolina.

A. Clarendon County in 1947 was 70 percent black; more than two-thirds of the black families earned less than $1,000 per year, and most were sharecroppers who raised cotton for white landowners.
   1. The county spent $179 per year for each white student but only $43 on each black child.
   2. The black schools had no desks, electricity, or indoor plumbing.

B. The county provided no school buses for black children.
   1. Reverend Joseph DeLaine was pastor of a black church and taught in a black school.
   2. He approached a black farmer, Levi Pearson, who signed a petition asking for school buses for black children.
   3. The county school superintendent, Reverend L. B. McCord, rejected the petition, which was drafted by a black civil rights lawyer, Harold Boulware.

C. Boulware filed a suit in federal court in 1947, seeking an order to provide buses for black students, but the case was dismissed.

D. In 1949, Thurgood Marshall visited Clarendon County and agreed to file a suit seeking equal school facilities, if Reverend DeLaine and Pearson could recruit 20 plaintiffs.

E. Marshall and Boulware filed the suit in November 1949. Harry Briggs was the lead plaintiff; he was a Navy veteran with five children.

F. After the suit was filed, Briggs was fired from his gas station job and other black plaintiffs lost their jobs, bank credit, and farms.

III. The case of Briggs v. Elliott came before federal judge J. Waties Waring in Charleston, South Carolina. Elliott was the county school board chairman.

A. Waring persuaded Marshall to amend his suit to challenge segregated education as a violation of the Fourteenth Amendment.

B. Under federal rules, constitutional challenges to state laws were decided by panels of three federal judges; John Parker of the federal court of appeals and district judge George Timmerman joined the panel.
C. Marshall presented the testimony of Kenneth Clark, a noted black psychologist who studied the effects of segregation on black children.

1. Clark gave his “doll test” to 16 black children in Clarendon County. He showed them black and white dolls, and most children said that the black doll was “bad.”

2. Clark told the judges his doll test showed that black children were “definitely harmed” in personality development by school segregation.

D. Judges Parker and Timmerman ruled for the school board; they relied on the Plessy case for precedent.

E. Judge Waring dissented; he said “segregation is per se inequality.”

F. Marshall filed an appeal from this ruling with the Supreme Court.

IV. The next case began in Prince Edward County in Virginia.

A. Students in the county’s black high school led a strike against bad conditions; they attended classes in tarpaper shacks.

B. NAACP lawyers agreed to help the black students and filed suit to integrate the county’s schools. The lead plaintiff was a black girl named Dorothy Davis.

C. A panel of federal judges ruled in *Davis v. Prince Edward County* that school segregation was part of the “mores” of Virginia and caused “no hurt or harm to either race.” The NAACP filed an appeal of this ruling with the Supreme Court.

V. Another case began in Washington, DC, in which Congress had allowed school officials to segregate the public schools.

A. A black barber, Gardner Bishop, had tried to enroll black students in an all-white junior high school; when they were turned away, he approached a Howard University law school professor, James Nabrit, for help.

B. Nabrit filed suit on behalf of a black student, Spottswood Bolling, against the school board chairman, Melvin Sharpe.

C. A federal judge in Washington dismissed the suit in *Bolling v. Sharpe*. 
VI. A fourth suit began in New Castle County, Delaware, on behalf of two black girls, Shirley Bulah and Ethel Belton. Francis Gebhart, who chaired the state’s school board, was the lead defendant.

A. This suit came before a state judge, Collins Seitz, who had earlier ruled that the University of Delaware must admit black students.

B. Judge Seitz ruled in Bulah and Belton v. Gebhart that the state must integrate its schools, but he said the Supreme Court must decide whether to overturn the Plessy case.

VII. The final school case began in Topeka, Kansas. Under state law, only grade schools in Topeka and Wichita could be segregated.

A. The NAACP president in Topeka, McKinley Burnett, persuaded Oliver Brown and other black parents to challenge segregation; Brown’s daughter, Linda, attended a segregated grade school.

B. The NAACP presented testimony by a psychologist, Louisa Holt, that segregation was seen by both races as “denoting the inferiority of the Negro group.”

C. The federal judges in Brown v. Board of Education of Topeka cited Holt’s testimony but ruled that they were bound by the Plessy case.

VIII. The appeals in all five school cases reached the Supreme Court for argument in December 1952.

Suggested Readings:


Questions to Consider:

1. Should the lower-court judges in the school segregation cases have relied on the Plessy case for precedent or ruled that it did not govern these cases?

2. Kenneth Clark’s doll tests showed that most black children thought the black doll was “bad.” Do you think this was the result of school segregation or the whole Jim Crow system in which the children lived?
Lecture Twenty-Two
The Hearts and Minds of Black Children

Scope: This lecture discusses the Court’s deliberations and decisions in Brown v. Board of Education in 1954 and 1955. The five school segregation cases we discussed in the previous lecture were first argued in 1952, while Fred Vinson still served as chief justice. After his sudden death in September 1953, they were reargued that December, with Earl Warren presiding. The major figures in this lecture include Warren, Thurgood Marshall, and John W. Davis, a noted lawyer and former presidential candidate who defended school segregation in South Carolina and who was matched with Marshall in that case. We will look at some of the dramatic exchanges between the lawyers and justices in these arguments. This lecture also recounts Chief Justice Warren’s successful effort to frame a unanimous opinion in the Brown case, finally winning over the last holdout, Justice Stanley Reed. Finally, we will examine the Brown decision, in which Warren ruled that racial segregation in public schools damaged the “hearts and minds” of black children and violated the equal protection clause of the Fourteenth Amendment.

Outline

I. This lecture examines the oral arguments and Supreme Court deliberations in the five school segregation cases that were decided in May 1954 as Brown v. Board of Education of Topeka, Kansas.
   A. The five cases began in South Carolina, Virginia, the District of Columbia, Delaware, and Kansas.
   B. The state judge in the Delaware case had ordered the admission of black students to the all-white schools, but the federal judges in the remaining cases had all upheld school segregation, relying on the Plessy case for precedent.

II. Among the legal briefs in these cases, the most important was filed by the federal government as a “friend of the court.”
A. This brief said that racial segregation in the District of Columbia was viewed by foreign governments “as a measure of our attitude toward minorities generally.”

B. The government’s brief included a letter from Secretary of State Dean Acheson, asserting that school segregation was a source of “constant embarrassment” in the nation’s conduct of its foreign policies.

III. The oral arguments in the school cases began on December 9, 1952.

A. The first case argued was the Brown case from Topeka, Kansas.

B. Robert Carter of the NAACP legal staff argued for the black plaintiffs. Carter responded to a question by saying the Plessy case “should squarely be overruled.”

C. The Topeka school board did not send a lawyer to defend its school segregation policy. The Court had ordered the state of Kansas to defend the law that allowed Topeka to segregate its grade schools. The state’s lawyer said that black children in Topeka had not suffered any “detriment” from segregation.

IV. The second case argued was Briggs v. Elliott from Clarendon County, South Carolina.

A. Thurgood Marshall argued for the black plaintiffs. He cited the glaring disparities in the quality of the county’s black and white schools.
   1. Marshall cited the trial testimony of Kenneth Clark as showing the stigma that segregation imposed on black children.
   2. He also asked the Court to overrule the Plessy case.

B. John W. Davis, a noted lawyer and former Democratic presidential candidate, argued for the Clarendon County school board.
   1. Davis argued that the drafters of the Fourteenth Amendment had not intended to outlaw school segregation.
   2. He responded to a question from Justice Felix Frankfurter by conceding that concepts of equality might have changed since the Fourteenth Amendment was adopted in 1868.
   3. Davis said the Court should not force white children into “unwelcome contact” with black children.
C. The arguments in the three remaining cases largely repeated those in the Kansas and South Carolina cases.

V. Chief Justice Fred Vinson presided at the Court’s deliberations after the oral arguments concluded.

A. No formal votes were taken, but Justice Stanley Reed indicated he would vote to uphold school segregation, and three other justices expressed some doubt about overruling the *Plessy* case.

B. Justice Felix Frankfurter wanted the Court to issue a unanimous decision to strike down school segregation. Because the Court was divided, he proposed another round of arguments.
   1. Frankfurter wanted the lawyers to discuss whether the Fourteenth Amendment’s framers intended to outlaw school segregation.
   2. If the framers did not intend to ban segregation, did the Court have the power to make this decision itself?
   3. The second round of oral argument was scheduled for October 1953.

VI. But in September 1953, Chief Justice Vinson died of a heart attack.

A. Justice Frankfurter said: “This is the first indication I have ever had that there is a God.”

B. President Dwight Eisenhower replaced Vinson with California Governor Earl Warren.
   1. Warren had swung his state’s delegation behind Eisenhower at the 1952 Republican convention.
   2. Eisenhower had promised Warren the first opening on the Supreme Court as a reward.

VII. The second round of arguments in the school cases took place in December 1953.

A. The arguments largely rehashed those in the first round and did not provide any definitive answer to the questions about the intent of the Fourteenth Amendment’s framers on school segregation.

B. Chief Justice Warren was determined to frame a unanimous decision to strike down school segregation in the *Brown* case.

C. He convinced Justice Reed to join the Court’s opinion, telling him it was “the best thing for the country.”
VIII. Warren announced the Court’s decision on May 17, 1954.
A. He said the intent of the Fourteenth Amendment’s framers on school segregation was “inconclusive.”
B. He dismissed the *Plessy* case as precedent, saying it involved “not education but transportation.”
C. Warren said segregation generated a “feeling of inferiority” in black children and affected their “hearts and minds in a way unlikely ever to be undone.”
D. He cited the studies of Kenneth Clark and other social scientists in a footnote to support his conclusion that school segregation violated the Fourteenth Amendment.
E. However, Warren bowed to the demand of Justice Frankfurter that the Court schedule further arguments on the “implementation” of its ruling.

Suggested Readings:

Questions to Consider:
1. Do you think Chief Justice Warren was justified in relying on social science data in ruling that school segregation violated the Constitution?
2. Should the Court have flatly ruled that southern school districts must immediately move to integrate their schools?
Lecture Twenty-Three
“War against the Constitution”

Scope: This lecture focuses on the defiant reaction of southern school boards and politicians to the \textit{Brown} decision and their use of the Court’s \textit{all deliberate speed} formula to delay and avoid integration. This lecture also examines the important and dramatic case that began in Little Rock, Arkansas, with the school board’s plan for “phased integration” over a 10-year period, beginning with the admission of nine black students to Central High School. We look at the turmoil and violence that erupted when Governor Orval Faubus called out National Guard troops to keep the black students out, with the dramatic story of 16-year-old Elizabeth Eckford’s narrow escape from white bigots who yelled, “Lynch her!” The lecture also recounts President Eisenhower’s reluctant decision to send federal troops to clear the mobs around Central High. The NAACP’s challenge to a federal judge’s decision to delay further integration for two years led to the Supreme Court’s landmark ruling in \textit{Cooper v. Aaron} that Arkansas officials must end their “war against the Constitution.”

Outline

I. This lecture discusses three issues that followed the Supreme Court’s decision in \textit{Brown v. Board of Education} that school segregation violated the Fourteenth Amendment.
   
   A. We will look at the final round of arguments on the implementation of the \textit{Brown} decision.
   
   B. We will examine the southern reaction to the Court’s ruling that school officials could proceed with “all deliberate speed” to integrate their schools.
   
   C. And we will see the Court’s response in 1958 to the most serious case of resistance to integration orders, in Little Rock, Arkansas.

II. The Court heard arguments on the implementation of the \textit{Brown} decision in April 1955.
A. There was a new justice on the bench; Justice Robert Jackson died in 1954 and was replaced by President Dwight Eisenhower with John Marshall Harlan.
   1. Harlan was the grandson and namesake of Justice John Marshall Harlan, the only dissenter in the *Plessy* case in 1896.
   2. Justice Harlan was a former corporate lawyer who followed the judicial restraint philosophy of Justice Felix Frankfurter. But he was a principled judicial conservative and supported First Amendment rights in many cases.

B. The Court heard arguments from 16 lawyers on the implementation issue, including lawyers from states that maintained segregated schools.
   1. Thurgood Marshall said there was “no local option on the Fourteenth Amendment.” He urged the Court to order integration “forthwith” and not to allow “local hostilities and prejudices” to delay the process.
   2. The southern lawyers all said that integration would be resisted by white parents. The lawyer for Clarendon County, South Carolina, told the Court “we would not conform” to any integration orders.
   3. The U.S. solicitor general asked the Court to allow federal judges to decide how much time should be allowed to adopt “feasible” integration plans.

C. The Court ruled in May 1955 that federal judges should allow southern officials to proceed with “all deliberate speed” in complying with integration orders.

III. The reaction to this decision by southern politicians was defiant.

A. Virginia’s governor vowed to use “every legal means” to resist integration; the governor of Mississippi said his state “will insist upon segregation regardless of consequences.”

B. Federal judge John Parker issued an opinion in the South Carolina case, six weeks after the second *Brown* decision.
   1. He said there was “no violation of the Constitution” if children of different races “voluntarily attend different schools.”
   2. Parker added that the Constitution “does not require integration.”
3. His opinion offered support for the “freedom of choice” plans that southern officials adopted to evade integration.

IV. There was widespread resistance to integration in 1956.
   A. In Clinton, Tennessee, state troopers and National Guard troops were called out to disperse a mob that chased blacks through the streets.
   B. In Mansfield, Texas, a mob of whites blocked the entrance of black students to the high school.
   C. National Guard troops forced back a white mob that roamed the streets in Sturgis, Kentucky.

V. The most violent resistance to integration came in Little Rock, Arkansas, in 1957.
   A. The school board adopted a plan of “phased” integration over a 10-year period.
   B. The segregationist governor of Georgia whipped up a white crowd in Little Rock, urging defiance of the board’s integration plan, which began with the admission of nine black students to Central High School.
   C. Arkansas governor Orval Faubus called out National Guard troops to block the black students from entering Central High.
   D. A white mob threatened to lynch one of the black students.
   E. President Dwight Eisenhower ordered Army troops to restore order in Little Rock.
   F. The black students began classes, but they were harassed inside the school and on the streets.

VI. In June 1958, the Little Rock school board persuaded a federal judge to order a two-year halt to further integration.
   A. NAACP lawyers appealed this ruling, but a federal appellate court upheld the order.
   B. The Supreme Court agreed to decide the Little Rock case in a special summer session.
   C. The school board’s lawyer argued that it would be “impossible” to operate integrated schools in the face of mob violence.
D. Thurgood Marshall replied that the Court should not allow whites to “defy the lawful authorities.”

VII. The Court ruled unanimously in September 1958 that state officials could not “wage war against the Constitution” and must obey federal court orders.

A. Arkansas officials responded by closing the Little Rock schools for an entire year.

B. Little Rock voters finally elected a new school board that implemented the integration orders.

C. The Little Rock case raised a crucial question: What good is the Constitution if government officials refuse to obey its commands?

Suggested Readings:
Peter Irons, A People’s History of the Supreme Court, chapter 30 (1999).

Questions to Consider:
1. Should parents be allowed to transfer their children to schools in which they would be in the majority race, or should children attend the schools nearest to their homes?
2. Do you think the Court should have held Arkansas Governor Orval Faubus in contempt and ordered him jailed if he refused to comply with its decisions?
Lecture Twenty-Four
Earl Warren—Politician to Chief Justice

Scope: This lecture is largely biographical, focusing on Earl Warren, who replaced Fred Vinson as chief justice in 1953. We will look at Warren’s life and career as a government lawyer and political leader, from his service as a district attorney in Alameda County, California, to election as his state’s attorney general and three terms as governor. We will also recount the story of how Warren reached the Supreme Court as a reward for backing Dwight Eisenhower for the Republican presidential nomination in 1952 and how he assumed leadership of a Court that was divided by clashing personalities and philosophies. Warren used his personal charm and political skills to shape the Court into a unified institution that issued many landmark decisions during the years before his retirement in 1969. We will look at several of Warren’s important opinions. In criminal cases, he overturned a death sentence based on a coerced confession, but he upheld the police practice of “stop-and-frisk” searches. Warren’s ruling that Congress exceeded its powers in questioning suspected Communists led to calls by the right-wing John Birch Society for his impeachment. And in Loving v. Virginia, he struck down a Virginia law that banned interracial marriages.

Outline

I. This lecture takes a biographical approach to the background and career of Chief Justice Earl Warren and examines several of his major opinions. Warren wrote many landmark opinions in cases that involved conflicts between the rights of individuals and the powers of government.

II. Warren’s life reads like a Horatio Alger novel of the 19th century.
   A. He was born in Los Angeles, California, in 1891 and was raised in the agricultural and railroad center of Bakersfield, in the state’s central valley.
   B. His parents were both immigrants, his father from Norway and his mother from Sweden.
C. Warren’s father spent 40 years with the Southern Pacific Railroad as a car repairman.

D. During his teenage years, Warren worked as a “call boy” for the railroad; he developed a lifelong hostility toward corporate oppression of workers and financial and political corruption, which the Southern Pacific epitomized.

III. Warren attended the University of California at Berkeley as an undergraduate and law student.

A. He was not an outstanding student; he joined many clubs but did not become a leader.

B. Warren got involved in politics as a law student and became active in the “progressive” wing of the Republican party, campaigning for Hiram Johnson, who became a reform governor.

C. Warren completed law school in 1914 and spent three years in practice before he entered the Army during World War I.

D. After he left the Army in 1918, he took a job as a law clerk in the California legislature; he used his political contacts to secure a position as a deputy county attorney.

E. Warren prosecuted several corrupt public officials and was elected as district attorney in 1926.

F. In 1938, he won election as California’s attorney general and continued his campaign against political and official corruption.

G. Warren was elected governor in 1942 on a slogan of “Leadership, Not Politics.” He won both the Republican and Democratic primaries in 1946.

H. In 1948, Warren was the Republican vice-presidential candidate, running with Thomas Dewey, but the ticket narrowly lost the election to President Harry Truman.

IV. In 1952, Warren swung the California delegation behind Dwight Eisenhower for the Republican presidential nomination.

A. As a reward, Eisenhower promised Warren the next Supreme Court vacancy.

B. Chief Justice Fred Vinson died in September 1953, and President Eisenhower named Warren to replace him.
C. Warren had no prior judicial experience, but he brought his political skills and personal warmth to his new position.

D. Warren had earlier defined “the American concept of civil rights” as “the absence of arbitrary action by government.” This became his guiding legal principle.

V. We will examine several of Warren’s landmark opinions in the fields of criminal law, free speech, and civil rights.

A. Warren had been a prosecutor, and he recognized the need to balance effective law enforcement against the rights of defendants.

B. In 1966, he reversed the murder conviction of a black man who confessed after 16 days of interrogation, with little food and no access to a lawyer. Warren held in *Davis v. North Carolina* that the confession had been coerced and was not admissible as evidence.

C. But in 1968, Warren upheld the conviction of a black man who had been observed “casing” a clothing store by a police officer who suspected he was planning a robbery.

   1. The officer conducted a “stop-and-frisk” search that turned up a concealed revolver.
   2. Warren ruled in *Terry v. Ohio* that the search was lawful because of the suspect’s “suspicious behavior” and the danger to officers of concealed weapons.

VI. Warren generally upheld free speech claims against government repression.

A. In 1956, he reversed the firing of a Marxist professor in *Sweezy v. New Hampshire*. He said that academic freedom protected the expression of “unorthodox” views.

B. Warren’s opinion in the case of *Watkins v. the United States* sparked an outcry that culminated in calls for his impeachment.

   1. Watkins was a long-time union organizer who, when called before the House Committee on Un-American Activities, was asked to identify Communist Party members on a list provided by the committee.
   2. Watkins refused, citing the First Amendment as protection, and was convicted of contempt of Congress.
3. When his appeal reached the Supreme Court, Chief Justice Warren wrote an opinion rebuking the Un-American Activities Committee for exceeding its investigatory powers.

4. The campaign by the John Birch Society, a right-wing political group, calling for impeachment of Chief Justice Warren reflected prevailing conservative concerns that the Warren Court was “soft on communism.”

C. In the early 1970s, conservatives launched an effort to impeach Justice William O. Douglas, charging that he had ties with a foundation that had been bankrolled with money from a Las Vegas gambling casino.

   1. The threat of impeachment of Supreme Court justices has remained since the 1805 impeachment trial of Justice Samuel Chase.

   2. Conservative politicians have not been the only ones urging impeachment of justices whose decisions they deplored. In 1895, when the Court upheld the conviction of Eugene Debs, liberal politicians called for the impeachment of Supreme Court justices.

VII. Warren’s belief in personal rights was best expressed in his 1967 opinion in *Loving v. Virginia*.

   A. This case involved the conviction of an interracial couple for violating the state law against mixed marriages.

   B. Richard Loving was a white man who married a black woman, Mildred Jeter.

   C. The Lovings were sentenced to jail, but the sentence was suspended if they agreed to leave the state. They sued after they returned to Virginia from Washington, DC.

   D. Warren ruled that marriage was a “basic civil right” and could not be infringed by the state.

   E. Over his entire tenure as chief justice, Warren followed the principle that the Constitution protects the “freedom and dignity” of every American.

Suggested Readings:

**Questions to Consider:**

1. Chief Justice Earl Warren was one of many justices with no prior judicial experience. Should justices be selected from those who serve on state and federal courts?

2. Warren ruled in the *Loving* case that states could not prohibit interracial marriages. Should this ruling be applied to same-sex marriages as well?
Lecture Twenty-Five
“We Beg Thy Blessings”

Scope: The historical context of this lecture goes back to colonial days and to conflicts over religion, which led the Framers to provide, in the First Amendment, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Not until the late 1930s, however, did the Supreme Court hold that state and local officials were bound by these provisions. This lecture looks at four major cases decided by the Court between 1947 and 1963 that dealt with government aid to religion and with prayer in public schools. The Court’s opinions in the first two cases, *Everson* and *McCollum*, were written by Justice Hugo Black, and both affirmed the Court’s commitment to governmental “neutrality” in religion, but these cases had different outcomes, which we will briefly analyze. The second pair of cases, *Engel* and *Schempp*, involved challenges to school prayer. We look at the Court’s rulings in both cases, holding that classroom religious exercises violate the First Amendment. We conclude by looking at the long-term impact of these decisions, which the Court has reaffirmed but are still widely disobeyed in schools across the country.

Outline

I. This lecture discusses the Supreme Court’s rulings in cases that involved the religion clauses of the First Amendment, between 1947 and 1963.

A. The background of these cases reflects the religious diversity of the American people.
   1. More than six of out of seven people identify themselves as Christians.
   2. Protestants make up 56 percent of the population, and 27 percent belong to the Roman Catholic Church, with 62 million members.
   3. There are also several million Jews, Muslims, Hindus, Buddhists, and members of other non-Christian denominations.
4. Some 8 percent of the population has no religious affiliation.

B. These figures reflect divisions over religious belief and practices that create conflicts that often wind up in the Supreme Court.

II. During the colonial period, the Puritan settlers in Massachusetts and other colonies believed that church and state should both be governed by biblical principles.

A. The first law code of Massachusetts was based on the Bible, with citations to Old Testament verses for authority.

B. The Massachusetts colonists expelled those who questioned their religious orthodoxy.

1. Roger Williams was banished to Rhode Island in 1636 for preaching that the state had no power to enforce religious edicts.

2. Anne Hutchinson was also banished for holding religious meetings in her home.

C. Advocates of separating church and state placed their views in the First Amendment, which provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

D. The First Amendment applies only to acts of Congress, and the Supreme Court did not apply its provisions to the states until the 1920s.

E. The Court’s early decisions in religion cases involved the free exercise clause and the rights of religious minorities, such as the Jehovah’s Witnesses.

III. The “establishment of religion” clause has presented the Court with a choice between two views.

A. Thomas Jefferson said, in 1802, that the clause erected a “wall of separation” between church and state.

B. Justice William Douglas said, in 1952, that the Court should “accommodate” the religious views of the people in public areas.

IV. The Court’s first major establishment clause decision came in 1947, in the case of Everson v. Ewing Township, New Jersey.

A. The state legislature provided that the school board could reimburse parents with children in religious schools for their bus
transportation. The tax funds in Ewing Township were all paid to parents with children in Catholic schools.

B. This law was challenged by a parent named Arch Everson as violating the First Amendment.

C. The Court upheld the law by a five-to-four vote.
   1. Justice Hugo Black wrote for the majority, quoting Jefferson’s words about the “wall of separation” between church and state.
   2. Black also said that “no tax in any amount” could be levied to support “any religious activities or institutions.”
   3. However, he said that bus transportation did not aid the religious activities of the Catholic schools.

D. The dissenters cited the “religious test” by which tax funds were paid; they foresaw efforts to introduce religious observances into public schools.

V. In 1948, the Court struck down a program of religious education in public schools in *McCollum v. Champaign-Urbana School District of Illinois*.

   A. In this case, Christian ministers and Jewish rabbis conducted religious classes in a “released time” program for students whose parents approved.

   B. Justice Black also wrote for the majority in this case, holding that schools could not be used for “the dissemination of religious doctrines.”

   C. The sole dissenter, Justice Stanley Reed, said that the religion classes were part of the nation’s history and did not violate the establishment clause.


   A. In *McGowan v. Maryland*, he said that Sunday is “a day of rest for all citizens” and that the law’s religious motivation was “irrelevant.”

   B. In *Braunfeld v. Brown*, Warren said that Orthodox Jewish merchants who observed Saturday as their holy day could not challenge a Sunday-closing law.
VII. The Court faced the issue of school prayer in two landmark cases in 1962 and 1963.

A. In 1962, the Court ruled that public schools in New York could not use a “non-denominational” prayer in classrooms.
   1. Justice Black again cited Jefferson’s “wall of separation” in his majority opinion in *Engel v. Vitale*. He said that prayer established the “religious beliefs” of the lawmakers who approved its use.
   2. The sole dissenter, Justice Potter Stewart, said the Court’s decision prevented students from sharing in “the spiritual heritage of our nation.”

B. The Court ruled in 1963 that Pennsylvania could not require the recitation of the Lord’s Prayer and Bible verses in public schools.
   1. Justice Tom Clark wrote in *Abington Township School District v. Schempp* that “the state is firmly committed to a position of neutrality” in matters of religion.
   2. He said the Lord’s Prayer and Bible readings showed the state’s “official endorsement of Christian belief.”
   3. Justice Stewart again dissented, saying the state should be able to “accommodate” the beliefs of the Christian majority in public school exercises.

C. The *Engel* and *Schempp* decisions were widely criticized, and religious practices in public schools remain a source of division in American society.

Suggested Readings:

Questions to Consider:
1. Do you think public schools should allow “released-time” programs for students to attend classes that are taught by ministers and rabbis, if attendance is voluntary?
2. Should schools be allowed to use Bible stories in teaching about moral values, if they also use the holy books of other religions, such as Islam and Buddhism?
Lecture Twenty-Six
“You Have the Right to Remain Silent”

Scope: The context of this lecture goes back to colonial days and the imposition of laws to define and punish criminal behavior. The Massachusetts Bay colony based its criminal laws on the Bible and provided capital punishment for religious crimes, such as idolatry, blasphemy, and witchcraft. The Constitution’s Framers included in the Bill of Rights four amendments that protected the rights of criminal defendants in such areas as search and seizure, self-incrimination, the right to counsel, and the imposition of “cruel and unusual punishment.” However, the Supreme Court did not begin applying these provisions to the states until the 1930s, and not until the Warren Court years did it fashion a national code of criminal procedure. We will examine several landmark decisions in this field, including *Mapp v. Ohio*, which dealt with search and seizure; *Gideon v. Wainwright*, which ruled that criminal defendants have the right to a lawyer at their trials; and *Miranda v. Arizona*, protecting the right against self-incrimination under police interrogation.

Outline

I. This lecture examines the Supreme Court’s rulings, between 1942 and 1966, in cases that involve the criminal law provisions of the Constitution. As background, the Declaration of Independence denounced King George for obstructing “the administration of justice” and depriving the colonists of “trial by jury.”

II. The Bill of Rights included several provisions that established a code of criminal procedure to protect the rights of criminal defendants.

A. The Fourth Amendment protects the right to be secure “against unreasonable searches and seizures” and requires a warrant based on “probable cause” that describes “the place to be searched, and the person or things to be seized.”

B. The Fifth Amendment has several criminal law protections.
   1. It requires an indictment by a grand jury for criminal charges.
2. It also protects defendants against being “twice put in jeopardy of life or limb.”
3. It says no person “shall be compelled in any criminal case to be a witness against himself.”
4. It provides that no person shall “be deprived of life, liberty, or property without due process of law.”

C. The Sixth Amendment includes several protections for criminal defendants.
1. It provides “the right to a speedy and public trial by an impartial jury.”
2. Criminal defendants must be “informed of the nature and cause of the accusation” against them.
3. They also have the rights “to be confronted by the witnesses” against them; to have “compulsory process” to obtain witnesses in their defense; and to “have the assistance of counsel” for their defense.

D. The Eighth Amendment prohibits “excessive” bail and fines and the imposition of “cruel and unusual punishments.”

III. The criminal law provisions of the Bill of Rights were intended to apply only in federal prosecutions.

A. Beginning in the 1920s, the Supreme Court “incorporated” provisions of the Bill of Rights into the Fourteenth Amendment in cases dealing with First Amendment rights and applied them to the states.

B. Questions remained about the “incorporation” of the criminal law provisions and their application to state prosecutions.

IV. Federal courts have long applied the search-and-seizure provision of the Fourth Amendment in federal cases through the exclusionary rule that bars the admission of illegally seized evidence.

A. In 1949, the Supreme Court ruled in *Wolf v. Colorado* that the exclusionary rule did not apply to the states.

B. In 1961, the Court overruled the *Wolf* decision in *Mapp v. Ohio*.
   1. This case involved a police search of Dollree Mapp’s home in Cleveland, Ohio, looking for a criminal suspect. The police did not have a search warrant.
2. The officers did not find the suspect, but they seized allegedly obscene materials, and Mapp was convicted for possessing them.

3. The Court reversed her conviction, holding that applying the exclusionary rule to the states “makes very good sense” in subjecting states to the federal standard.

V. The Court also “incorporated” the right-to-counsel provision of the Sixth Amendment into the Fourteenth.

A. In 1942, the Court ruled in *Betts v. Brady*, by a vote of six to three, that indigent defendants in state cases did not have a right to counsel.
   1. The majority said the denial of counsel in state cases did not result in “fundamental unfairness” to defendants.
   2. The dissenters said criminal defendants should not be denied counsel “merely because of their poverty.”

B. This ruling was reversed in 1963 by unanimous vote in *Gideon v. Wainwright*.
   1. Clarence Gideon was convicted of burglary after the trial judge denied his request for court-appointed counsel.
   2. The Court held that an indigent defendant “cannot be assured of a fair trial unless counsel is provided for him.”

VI. The Court also applied the self-incrimination provision of the Fifth Amendment to the states.

A. In 1964, the Court ruled in *Escobedo v. Illinois* that criminal suspects who request a lawyer must be provided access to one.

B. The Court expanded this ruling in 1966 in the landmark case of *Miranda v. Arizona*.
   1. Ernesto Miranda was arrested for the kidnapping and rape of a young woman.
   2. He confessed after two hours of police questioning but was not informed of his rights to remain silent and to consult a lawyer.

C. The Court ruled by a five-to-four vote that Miranda’s confession was not “the product of his free choice.”
   1. Chief Justice Earl Warren’s opinion in *Miranda* required a detailed set of warnings that police must provide to suspects, including the right to remain silent and to obtain a lawyer.
2. Justice Byron White warned in dissent that the Court’s ruling would return criminals to the streets.

D. In Miranda’s case, he was convicted a second time without the excluded confession. Four years after his release from prison, he was stabbed to death in a fight in a Phoenix bar. When the police arrested the assailants, they were read their Miranda rights.

E. In subsequent cases, the Court has trimmed the *Miranda* ruling but has never overruled it.

**Suggested Readings:**


**Questions to Consider:**

1. Should juries be allowed to consider evidence of criminal acts that is obtained by police officers without “probable cause” to seize it?

2. Do you think lawyers should be present whenever police question a suspect who is held in custody?
Scope: In this lecture, we examine several of the landmark decisions of the Warren Court during the 1960s, the decade of its greatest influence. We first look at the justices who served under Earl Warren during this period: William Brennan, Potter Stewart, Byron White, Arthur Goldberg, Abe Fortas, and Thurgood Marshall. Justice Brennan, in particular, had a profound influence on the Court, not only during Warren’s tenure as chief justice, but also during the following decades, when he protected the legacy of the Warren Court from reversal by the conservative justices who were named by Presidents Nixon, Ford, Reagan, and Bush. We will examine several cases in which the Warren Court expanded the protections of the Bill of Rights. These cases include *Baker v. Carr* and *Reynolds v. Sims*, which established the principle of one person, one vote in state and federal legislative apportionment; *Heart of Atlanta Motel v. United States*, upholding the “public accommodations” provisions of the 1964 Civil Rights Act; and *Tinker v. Des Moines*, in which the Court upheld the right of public school students to protest the Vietnam War by wearing black armbands to classes.

Outline

I. This lecture concludes our discussion of the Warren Court and examines several of its rulings in cases that provoked controversy and debate.

   A. We first look at the justices who served under Chief Justice Warren, between his appointment in 1953 and his retirement in 1969.

   B. We then discuss cases in the areas of legislative representation, civil rights enforcement, and free speech.

II. During the first five years of Warren’s tenure, four justices left the Court through death or retirement.
A. Justice Robert Jackson died in 1954 and was replaced by John Marshall Harlan. He was a judicial conservative, but he supported First Amendment rights in many cases.

B. Justice Sherman Minton retired in October 1956, one month before the presidential election.
1. President Eisenhower named William Brennan of New Jersey, who sat on his state’s supreme court. He was a Democrat and a Catholic, and the president wanted to appeal to these groups before the election.
2. Brennan’s judicial philosophy was based on protecting the “dignity and well-being” of all Americans, a principle that he absorbed from the “social gospel” of the Catholic Church.
3. Brennan served for 34 years before he retired in 1990. He became the intellectual leader of the Warren Court and used his political skills and personal charm to persuade moderate justices to join liberal opinions.
4. Eisenhower later said that placing Warren and Brennan on the Court had been his two biggest mistakes.

C. Justice Stanley Reed retired in 1957, and Eisenhower replaced him with Charles Whittaker of Missouri, a former corporate lawyer and federal appellate judge.
1. Whittaker developed a writer’s block and produced very few opinions.
2. He retired as “disabled” in 1962 and was ranked a failure by legal scholars.

D. Justice Harold Burton retired in 1958, and Eisenhower’s final nominee was Potter Stewart of Ohio.
1. Stewart had backed Eisenhower for the 1952 presidential nomination and was placed on the federal appellate bench in reward.
2. On the Court, Stewart was a moderate who backed civil rights but was conservative in religion and criminal cases.

III. President John Kennedy was elected in 1960 and placed two justices on the Court.
A. Kennedy replaced Justice Whittaker with Byron White of Colorado.
1. White was a former professional football star who served with Kennedy in World War II.
2. He became deputy attorney general in 1961, enforcing federal civil rights laws.
3. On the Court, White had a liberal record in civil rights cases but was conservative on criminal law and abortion, which he consistently opposed.

B. Justice Felix Frankfurter retired in 1962, and Kennedy replaced him with Arthur Goldberg, the general counsel of the steelworkers’ union.
   1. Goldberg served only three years and was a consistent liberal.
   2. He left the Court in 1965 to become United Nations ambassador.

IV. President Lyndon Johnson succeeded Kennedy in 1963 and placed two justices on the Court.
   A. He replaced Goldberg with Abe Fortas, who had given Johnson legal and political advice for many years.
      1. Fortas founded a prominent Washington law firm and argued the *Gideon* case before the Court.
      2. Fortas served for three years and left the Court under a cloud of scandal for his financial dealings.
      1. We have examined Marshall’s long career as NAACP general counsel and his role in the school segregation cases in the 1950s.
      2. He had served as a federal appellate judge and U.S. solicitor general.
      3. Marshall retired in 1991 and was a consistent liberal ally of Justice Brennan.
   C. The justices named by Kennedy and Johnson, along with Chief Justice Warren and Justice Brennan, made up a solid liberal majority in most cases.

V. The Warren Court reshaped American law in several crucial areas.
   A. In two decisions in 1962 and 1964, the Court ordered state legislative reapportionment on a basis of one person, one vote.
      1. Chief Justice Warren said, in *Reynolds v. Sims*, “legislators represent people, not trees or acres.”
2. These decisions benefited minority voters in big cities and Republicans in suburban districts.

B. In 1964, Congress passed a civil rights law that banned racial discrimination in places of public accommodation, such as restaurants and hotels.
   1. The Court upheld this law in *Heart of Atlanta Motel v. United States*.
   2. The justices said Congress could legislate against the “moral and social wrong” of race discrimination.

C. In 1969, the Court struck down a ban on wearing black armbands by students in Des Moines, Iowa.
   1. Mary Tinker and other students wore the armbands to protest the Vietnam War and challenged their suspensions by school officials.
   2. The Court said public schools are not “enclaves of totalitarianism” and that students and teachers have First Amendment rights.
   3. Justice Hugo Black dissented, saying the decision would produce a “revolutionary era of permissiveness” in schools.

Suggested Readings:

Questions to Consider:
1. Do you think it violates the Constitution to draw state and congressional legislative districts to ensure the election of racial and ethnic minorities?
2. Should a high school student be allowed to wear a shirt or jacket with the Confederate battle flag on it? What about a Black Power slogan?
Lecture Twenty-Eight
Earl Warren Leaves, Warren Burger Arrives

Scope: The context of this lecture stems from the retirement of Earl Warren as chief justice in 1969 and his replacement by Warren Burger. We first recount the story of Warren’s effort to allow President Lyndon Johnson to name Justice Abe Fortas as his successor and the political miscalculations that gave that choice to President Richard Nixon, who picked Burger for his “law and order” opinions as a federal appellate judge. We also look at Burger’s career and his role as an ineffective leader of justices who still revered Warren. This lecture focuses on two cases that involved controversial issues. In *Swann v. Charlotte-Mecklenburg School District*, the Court upheld a busing plan to achieve racial balance in the schools of Charlotte, North Carolina. The second case began with the publication in 1971 by the *New York Times* and *Washington Post* of excerpts from a top-secret history of the Vietnam War, known as the *Pentagon Papers*. The Nixon administration sought injunctions to prevent further publication, and the Court ruled that government officials could not impose a “prior restraint” on the press in this case.

Outline

I. This lecture discusses Chief Justice Warren’s resignation in 1969 and his replacement by Warren Burger. We also examine two landmark rulings of the Burger Court, on school busing and the *Pentagon Papers* case.

II. President Lyndon Johnson announced in March 1968 that he would not seek another term.

A. Chief Justice Warren wanted to retire and name Justice Abe Fortas as his successor.

1. Johnson told Warren in June 1968 that he would accept his resignation “at such time as a successor is qualified.”

2. Johnson nominated Fortas as chief justice, but Senate Republicans mounted a filibuster to delay his confirmation, with the November election in mind.
3. The press uncovered embarrassing details of Fortas’s financial dealings, and Johnson withdrew his nomination in October 1968.
4. Warren remained as chief justice until June 1969, after Richard Nixon was elected president.

B. Nixon named Warren Burger of Minnesota to replace Warren.
   1. Burger was born in 1907 and worked his way through law school at night.
   2. He was active in Republican politics and was placed on the federal appellate bench by President Eisenhower in 1956.
   3. Burger took a conservative position as an appellate judge, particularly in criminal cases.
   4. Nixon chose Burger as a “law and order” judge, hoping to move the Court to the right.

C. However, Burger was, in my opinion, not an effective leader, and the Court did not reverse the landmark Warren Court rulings.
   1. Burger upset other justices by switching his vote in several cases to be able to assign the majority opinion.
   2. Justice William Douglas wrote a memo to his colleagues, saying that Burger’s moves would create “a frayed and bitter Court, full of needless strains and quarrels.”

III. Justice Abe Fortas resigned in May 1969, after further press reports of his financial improprieties.
   A. President Nixon was determined to place southern conservatives on the Court, part of his electoral strategy to appeal to white voters.
   B. Nixon’s first nominee to replace Fortas was Clement Haynsworth of South Carolina, a federal appellate judge.
      1. Haynsworth had voted in one case for a company in which he owned stock, which led several Senate Republicans to oppose his confirmation.
      2. Civil rights and labor groups also opposed Haynsworth, and his nomination was defeated by a 55-45 vote.
   C. Nixon then nominated another federal appellate judge, Harrold Carswell of Florida.
      1. Reporters discovered a 1948 speech in which Carswell defended white supremacy.
2. The Senate rejected his confirmation by a 51-45 vote.

D. Nixon then abandoned his “southern strategy” and nominated Harry Blackmun of Minnesota.

1. Blackmun was a boyhood friend of Chief Justice Burger and had represented the Mayo Clinic as a lawyer; he later served as a federal appellate judge.

2. The Senate confirmed Blackmun by unanimous vote; he took a conservative position on the Court but moved to the liberal side after several years.

IV. The Burger Court decided a landmark case in 1971, upholding school busing to achieve racial balance.

A. The case of *Swann v. Charlotte-Mecklenburg School District* involved the schools in North Carolina’s largest district.

1. A federal judge ordered busing to provide a racial balance of 79 percent white students and 21 percent black.

2. President Nixon opposed school busing, and it became a heated political issue.

3. A federal appellate court reversed the busing order.

B. During the Court’s deliberations in the *Swann* case, Chief Justice Burger first voted to uphold the appellate court ruling against busing.

1. Under the Court’s tradition, Justice William Douglas had the power to assign the majority opinion, but Burger said he would write it; Douglas objected strongly, but Burger went ahead.

2. He produced a unanimous opinion that took a narrow approach, which allowed school districts to maintain all-white or all-black schools if student assignments were not based on racial discrimination.

V. The Burger Court also handed down a landmark ruling on government press censorship in 1971.


1. The so-called Pentagon Papers had been given to the newspapers by Daniel Ellsberg, a former Pentagon official who had turned against the war.
2. Government lawyers obtained judicial injunctions to bar further publication of the Pentagon Papers.

B. The legal issue in *New York Times v. United States* was the *prior restraint* doctrine, which prohibits censorship before publication without strong evidence of harm to national security.

1. Government lawyers argued that further publication would “materially affect the security of the United States” and would complicate efforts to end the Vietnam War.

2. The newspapers’ lawyers replied that only evidence of “immediate and irreparable” harm to national security could justify the government’s “heavy burden” against prior restraint.

C. The Court ruled for the newspapers by a six-to-three margin.

1. The Court issued a one-paragraph, unsigned opinion, but several justices added their own opinions.

2. Justice Hugo Black called the government’s actions a “flagrant” violation of the First Amendment.

3. In dissent, Justice Burger criticized the “unseemly haste” in bringing the case to the Court.

*Suggested Readings:*


*Questions to Consider:*

1. Do you think Chief Justice Warren was justified in conditioning his retirement on the confirmation of his chosen successor?

2. Should the government be allowed to prohibit the publication of material that might inform hostile nations or terrorist groups about American military or diplomatic plans?
Lecture Twenty-Nine  
“A Right to Privacy”

Scope: This lecture begins with a look at two justices placed on the Supreme Court by President Richard Nixon: Lewis Powell and William Rehnquist. We will examine in some detail the background and judicial philosophy of Justice Rehnquist, who was named to lead the Court in 1986. We will then discuss the controversies, going back to the 19th century, over such “personal autonomy” issues as forced sterilization, access to contraceptives, and criminal abortion laws. The major judicial figures in this area include Justices Oliver Wendell Holmes, whose 1927 opinion in *Buck v. Bell* upheld Virginia’s forced sterilization law; William O. Douglas, who wrote for the Court in 1965, striking down a state ban on contraceptive use in *Griswold v. Connecticut*; and Harry Blackmun, whose 1973 opinion in *Roe v. Wade* ruled that states could not make abortion a criminal offense. We will look at the differing personal views and judicial approaches these justices brought to each case. We will also hear the stories of Carrie Buck, who was sterilized for bearing an illegitimate child; Estelle Griswold, who headed a Planned Parenthood clinic; and Norma McCorvey, the “Jane Roe” in the abortion case. This lecture follows the *Roe* case from its beginning through the Supreme Court arguments over the Texas law that banned all abortions unless the life of the pregnant woman was endangered.

Outline

I. This lecture begins our discussion of the Court’s rulings on abortion and examines the backgrounds and careers of two justices who joined the Court in 1972.

II. Justices Hugo Black and John Harlan both retired in September 1971, and both died before the year ended.

A. President Richard Nixon nominated Lewis Powell of Virginia to replace Black.

   1. Powell was a prominent lawyer in Richmond, who had chaired both the city and state school boards.
2. He had served as president of the American Bar Association and had opposed the “massive resistance” program of Virginia’s segregationist politicians.

3. Powell had earlier turned down a Supreme Court nomination, but he agreed to join the Court at Nixon’s request.

4. On the Court, Powell was a moderate conservative and often cast the swing vote in crucial cases.

B. Nixon nominated William Rehnquist of Arizona to replace Harlan.
   1. Rehnquist graduated at the top of his Stanford law school class and had served as law clerk to Justice Robert Jackson.
   2. He practiced law in Phoenix and was active in Republican politics.
   3. Rehnquist served in the Justice Department as legal counsel to the attorney general in the Nixon administration.

C. He was an advocate of legal positivism, the doctrine that laws have no moral content and should be obeyed because they reflect majority sentiment.
   1. He took very conservative positions on civil rights, arguing against “public accommodation” laws and school integration plans in Phoenix.
   2. During his Senate confirmation hearings, he was confronted with a memo he wrote to Justice Jackson in 1953, arguing, “Plessy v. Ferguson was right and should be reaffirmed.”
   3. Rehnquist was only 47 when he joined the Court; Nixon said he chose him because he could serve another 25 years or more.

III. We will examine the origins of the “right to privacy” in American law.

   A. In 1890, Louis Brandeis wrote a Harvard Law Review article on the right to privacy.
      1. He was concerned about the invasion of privacy by tabloid newspapers.
      2. Brandeis argued that a basic principle of law was “the right to be let alone” in personal matters, although he did not mention abortion.

   B. However, Brandeis joined the opinion of Justice Oliver Wendell Holmes in the 1927 case of Buck v. Bell.
1. In this case, Holmes upheld a Virginia law that allowed the forced sterilization of “feeble-minded” and “morally delinquent” inmates of state institutions.

2. Holmes said the state had a right to prevent those who were “manifestly unfit from continuing their kind.”

C. In 1942, the Court ruled against the forced sterilization of three-time felons in state prisons, in *Skinner v. Oklahoma*.

1. Justice William Douglas said that sterilization could be abused by officials with “evil or reckless hands,” a reference to the policies of Nazi Germany.

2. He also said that marriage and procreation were among “the basic civil rights of man.”

IV. In 1965, Douglas again wrote for the Court in striking down a state law that banned the use or distribution of contraceptives, in *Griswold v. Connecticut*.

A. This case involved a challenge by the director of the Planned Parenthood clinic in New Haven.

B. Douglas found a “right of privacy” in the Constitution that stemmed from the protections of the Bill of Rights.

C. Justice Hugo Black dissented in *Griswold*, saying that the Constitution does not mention privacy.

D. In my view, the split between Black and Douglas, two of the Court’s most liberal justices, says a great deal about the power of ideas.

1. Douglas believed the Constitution should be read broadly to protect “fundamental rights” against governmental interference. He believed that conceptions of these fundamental rights should reflect changes in society.

2. Black felt strongly that new rights could be created only by amending the Constitution.

V. The case of *Roe v. Wade* confronted the Court with the abortion issue in 1971 and 1972.

A. This case began in Dallas, Texas, when a pregnant woman named Norma McCorvey approached two young lawyers, Linda Coffee and Sarah Weddington.
B. They filed a suit on behalf of McCorvey, protecting her identity as “Jane Roe.” Henry Wade, the Dallas district attorney, was the lead defendant.

C. Texas law banned all abortions, except those necessary to save a pregnant woman’s life.

D. A panel of federal judges struck down the law as a violation of the Ninth Amendment, which protects rights that are “retained by the people” from government abridgment.

VI. The oral arguments before the Supreme Court in *Roe v. Wade* focused on two issues.

A. Does the Constitution protect a “right to privacy” that includes abortion?

B. Is a fetus a “person” with rights to life under the due process clause of the Fourteenth Amendment?

C. Our next lecture discusses the Court’s deliberations and decision in the *Roe* case.

**Suggested Readings:**


**Questions to Consider:**

1. Do you think there should be any circumstances in which people could be sterilized without their consent, such as profound mental retardation?

2. If the Constitution does not mention a “right to privacy,” should judges have the power to find one in other constitutional provisions?
Lecture Thirty
From Abortion to Watergate

Scope: This lecture begins with the Court’s deliberations in the *Roe* case, with a focus on the majority opinion of Justice Harry Blackmun. We will look at the way in which Blackmun based his ruling on several earlier cases that dealt with such issues as search and seizure, wiretapping, possession of pornography, and the right of parents to control their children’s education. We will see how Blackmun drew out of these earlier cases a “right to privacy broad enough to encompass a women’s decision whether or not to terminate her pregnancy.” This lecture also discusses the dissenting opinions of Justices William Rehnquist and Byron White in the *Roe* case, who argued that states should retain the right to decide whether abortion should be legal or banned. Finally, we will look at the so-called “Watergate Tapes” case, in which the Court sustained the power of federal courts to order President Richard Nixon to turn over the Oval Office tape recordings of his conversations about the cover-up of White House involvement in the Watergate burglary of the Democratic National Committee in 1972.

Outline

I. This lecture discusses the Supreme Court’s deliberations and decision in the abortion case of *Roe v. Wade*. It also examines the Court’s landmark ruling in 1974, in the Watergate Tapes case of *Nixon v. United States*.

II. The Court began its deliberations in *Roe v. Wade* shortly after the oral arguments in December 1971.

A. Only seven justices heard the arguments; Justices Lewis Powell and William Rehnquist had been confirmed by the Senate but did not take their seats until January 1972.
B. Chief Justice Warren Burger presided at the conference on the *Roe* case.
   2. Justice Byron White made clear that he would vote to uphold the law.
   3. Justices Harry Blackmun and Potter Stewart took a middle-of-the-road position; they supported a doctor’s right to use his medical judgment on abortion but were not convinced that the Constitution protected a broad right to privacy.
   4. Chief Justice Burger argued for upholding the Texas law but reserved his vote on the *Roe* case.

C. Justice Douglas counted Stewart on his side and said there was a majority to strike down the law.
   1. Under the Court’s practice, Douglas had the power to assign the majority opinion.
   2. However, Burger announced he had assigned the opinion to Blackmun.
   3. Douglas protested, but he finally agreed to let Blackmun draft an opinion. He suspected that Burger wanted to hold up the decision to avoid making abortion an issue in the 1972 presidential election.

III. The *Roe* case was argued a second time in October 1972, after Justices Powell and Rehnquist took their seats.
   A. The arguments largely rehashed those in the first round.
   B. The final vote on the *Roe* case was seven to two.

IV. Justice Blackmun spent several months drafting an opinion in the *Roe* case.
   A. He explored the medical history of abortion.
      1. Most countries did not ban it until the late 19th century, over concerns about infection.
      2. However, modern antiseptic procedures had made abortion safer than childbirth.
B. Blackmun devoted just one paragraph to the constitutional issues.
   1. He cited 14 earlier decisions to support his conclusion that the Constitution included a right to privacy that prohibited states from banning abortions.
   2. These cases spanned the years from 1886 to 1972.
   3. None of them dealt with abortion; they covered such issues as search and seizure, wiretapping, the rights of parents and teachers to educate children, and police “stop-and-frisk” practices.
   4. Only the *Griswold* decision of 1965 dealt with issues of personal autonomy in procreation.
   5. Blackmun based his opinion on the “liberty” interest in the due process clause of the Fourteenth Amendment.

C. Blackmun’s opinion applied the strict scrutiny test, which the Court applied in cases involving fundamental rights under the Constitution.

D. Justice Rehnquist based his dissent on the rational basis test, saying that abortion was “far more appropriate to a legislative judgment than to a judicial one.”

E. Justice White also dissented, saying the decision was “an exercise of raw judicial power.”

F. Chief Justice Burger finally joined the majority but said in a concurring opinion that the Constitution does not allow “abortion on demand.”

V. The public reaction to the *Roe* decision was sharply divided.
   A. Catholic leaders denounced the ruling, and abortion supporters praised it.
   B. A Gallup poll showed that 46 percent of the public felt that decisions about abortion during the first three months of pregnancy should be left to women and their doctors; 45 percent were opposed.

VI. The Court decided the Watergate Tapes case in 1974.
   A. This case began in June 1972 with a break-in at Democratic headquarters in the Watergate complex in Washington, DC.
   B. It was soon discovered that the men arrested for the break-in were tied to President Nixon’s reelection campaign.
C. Watergate became a national issue, and President Nixon was forced to appoint a special prosecutor, Archibald Cox.

D. When Cox requested tape recordings of Nixon’s Oval Office conversations about Watergate, the president fired him. Cox was replaced by a Houston lawyer, Leon Jaworski.

E. Jaworski pressed for the tapes, and Nixon refused to turn them over to a federal judge for the prosecution of White House officials.

VII. The case reached the Supreme Court, and Nixon’s lawyers argued that the tapes were protected under the executive privilege doctrine.

A. Jaworski said the president was no different from any other citizen in providing evidence in criminal cases.

B. The Court ordered Nixon to turn over the tapes in a unanimous ruling in July 1974.

C. The next month, Nixon resigned as president.

D. How the Court would rule in another confrontation between a president and federal judges is a difficult question.

Suggested Readings:

Questions to Consider:
1. Should abortion be a matter for each state’s legislature to decide, or should this issue be decided by unelected judges?
2. Under what circumstances do you think the president should have the power to protect his or her private conversations from disclosure to judges?
Lecture Thirty-One
The Court Faces Affirmative Action

Scope: This lecture focuses on long-standing patterns of discrimination against women and racial minorities in education and employment. In 1964, Congress passed the Civil Rights Act, banning discrimination based on gender or race. The **affirmative action** programs adopted by schools and businesses helped many women and blacks, but they generated a white male backlash that brought several important cases before the Supreme Court. We will examine in detail the landmark case of *Regents of the University of California v. Bakke*, first recounting the story of Allan Bakke, an aerospace engineer who applied for admission to the University of California medical school at Davis. Bakke claimed that the school’s minority admissions program, which set aside 16 places in a class of 100 for members of “disadvantaged minorities,” discriminated against him as a white applicant. We will look at the Court’s split decision in this case, in which Justice Lewis Powell cast the deciding vote to strike down the minority quota, but also to allow race to be used as a factor in medical school admissions.

Outline

I. This lecture examines the issue of affirmative action and the Court’s 1978 ruling in the landmark *Bakke* case.
   A. The background of this issue stems from discrimination against racial minorities and women during most of our nation’s history.
   B. Inferior education in segregated schools before the *Brown* ruling in 1954 made it difficult for blacks to compete with whites for professional training and good jobs.
   C. In 1960, blacks made up fewer than two percent of doctors, lawyers, engineers, and executives.
   D. Women also sought access to higher education and employment, but the failure of the Equal Rights Amendment in 1974 set them back.
II. Congress passed a Civil Rights Act in 1964 that banned racial discrimination in any program receiving federal funds, including most colleges and universities.
   A. The law also banned discrimination against women.
      1. Congressional opponents of civil rights had added the sex-discrimination provision to the bill, hoping to reduce its support.
      2. But this move backfired, and the bill passed with that provision.
   B. President Lyndon Johnson began the first major affirmative action program in 1965 with an executive order that banned discrimination by federal contractors.

III. The University of California medical school at Davis began its affirmative action program in 1969.
   A. This program set aside 16 places in each entering class of 100 for members of “disadvantaged minorities.”
   B. Applicants in this group were considered by a separate admissions committee.
   C. Between 1970 and 1974, 33 Mexican Americans, 26 African Americans, 12 Asian Americans, and 1 Native American were admitted through the special admission program.

IV. Allan Bakke first applied to the Davis medical school for admission in 1973, along with a dozen other schools.
   A. Bakke was an aerospace engineer who had served in Vietnam as a Marine officer.
      1. He was 33 years old, and most schools rejected him because of his age.
      2. Bakke had a B-plus undergraduate record and high scores on the medical college admissions test.
   B. He was rejected by Davis, falling two points short of admission under the regular admissions program.
   C. Bakke learned of the school’s minority admissions program and filed a complaint that he had been rejected on racial grounds.
   D. He applied again to the Davis medical school for admission in 1974 and was again rejected.
V. Bakke found a San Francisco lawyer, Reynold Colvin, who filed a lawsuit against the university’s board of regents in 1974.
   A. The suit alleged that Bakke had been discriminated against on racial grounds.
   B. It also said that “less qualified” minority students had been admitted.
   C. The university’s lawyers replied that the special admission program was aimed at “promoting diversity” in the medical profession.
   D. Bakke won favorable rulings from California state courts, which ordered his admission to the Davis school.

   A. For its representation, the university hired Archibald Cox, a former solicitor general and Watergate special prosecutor.
      1. Cox argued that the special admissions program did not result in the admission of “less qualified” medical students.
      2. He said minority students “may have qualities that are superior” to those of white students.
   B. Reynold Colvin replied that “race is an improper classification” in university admissions.

VII. The Supreme Court decided the *Bakke* case in 1978.
   A. The justices were split into two factions of four each in this case.
      1. Four liberal and moderate justices voted to uphold the special admissions program and the quota of 16 places for minority students.
      2. Four conservative justices rejected any consideration of race in admissions.
   B. Justice Lewis Powell cast the swing vote and wrote an opinion with two parts.
      1. He joined the liberal and moderate justices in upholding programs that made race a “plus” factor in admissions.
      2. Powell also joined the conservatives in striking down the quota system and ordered Bakke’s admission to the medical school.
C. Since the Bakke decision, the University of California has adopted a “race-blind” admissions policy, which has lowered the number of minority students.

D. Affirmative action remains a highly controversial issue, and the Court has continued to struggle with this question in subsequent cases.

Suggested Readings:
Peter Irons, A People’s History of the Supreme Court, chapter 34 (1999).

Questions to Consider:
1. Do you think colleges and graduate schools should be allowed to take racial and ethnic diversity into account in their admissions policies?
2. Should college and graduate school admissions be based solely on grades and test scores, or should other factors be considered? If so, which ones?
Lecture Thirty-Two
Down from the Pedestal, Out of the Closet

Scope: The historical context of this lecture stems from long-standing discrimination against two groups in American society, women and homosexuals. Women constitute a majority of the population, while gays and lesbians make up a small fraction, but they share a history of both social and legal disabilities. From colonial days until the 20th century, women in many states could not own property, participate in government, or aspire to higher education and well-paying jobs. Gays and lesbians fared even worse, subject to criminal laws against homosexual sodomy and harassment by police in gay bars. We will look at several important Supreme Court cases, including one involving women’s rights from the 19th century, when the Court ruled that Myra Bradwell could not practice law in Illinois, until 2000, when the justices struck down exclusion of women from the Virginia Military Institute. We will also examine a landmark gay rights case, Bowers v. Hardwick, in which the Court narrowly upheld Georgia’s criminal sodomy law against a challenge by a gay man, Michael Hardwick.

Outline

I. This lecture discusses the Supreme Court’s rulings in cases that dealt with discrimination against women and against gays and lesbians.
   A. The gender discrimination cases raise issues of how stereotypes about women have shaped laws and judicial decisions.
   B. The gay rights case we will discuss involves the question of society’s “moral disapproval” of homosexual behavior.
   C. These cases also raise the question of whether the Court should apply the strict scrutiny test to discrimination against women and gays.

II. We begin with the Court’s rulings in gender discrimination cases between 1873 and 1996.
A. The case of *Bradwell v. Illinois* involved a woman lawyer named Myra Bradwell.
   1. She published a legal periodical in Chicago that was highly respected by state judges.
   2. Bradwell passed the Illinois licensing exam for lawyers with flying colors.
   3. However, the state supreme court rejected her application for bar admission solely because she was a woman.

B. In the Supreme Court, her lawyer argued that the Fourteenth Amendment barred discrimination against any person, regardless of sex.

C. The Court unanimously upheld the state’s right to ban women from law practice.

D. In a concurring opinion, Justice Joseph Bradley said that the “timidity and delicacy” of women made them unfit to practice professions such as law. He added, “this is the law of the Creator.”

E. The Court followed the *Bradwell* precedent in a 1948 case, ruling in *Goesaert v. Cleary* that states could prohibit women from working as bartenders.

III. The feminist movement of the 1960s and 1970s generated pressure against gender discrimination.

A. The American Civil Liberties Union set up a Women’s Law Project, directed by a Columbia law professor, Ruth Bader Ginsburg.

B. This project challenged an Idaho law that preferred men over women as administrators of estates.

C. Sally Reed applied to administer the estate of her deceased son, but the state court chose her former husband for this position.

D. The Supreme Court struck down this decision in a unanimous ruling in 1971.
   1. The Court’s opinion cited a 1920 case that said “all persons similarly situated shall be treated alike” under state laws.
   2. The Court said the Idaho law made the kind of “arbitrary legislative choice” that violated the Fourteenth Amendment.
IV. In 1973, the Court applied this ruling in the case of *Frontiero v. Richardson*.

A. Sharron Frontiero was an Air Force lieutenant who applied for dependent’s benefits for her husband, who was a full-time college student.

B. The Air Force regulation gave such benefits to male officers, regardless of their spouse’s financial status, but female officers had to show they provided more than half of their husband’s support, which Frontiero did not.

C. Ruth Ginsburg argued for Frontiero, urging the Court to apply the strict scrutiny test in gender discrimination cases.

D. The Court struck down the Air Force regulation by an eight-to-one margin.
   1. Four justices agreed with the strict scrutiny standard in *Frontiero*, but three others in the majority disagreed.
   2. Justice Lewis Powell said in concurrence that the Court should wait for states to ratify the Equal Rights Amendment, which later failed.

V. In 1996, Ginsburg was sitting as a justice. She wrote the majority opinion in *United States v. Virginia*.

A. This case involved the Virginia Military Institute, a state-run school that barred women from admission.

B. After the federal government sued the state, Virginia set up a women-only “leadership training” school.

C. Ginsburg cited the Court’s earlier rulings in school segregation cases in ruling that Virginia had not offered women “substantial equality” in the women-only school.

VI. The Court ruled on gay rights in the 1986 case of *Bowers v. Hardwick*.

A. This case involved a Georgia law that made sodomy a crime, punishable by 20 years in prison.

B. Michael Hardwick was arrested in his bedroom for having sex with another man.

C. He challenged the sodomy law as a violation of “liberty” under the Fourteenth Amendment.
D. A federal appellate court struck down the law, and the Georgia attorney general, Michael Bowers, appealed to the Supreme Court as the defendant in the case.

VII. The Court ruled against Hardwick in June 1986 by a five-to-four margin.

A. The majority said that laws were “constantly based on notions of morality.”

B. The Court refused to apply the strict scrutiny test, saying that Georgia met the rational basis test in its citizens’ belief that homosexual sodomy was “immoral.”

C. The dissenters said that individuals, regardless of sexual orientation, should have the “freedom to choose how to conduct their lives,” including sexual behavior.

D. Justice Lewis Powell joined the majority in the Bowers case. After he retired in 1987, he said “I probably made a mistake” in that decision.

E. The Georgia supreme court later struck down the state’s sodomy law, while other states, including Texas and Alabama, have upheld their state laws against sodomy.

Suggested Readings:

Questions to Consider:
1. Women make up a slight majority of the population. Should they be subject to the same strict scrutiny test that courts apply to discrimination against racial and ethnic minorities?
2. Do you think women should be allowed to serve in front-line combat units in the armed forces?
Lecture Thirty-Three
Burning Flags and Burning Crosses

Scope: This lecture examines two acts of “symbolic speech” that have generated much controversy in American society: burning the American flag as an act of political protest and burning crosses to express racial hatred against blacks. We will focus on two cases in this area. In 1989, a sharply divided Court struck down a Texas law under which Gregory Johnson was sentenced to jail for burning the American flag. The majority opinion of Justice William Brennan ruled that flag burning was protected by the First Amendment. The four dissenters, led by Chief Justice William Rehnquist, argued vehemently that the flag held a “unique place” as our national symbol and could be protected by law against destruction or defacement. The Court later invalidated a municipal hate crime ordinance under which Robert Viktora was convicted for burning a cross on the lawn of a black family. We will analyze the conflicting opinions in these cases and look at the continuing debate over efforts to ban the symbolic expression of controversial views.

Outline

I. This lecture examines the Supreme Court’s rulings in cases that involve “desecration” of the American flag and burning of crosses as an expression of racial hostility. It also discusses major changes in the Court’s membership in 1986 and 1987.

II. Chief Justice Warren Burger announced his retirement in June 1986. He said that he would direct the preparations for celebrating the Constitution’s bicentennial in 1987.

A. President Ronald Reagan nominated Justice William Rehnquist to replace Burger.

B. Reagan had already placed Justice Sandra Day O’Connor on the Court, the first woman to serve in that post. She replaced Justice Potter Stewart.

1. O’Connor had graduated from Stanford law school but could not find employment in any major law firm.
2. She found a job in a California county attorney’s office and later established a law practice in Phoenix, Arizona.

3. O’Connor was elected to the Arizona senate, then became a state judge.

4. During her Senate confirmation hearings, she pledged to follow the judicial restraint position.

C. Justice Rehnquist was opposed by many Senate Democrats as too conservative.
   1. His opposition to abortion rights in the *Roe* case prompted pro-choice groups to lobby against him.
   2. Rehnquist was also questioned about his 1953 memo to Justice Jackson, saying, “*Plessy v. Ferguson* was right and should be reaffirmed.”
   3. He was finally confirmed as chief justice, with 33 votes against him.

D. Reagan nominated Antonin Scalia to fill the vacancy created by Rehnquist’s elevation to chief justice.
   1. Scalia was a former law professor and Justice Department official and had served on the federal appellate court in Washington, DC.
   2. He was an outspoken conservative and opponent of abortion, but he was confirmed without dissent.

   1. Like Scalia, Bork was a former law professor, Justice Department official, and federal appellate judge.
   2. He was also an outspoken conservative, who denounced the *Roe* decision.
   3. Pro-choice groups mounted a lobbying campaign against Bork, and the Senate rejected his confirmation by a 58-42 margin.

F. Reagan chose another appellate judge, Douglas Ginsburg, but withdrew his nomination after reports that Ginsburg had smoked marijuana as a Harvard law professor.

G. Reagan finally replaced Powell with Anthony Kennedy, a federal appellate judge from California. Kennedy was a judicial moderate with a “squeaky-clean” reputation and was confirmed without dissent.
In 1989, the Court struck down a Texas law against “desecration” of the flag in *Texas v. Johnson*, by a margin of five to four.

A. This case began with a Communist-led demonstration at the 1984 Republican convention in Dallas, at which protestors burned an American flag. Gregory Johnson was sentenced to a year in jail for this act.

B. Justice William Brennan wrote for the majority, saying Johnson could not be punished for the “content” of his message.

C. Brennan said the “bedrock principle” of the First Amendment was that society may not punish “the expression of an idea because society finds the idea offensive.”

D. Chief Justice Rehnquist wrote in dissent that the flag was a “special” symbol that deserved protection.

E. The Court’s ruling ignited a firestorm of public protest, and efforts to reverse it by constitutional amendment, but the Senate rejected this effort.

The Court struck down a municipal hate crimes law in the 1992 case of *R.A.V. v. City of St. Paul, Minnesota*.

A. Robert Viktora was a juvenile who burned a cross on the lawn of a black family in St. Paul. He was convicted under a law that made the placing of a burning cross on private or public property a crime if the act would arouse “anger or alarm” on the basis of race, religion, or gender.

B. The Court unanimously struck down the law, ruling that it violated the doctrine of content neutrality.

C. Justice Scalia wrote for the Court: “The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed.”

The Court’s ruling in the *R.A.V.* case did not end the judicial debate over cross burning. The issue returned to the Court in April of 2003, when the justices decided three separate cases from Virginia.

A. In 1952, the Virginia state legislature had passed a law making cross burning a crime, if its purpose was to “intimidate” anyone who witnessed the act, but the law permitted judges to instruct jurors that they could “infer” that any cross burning was meant to intimidate.
B. In one case, a Ku Klux Klan leader named Barry Black had presided at a Klan rally that included cross burning and Klan rhetoric about white supremacy, but no African Americans had witnessed the rally or the cross burning.

C. In the other cases, two white men had burned a cross on a black neighbor’s lawn after the neighbor had complained about the two men shooting firearms on their own property.

D. In deciding these cases, the justices were deeply split.
   1. Justice Sandra Day O’Connor wrote for the majority of six in *Virginia v. Black*, holding that states could outlaw cross burning “as a particularly virulent form of intimidation.” However, she also held that Virginia’s law was unconstitutional, because it required jurors to find that any act of cross burning was meant to intimidate those who witnessed it.
   2. O’Connor wrote that burning a cross at a Klan rally could be protected by the First Amendment as a form of “symbolic speech.” But burning a cross on a neighbor’s lawn, regardless of race, could be seen as a “true threat,” with no symbolic meaning and no First Amendment protection.
   3. Justices Souter, Kennedy, and Ginsburg dissented, arguing that the “content discrimination” in the Virginia law could not “rescue” it from the *R.A.V.* precedent.
   4. Justice Clarence Thomas also dissented, arguing that cross burning was not speech at all, but simply “terroristic conduct” whose only purpose was to intimidate blacks.

VI. Public opinion polls show that most people oppose the Court’s rulings in the flag-burning and cross-burning cases. But as Justice Kennedy wrote in his concurring opinion in the flag-burning case, “sometimes we must make decisions we do not like.”

**Suggested Readings:**


Questions to Consider:

1. Do you think the First Amendment should protect those who burn the American flag as an act of political protest?

2. Burning a cross has long been associated with the Ku Klux Klan and other racist groups. Should that act be treated as a criminal offense?
Lecture Thirty-Four
Prayer and Abortion Return to the Court

Scope: This lecture reflects the fact that some of the Supreme Court’s decisions in controversial cases do not resolve the issues they raise but, in fact, provoke even more controversy and produce more cases for the justices to decide. In this lecture, we look at cases in which the Court was forced to revisit issues involving school prayer and abortion that had been decided in earlier cases. The Court ruled in 1962 and 1963 that official prayers in public schools violated the establishment of religion clause of the First Amendment, but many schools continued to offer prayers. We will examine two recent cases in which the Court faced challenges to prayers at school commencement ceremonies and football games, *Lee v. Weisman* and *Santa Fe School District v. Doe*. We will also discuss two cases in which the Court ruled on federal and state laws to limit access to abortions, *Harris v. McRae* and *Webster v. Reproductive Health Services*. The Court upheld a federal ban on Medicaid funding for abortions in the *Harris* case and state restrictions on abortion access in the *Webster* case.

Outline

I. This lecture discusses the Supreme Court’s rulings in cases that involved school prayer and abortion in the years after its landmark decisions on these issues in the 1960s and 1970s.

   A. Efforts to overturn the earlier decisions through constitutional amendments came close to passage in Congress but were defeated.

   B. However, state and federal lawmakers passed many laws to limit or circumvent these decisions, producing cases that came before the Court.

II. In 1985, the Court struck down an Alabama law that allowed the recitation of a state-composed prayer in public schools.

   A. This case began in Mobile, Alabama, when Ishmael Jaffree, a lawyer and religious agnostic, objected to prayers in his children’s grade-school classrooms.
B. After Jaffree filed a lawsuit to stop the prayers, the state legislature adopted an official prayer that was drafted by the governor’s son.
   1. The legislature also provided that if the law was struck down by the courts, schools could establish a “moment of silence” for meditation or prayer.
   2. The lawmakers made clear the religious motivation for this law.
   3. A federal judge upheld the law, ruling that states were not bound by the First Amendment and could adopt an official state religion.
   4. A federal appellate court reversed this decision, saying that judges must obey “the controlling decisions of the Supreme Court.”

C. The Supreme Court struck down the Alabama law by a six-to-three vote in Wallace v. Jaffree.
   1. The majority said both the official prayer and moment of silence were motivated by religious sentiment and violated the First Amendment.
   2. Justice William Rehnquist said in dissent that the First Amendment does not require government “to be strictly neutral between religion and irreligion.”

III. In 1992, the Court struck down the practice of having ministers offer prayers at school graduation ceremonies in the case of Lee v. Weisman.
   A. The parents of a Jewish student objected to prayers by a rabbi at their daughter’s graduation from a middle school in Providence, Rhode Island.
   B. The Court ruled by a five-to-four margin that prayers offered by ministers who were invited by school officials violated the First Amendment.
      1. Justice Anthony Kennedy based his majority opinion on the school’s “endorsement” of religion.
      2. He also said that students were subjected to “coercion” and “peer pressure” by having to choose between attending their graduations and hearing prayers or staying away from these ceremonies if they objected.
      3. Justice Antonin Scalia dissented, saying the Court’s decision was a “jurisprudential disaster” and that graduation prayers reflected the “historic practices of our people.”
IV. The Court struck down the practice of offering prayers at high school football games in the 2000 decision in *Santa Fe School District v. Doe*.

A. Parents of Catholic and Mormon students filed a lawsuit against the prayers, saying their children were harassed because of their objections.

B. The Court ruled by a six-to-three margin that the football game prayers, which were led by students, were nonetheless “authorized by a government policy” and violated the First Amendment.

C. Chief Justice Rehnquist said in dissent that the majority opinion “bristles with hostility to all things religious in public life.”

V. The Court faced several abortion cases after its landmark ruling in *Roe v. Wade* in 1973.

A. In 1980, the Court upheld, by a five-to-four margin in *Harris v. McRae*, the so-called Hyde Amendment, in which Congress barred the use of Medicaid funds to pay for abortions for poor women.
   1. The majority said the inability of poor women to obtain abortions under the Medicaid program was not based on “governmental restrictions on access to abortions” but resulted from their “indigency.”
   2. The dissenters said the Court’s ruling would have a “devastating impact on the lives and health of poor women.”

B. In 1989, the Court upheld, by a five-to-four vote, several state restrictions on access to abortions in *Webster v. Reproductive Health Services*, which involved a Missouri law.
   1. Four justices were willing to reverse the *Roe* decision in *Webster*, but Justice Sandra O’Connor said *Webster* was not a “proper case” to reexamine that decision.
   2. Justice Harry Blackmun, writing in dissent, expressed his fear that a new justice might create a majority to overturn *Roe*.

VI. Two new justices did join the Court after the *Webster* decision.

A. Justice William Brennan retired in 1990 after 34 years of service.

B. President George Bush replaced him with David Souter of New Hampshire.
   1. Souter was a former state attorney general and supreme court judge and had served on the federal appellate court in Boston for just seven months before his nomination.
2. During his Senate confirmation hearings, Souter said the Constitution protected a right to privacy, but he did not express his views on the Roe decision.

   1. President Bush named Clarence Thomas to replace him.
   2. Thomas was an outspoken black conservative, who had served in the Reagan administration and, later, on the federal appellate court in Washington, DC.
   3. During his Senate confirmation hearings, a former Thomas aide, Anita Hill, accused him of sexual harassment, but Thomas denied the charges and was confirmed by a 52-48 vote.

D. With Souter and Thomas on the bench, the Court faced a crucial abortion case in 1992, with the reversal of Roe a distinct possibility.

Suggested Readings:
Peter Irons, A People’s History of the Supreme Court, chapter 34 (1999).

Questions to Consider:
1. Do you agree that offering non-sectarian prayers at school functions, such as graduations, violates the Constitution?
2. Should state and federal lawmakers have the power to ban public funding of abortions?
Lecture Thirty-Five
One Vote Decides Two Crucial Cases

Scope: This lecture begins with the Court’s continuing struggle to deal with the contentious issue of abortion and ends with its five-to-four decision in the disputed presidential election of 2000. No issue has so sharply divided the Court, and the American public, over the past three decades as abortion. We will follow the cases that were discussed in the previous lecture with two additional landmark rulings on abortion. In the 1992 case of Planned Parenthood v. Casey, three moderate justices reaffirmed the central holding of Roe but also upheld several restrictions on abortion. They based their decision on concerns about damaging the Court’s “legitimacy” if the Court struck down the Roe case and upset the “settled expectations” of American women about their right to obtain abortions. In the partial-birth abortion case of Stenberg v. Carhart, the Court divided five to four on this controversial abortion method, with the majority holding that states could not prohibit doctors from performing this procedure in late-term abortions. Finally, we will examine the case of Bush v. Gore, in which the Court also split five to four in blocking the further recount of votes in Florida, a case that ended with the narrow victory of George W. Bush over Al Gore in the presidential election of 2000.

Outline

I. This lecture discusses three landmark Supreme Court decisions, in cases that involved abortion and the presidential election of 2000.

II. As background to the abortion cases, the Court in 1989 had upheld restrictions on access to abortion in the Webster case.
   A. Four justices were clearly willing to overturn the 1973 Roe decision in Webster, but Justice Sandra O’Connor said that was not the “proper case” in which to reexamine Roe.
   B. Following the Webster decision, two justices who supported abortion rights, William Brennan and Thurgood Marshall, retired from the Court.
C. They were replaced by Justices David Souter and Clarence Thomas; many observers felt that one or both would vote to overturn the *Roe* decision.

III. In 1992, the Court decided an important abortion rights case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

A. This case involved several restrictions the state legislature had imposed on access to abortion; lower federal courts had upheld the challenged provisions.
   1. The Court heard arguments in April 1992, during a presidential election year; most observers felt that abortion would become a major issue in the campaigns.
   2. Lawyers on both sides asked the justices to make a clear ruling on whether or not to overturn *Roe*.

B. The lawyer for Planned Parenthood said that access to abortion had been “part of the settled rights and expectations” of women for nearly two decades.

C. The state’s lawyer said, “*Roe*, being wrongly decided, should be overruled.”

IV. In June 1992, the Court handed down its decision in the *Casey* case.

A. The justices did not agree on a majority opinion in *Casey*.

B. Three moderate justices—Sandra O’Connor, Anthony Kennedy, and David Souter—signed an opinion that said, “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”
   1. They were joined in this holding by two liberal justices, Harry Blackmun and John Stevens.
   2. The three moderates noted that public opinion had not shifted against abortion since *Roe* was decided, and reversing it would intensify the debate on this issue.
   3. These justices concluded that overturning *Roe* “would subvert the Court’s legitimacy beyond any serious question.”


D. But the three moderates and four conservatives joined in upholding all but one provision of the Pennsylvania law.
V. Justice Blackmun noted in his separate *Casey* opinion that he was 83 and that abortion would likely become the central issue in choosing his successor.

A. Blackmun retired in 1994, after Bill Clinton defeated President Bush in the 1992 election.

B. Clinton had already named Ruth Bader Ginsburg, who supported abortion rights, to replace Justice Byron White, who had consistently opposed abortion.

C. Clinton named Stephen Breyer to replace Blackmun; Breyer was a former Harvard law professor and federal appellate judge who supported abortion rights.

VI. In 2000, the Court struck down a Nebraska law that banned so-called “partial-birth” abortions by a five-to-four margin.

A. The two new justices, Ginsburg and Breyer, joined the majority in *Stenberg v. Carhart*.

B. Justice Kennedy, who joined the *Casey* opinion that upheld the central holding of *Roe*, voted with the dissenters in the *Stenberg* case.

C. Justice Breyer wrote a narrow majority opinion in *Stenberg*, holding that the Nebraska ban on partial-birth abortions was “overbroad” in banning other abortion procedures that were legal under the *Roe* decision.

D. Justice Scalia wrote in dissent that “a five-to-four vote on a policy matter” by unelected judges should not override the judgment of elected lawmakers.

E. The partial-birth abortion procedure remains a controversial issue in American politics.

VII. The Court became embroiled in the disputed 2000 presidential election between Texas governor George Bush and Vice President Al Gore.

A. After Florida election officials awarded the state’s electoral votes to Bush, the state supreme court ordered a recount and extended the statutory deadline for reporting the vote to Congress.

B. Bush asked the Supreme Court to halt the recount, arguing that election officials in different counties applied different standards in deciding the voter’s intent.
C. The Court ruled for Bush by a five-to-four margin, ordering the state judges to halt the recount.

D. The majority said that applying different vote-counting standards violated the equal protection clause of the Fourteenth Amendment.

E. All five justices in the majority had been active in Republican politics, which led to criticism that the decision was partisan.
   1. However, two justices named by Republican presidents dissented in *Bush v. Gore*.
   2. This case underscores the observation of Alexis de Tocqueville in the 1830s: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

**Suggested Readings:**


**Questions to Consider:**

1. Do you think doctors should be allowed to perform partial-birth abortions? If not, should there be an exception if the fetus has little or no chance of survival?

2. Was the Supreme Court justified in halting the Florida recount in the 2000 presidential election?
Lecture Thirty-Six
Looking Back and Looking Ahead

Scope: In this lecture, we will first look back at the basic themes we have discussed throughout this course: continuity and change in the Supreme Court’s history, consensus and conflict in its rulings, and the impact of the diversity in American society on the cases that reach the Court for decision. We will place some of the Court’s landmark rulings in the context of the judicial doctrines the justices have developed as tools for deciding cases. These doctrines reflect political and economic changes in American society, as well as changes in the Court’s membership, as presidents add new justices to replace those who die or retire. Our primary focus will be on the doctrines of judicial activism and judicial restraint, which are generally associated with liberal and conservative positions. We will see that these labels are not always accurate, as conservative justices often strike down laws, and liberal justices often uphold them. We will conclude with a look at the Court as a model for other countries that have adopted many provisions of our Bill of Rights in the Universal Declaration of Human Rights.

Outline

I. This lecture looks back at the Supreme Court’s history in the context of three basic themes.
   A. The first theme is continuity and change.
      1. The Constitution and the Court have endured for more than two centuries.
      2. But there have been major changes in American society, with rapid growth in population and a shift from an agrarian to an industrial economy.
   B. A second theme is consensus and conflict.
      1. We have a shared consensus on the values of representative democracy and the rule of law.
      2. But there has been much conflict over such issues as race and religion.
C. A third theme is the diversity in American society.
   1. We are not a homogenous nation in such areas as race, religion, politics, and sexual orientation.
   2. But we are not so divided that we have continuing outbreaks of violence over these issues.

II. In this course, we looked at three periods in the Court’s history.
   A. The first began with the Constitutional Convention in 1787 and extended through World War I. It was marked by conflicts over slavery and the Civil War.
   B. The second extended from the 1920s through the Court’s leadership by Chief Justice Earl Warren. Crucial events included the Great Depression, World War II, and the Court’s 1954 ruling against school segregation.
   C. The third period included the Warren Court’s landmark rulings on religion, criminal law, and free speech. It extends to the present, with rulings on abortion and affirmative action under Chief Justices Warren Burger and William Rehnquist.

III. The Court has employed various judicial doctrines in reading the Constitution and deciding cases.
   A. These doctrines are affected by changes in the Court’s membership.
      1. One example is the Constitutional Revolution of 1937.
      2. After the Court shifted its position on economic regulation, President Franklin Roosevelt named several liberal justices.
   B. Judicial doctrines are also affected by changes in American society.
      1. One example is the 19th-century shift from an agrarian to an industrial economy.
      2. These changes produced conflict between workers and employers and between farmers and railroads.
      3. The Court employed the liberty of contract doctrine to protect business interests.
   C. Another example is the Civil Rights movement of the 20th century.
      1. The NAACP was founded in 1909 and campaigned against racial segregation.
2. The Court developed the strict scrutiny doctrine to protect racial and religious minorities.

IV. The Court’s decisions often reflect the complex interaction of personality and politics.

A. One example is the *Dred Scott* decision in 1857.
   1. Chief Justice Taney held that no black person could be a citizen and that Congress had no power to ban slavery in the territories.
   2. Taney’s opinion reflected his uncompromising support for slavery, rooted in his background in southern politics.

B. Another example is Chief Justice Warren’s opinion in the *Brown* case.
   1. Warren based his opinion on the psychological impact of segregation on black children.
   2. He had become sensitive to this issue through its impact on his own chauffeur.

V. This course has looked at the doctrines of judicial activism and judicial restraint.

A. Activism is generally associated with liberal views and restraint, with conservative ones, but this is not always true.

B. One example is Chief Justice Marshall’s 1803 opinion in *Marbury v. Madison*.
   1. Marshall struck down an act of Congress, which could be viewed as activism.
   2. But Marshall was a political conservative; his real motivation was to assert judicial supremacy over the other branches of government.

C. During the years from the 1880s to the 1930s, conservative justices employed the liberty of contract doctrine to strike down state and federal economic regulation; this was certainly judicial activism.

D. On the other side, liberal justices showed restraint in upholding state and federal laws during and after the Constitutional Revolution in 1937.
VI. There are two competing approaches to judicial decision making.
   
   A. One is that the meaning of constitutional provisions, such as due process and equal protection, depends on who determines that meaning. Chief Justice Hughes once said, “The Constitution is what the judges say it is.”

   B. The other looks to the “original intent” of the Constitution’s Framers.
      1. Justice Antonin Scalia argues that justices should not read their own views into the Constitution.
      2. Justices who hold this view have been called strict constructionists.

   C. Efforts to find the Framers’ intent in such phrases as “due process” do not provide guidance in particular cases.
      1. Justice William Brennan believed the due process clause was based on “the underlying vision of human dignity.”
      2. Justice John Harlan wrote that due process cannot be “reduced to any formula; its content cannot be determined by reference to any code.”

VII. The Court has become a model around the world, as an independent body with the power to protect “all persons.”

   A. The Universal Declaration of Human Rights was adopted by the United Nations in 1948 and includes the basic protections of our Bill of Rights.

   B. Admiration for our Supreme Court helped in adopting that Declaration.

Suggested Readings:
Peter Irons, A People’s History of the Supreme Court (1999).

Questions to Consider:
1. Do you think presidents should agree to choose Supreme Court nominees from a short list of the most qualified candidates selected by a nonpartisan committee of eminent lawyers and judges?
2. Would you support a constitutional amendment that provided that Supreme Court justices should be subject to a second confirmation vote after 10 years of service?
# Justices of the Supreme Court

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* Elevated
Timeline

1781 .................................................. Articles of Confederation adopted to govern 13 “sovereign” states.

1787 .................................................. Constitutional Convention held in Philadelphia to draft a charter for a “federal” government with three branches.

1789 .................................................. Constitution ratified and becomes effective.

1790 .................................................. Supreme Court holds first meeting in New York City under Chief Justice John Jay.

1791 .................................................. Bill of Rights ratified and adds first ten amendments to Constitution.

1793 .................................................. Court decides *Chisholm v. Georgia*, which leads to adoption of the Eleventh Amendment in 1795.

1795 .................................................. John Rutledge named to replace Jay as chief justice; he serves five months before the Senate rejects his nomination.

1796 .................................................. Oliver Ellsworth confirmed as chief justice to replace Rutledge.

1801 .................................................. John Marshall replaces Ellsworth as chief justice.

1803 .................................................. Marshall writes opinion in *Marbury v. Madison*, asserting the Court’s power of judicial review over laws passed by Congress.

1810 .................................................. Court upholds land grants in *Fletcher v. Peck*. 

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1819 ................................................ Court decides landmark cases of *McCulloch v. Maryland* and *Dartmouth College v. Woodward*.

1824 ................................................ Court upholds federal power over interstate commerce in *Gibbons v. Ogden*.

1825 ................................................ Court returns captured slaves to foreign owners in *The Antelope* case.

1832 ................................................ Court upholds Indian land rights in *Worcester v. Georgia*.

1835 ................................................ Chief Justice Marshall dies and is replaced by Roger Brooke Taney in 1836.

1836 ................................................ Court allows state to revise corporate charter in *Charles River Bridge* case.

1842 ................................................ Court upholds fugitive slave law in *Prigg v. Pennsylvania*.

1850 ................................................ Court rules that the status of slaves depends on owner’s residence in *Strader v. Graham*.

1857 ................................................ Taney holds in the *Dred Scott* case that no person of African descent can be a citizen of the United States or any state.

1864 ................................................ Taney dies and is replaced as chief justice by Salmon P. Chase.

1865 ................................................ Thirteenth Amendment ratified to abolish slavery.

1868 ................................................ Fourteenth Amendment ratified to overturn *Dred Scott* decision and grant citizenship to former slaves; requires states to provide “due process” and “equal protection of the laws” to all persons.
1870 ................................................Fifteenth Amendment ratified to protect voting rights of blacks.
1873 ................................................Court upholds state monopoly in Slaughterhouse Case; upholds state ban on women lawyers in Bradwell case.
1874 ................................................Morrison Waite replaces Chase as chief justice.
1875 ................................................Court strikes down civil rights enforcement act in Cruikshank case.
1877 ................................................Court upholds regulation of grain storage rates in Munn case and state ban on liquor trade in Mugler case.
1883 ................................................Court holds in Civil Rights Cases that the Fourteenth Amendment does not ban “private” discrimination.
1886 ................................................Court strikes down discrimination against Chinese in Yick Wo case.
1888 ................................................Melville Fuller replaces Waite as chief justice.
1890 ................................................Court strikes down railroad rate regulation in Chicago, Milwaukee case.
1895 ................................................Court strikes down Sherman Antitrust Act in E.C. Knight case; strikes down federal income tax in Pollock case; upholds conviction of union leader in Debs case.
1896 ................................................Court adopts separate but equal doctrine in Plessy v. Ferguson.
1908 ................................................Court upholds maximum hours law for women in Muller case.
1910 ..................................................Edward D. White replaces Fuller as chief justice.

1919 ..................................................Court decides landmark First Amendment cases in *Schenck, Debs,* and *Abrams*; creates clear and present danger doctrine.

1921 ..................................................William Howard Taft replaces White as chief justice.

1923 ..................................................Court strikes down minimum wages for women in *Adkins v. Children’s Hospital*; strikes down ban on teaching foreign languages in *Meyer v. Nebraska.*

1925 ..................................................Court upholds conviction of Communist in *Gitlow* case; strikes down ban on private schools in *Pierce v. Society of Sisters.*

1927 ..................................................Court upholds conviction of Communist in *Whitney* case; upholds state sterilization law in *Buck v. Bell.*

1928 ..................................................Court upholds wiretap law in *Olmstead* case.

1929 ..................................................Court upholds ban on citizenship for pacifists in *Schwimmer* case.

1930 ..................................................Charles Evans Hughes replaces Taft as chief justice.

1932 ..................................................Court strikes down state regulation of ice business in *New York State Ice Co.* case.

1934 ..................................................Court upholds state “mortgage moratorium” law in *Blaisdell* case; upholds state regulation of milk prices in *Nebbia* case.
1935 ................................................Court strikes down regulation of oil production in *Panama Refining* case; strikes down National Recovery Act in *Schechter Poultry* case.

1936 ................................................Court strikes down Agricultural Adjustment Act in *Butler* case; strikes down state minimum-wage law for women in *Morehead* case.

1937 ................................................Constitutional Revolution, in which Court’s rulings in *West Coast Hotel* and *Jones & Laughlin* cases derail FDR’s court-packing plan; Court upholds unemployment benefits in *Stewart Machine* case and Social Security Act in *Helvering v. Davis*; strikes down convictions of Communists in *De Jonge* and *Herndon* cases.

1938 ................................................Justice Stone states strict scrutiny test in *Carolene Products* case; Court upholds separate but equal law schools in *Gaines* case; strikes down licensing of Jehovah’s Witnesses in *Lovell* case.

1939 ................................................Court strikes down licensing of Jehovah’s Witnesses in *Schneider* case.

1940 ................................................Court strikes down licensing of religious groups in *Cantwell* case; upholds expulsion of Jehovah’s Witnesses for refusing school flag salute in *Minersville v. Gobitis*.

1941 ................................................Justice Harlan Fiske Stone replaces Hughes as chief justice.

1942 ................................................Court says indigent defendants have no right to lawyer in *Betts v. Brady*.
1943 ................................................Court strikes down expulsion of Jehovah’s Witnesses for refusing flag salute in Barnette case; upholds wartime curfew on Japanese Americans in Hirabayashi and Yasui cases; strikes down sterilization of prisoners in Skinner case.

1944 ................................................Court upholds internment of Japanese Americans in Korematsu case.

1946 ................................................Fred Vinson replaces Stone as chief justice; Court rules that states cannot be sued in reapportionment cases in Colegrove case.

1947 ................................................Court upholds state payment for bus transportation of parochial school students in Everson case.

1948 ................................................Court orders admission of black student to white law school in Sipuel case; strikes down school religion classes in McCollum case; says states can ban women bartenders in Goessart case.

1949 ................................................Court says that the exclusionary rule against illegally seized evidence does not apply to states in Wolf v. Colorado.

1950 ................................................Court orders admission of black students to law and graduate schools in Sweatt and McLaurin cases.

1951 ................................................Court upholds convictions of Communist leaders in Dennis v. United States.

1953 ................................................Earl Warren replaces Vinson as chief justice.

1954 ................................................Court strikes down school segregation in Brown v. Board of Education.
1955 ................................................Court approves “all deliberate speed” in school integration in Brown case.

1957 ................................................Court strikes down conviction of Communists in Yates and Watkins cases; strikes down firing of Marxist professor in Sweezy case.

1958 ................................................Court orders Arkansas officials to comply with integration decision in Cooper v. Aaron.

1961 ................................................Court upholds Sunday-closing laws in McGowan and Braunfeld cases; applies exclusionary rule to states in Mapp v. Ohio.

1962 ................................................Court rules against school prayer in Engel case; says states can be sued on legislative reapportionment in Baker v. Carr.

1963 ................................................Court strikes down school Bible reading in Schempp case; says states must provide lawyers for indigent defendants in Gideon case.

1964 ................................................Court strikes down obscenity law in Jacobellis case; rules defendants have right to consult lawyers in Escobedo case; states “one-person, one-vote” rule in Reynolds v. Sims; upholds federal Civil Rights Act in Heart of Atlanta Motel case.

1965 ................................................Court strikes down state ban on contraceptive use in Griswold case.

1966 ................................................Court upholds right against self-incrimination in Miranda v. Arizona.

1967 ................................................Court strikes down state ban on interracial marriages in Loving case.
1968 ................................................Court upholds police stop-and-frisk searches in *Terry v. Ohio*.

1969 ................................................Warren Burger replaces Earl Warren as chief justice; Court strikes down school ban on armbands as Vietnam War protest in *Tinker* case; strikes down conviction for racist speech by Klan leader in *Brandenburg* case.

1971 ................................................Court strikes down “prior restraint” on publishing the Pentagon Papers in *New York Times* case; strikes down state ban on women as estate administrators in *Reed v. Reed*.


1974 ................................................Court rules against President Nixon in Watergate Tapes Case.

1978 ................................................Court strikes down racial preferences in medical school admissions in *Bakke* case.

1980 ................................................Court upholds federal ban on Medicaid funds for abortions in *Harris v. McRae*.

1985 ................................................Court strikes down school prayer in *Wallace v. Jaffree*.

1986 ................................................Justice William Rehnquist replaces Burger as chief justice; Court upholds Georgia law against homosexual sodomy in *Bowers v. Hardwick*.

1989 ................................................Court strikes down law against flag-burning in *Texas v. Johnson*; upholds state restrictions on abortion access in *Webster* case.


2003 ................................................Court rules that states can punish cross burning in Virginia v. Black.
Glossary

Note: The best source for the meaning of legal terms is Black’s Law Dictionary, which is available in most libraries.

acquittal: A decision by a jury or judge that a person charged with a crime is not guilty.

affirm(ed): A judicial decision upholding the ruling of a lower court.

amicus curiae: Latin for “friend of the court”; a person or group that is not a party in the case and submits a brief to the court.

appeal: A procedure by which the ruling of a lower court is submitted to a higher court for review.

appellant: In the federal courts of appeals, the party asking for reversal of a district court ruling (see appellee).

appellee: In the federal courts of appeals, the party asking for affirmation of a district court ruling (see appellant).

Attainder, Bill of: A legislative act declaring a person guilty of a crime without a trial or hearing; prohibited by the Constitution.

balancing test: The judicial practice of deciding cases by weighing the rights of one party against the other without applying a strict doctrinal rule.

brief: The written submission of a party (or amicus group) to a court, presenting the legal arguments in a case.

certiorari, writ of: The Latin name for a request that the Supreme Court review a case; the Court denies most applications for this writ.

class action: A lawsuit brought on behalf of a class of people with a similar stake in its decision.

common law: The practice imported from English law of deciding cases on the basis of precedent established by courts in earlier cases, rather than by reliance on legislation or constitutional provisions.

concurring opinion: An opinion by a judge who agrees with the court’s ruling but who writes separately to explain his or her reasoning in the case.

contempt: A knowing failure or refusal to carry out or abide by a judicial ruling; judges can punish contempt with fines or jail terms.
courts of appeal: In the federal system, the intermediate layer of courts that hear appeals from the district (trial) courts; rulings of the courts of appeal may be reviewed by the Supreme Court.

de facto: A Latin term for a factual situation that is not imposed by law; applied most often in school segregation cases (see de jure).

de jure: A Latin term for a factual situation that is imposed by law, as in de jure segregation.

defendant: The party against whom judicial relief is sought in a lawsuit.

dicta, obiter dicta: A statement in a judicial opinion that is not related to the ruling and that has no force as law or precedent.

discretionary jurisdiction: A term for cases that a court is not required by law or the Constitution to decide but may if it chooses to exercise its power of decision (see mandatory jurisdiction).

dissenting opinion: An opinion by a judge (or judges) in the minority in a case, taking issue with the court’s ruling.

distinguish: A judge’s explanation of reasons why a prior decision does not apply to a present case as precedent.

district courts: In the federal system, the trial courts in which most cases are heard and decided.

diversity jurisdiction: The power of federal courts to decide cases brought under state law by parties who are residents of different states.

due process: The requirement, established in both the Fifth and Fourteenth Amendments, that governments treat all persons fairly in actions that might deprive them of “life, liberty, or property” (see substantive due process).

ex post facto law: A criminal law that punishes a person for acts committed before the law was passed.

exclusionary rule: The judicial doctrine that courts must not admit illegally obtained evidence in criminal trials.

habeas corpus, writ of: A Latin term for “you have the body”; a writ ordering an official to bring a person into court to determine if he or she is being unlawfully detained.
incorporation: The judicial doctrine that provisions of the Bill of Rights were “incorporated” into the due process clause of the Fourteenth Amendment and apply to the states.

injunction: A judicial order commanding a person to perform or refrain from performing an act required by law.

judicial activism: A legal philosophy that judges should decide cases to protect the rights of minorities and dissenters, striking down laws if necessary to accomplish this aim.

judicial restraint: A legal philosophy that judges should defer to the decisions of the legislative and executive branches unless their actions clearly violate a constitutional provision.

judicial review: The power of courts to determine whether a law or executive act conforms to the Constitution and to strike down those that violate the court’s interpretation of the Constitution.

jurisdiction: The grant of power to courts, by the Constitution or laws, to hear and decide a case.

litigant: A party to a lawsuit.

mandamus, writ of: A Latin term from the word for “hand”; a judicial order directing an official to perform an act required by law.

mandatory jurisdiction: A term for cases that courts are required by law or the Constitution to hear and decide (see discretionary jurisdiction).

motion: A request made to a court for a ruling on a point of law, such as a motion to dismiss a case or to rule on the admissibility of evidence.

order: A written command of a judge to carry out the court’s ruling in a lawsuit.

per curiam: A Latin term for “by the court”; a judicial opinion that is unsigned or issued by the court as a body.

petitioner: In Supreme Court procedure, the party asking for reversal of a lower-court decision (see respondent).

plaintiff: The party who brings a lawsuit asking for judicial relief.

plurality opinion: A judicial opinion that decides the case but is not joined by a majority of the court.
**police powers**: The judicial doctrine that governments have the power to pass laws protecting the health, safety, welfare, or morals of the public, originating in English common law.

**precedent**: Previously decided cases that establish judicial doctrine that judges follow in ruling on cases before them.

**pro se litigant**: A party who appears in court on his or her own behalf, without a lawyer.

**rational basis test**: The judicial doctrine that presumes the constitutionality of laws for which any “rational” argument can be found or presumed in its defense (see **strict scrutiny test**).

**respondent**: In Supreme Court procedure, the party asking for affirmance of a lower-court decision (see **petitioner**).

**reversal**: A court’s decision to reverse the ruling of a lower court.

**Solicitor General**: The Justice Department lawyer who represents the United States in cases before the Supreme Court.

**stare decisis**: A Latin term for “let the decision stand”; the judicial doctrine that precedent established in earlier cases should be followed in a present case.

**state action**: An action taken by an official or agency of government.

**strict scrutiny test**: The judicial doctrine that laws will be held unconstitutional if they infringe on “fundamental rights” protected by the Constitution or discriminate against members of minority groups, unless governments can show a “compelling state interest” to justify the law.

**subpoena**: A judicial order that a person appear in court or produce a document or other evidence.

**substantive due process**: The judicial doctrine that the “liberty” interests protected by the due process clause include rights that cannot be infringed by legislation and are subject to judicial review.

**vacate**: A judicial order to rescind the ruling of a lower court.

**venue**: The geographic jurisdiction in which a case is heard.

**warrant**: A judicial order for an arrest or for a search and seizure of evidence.
writ: A judicial order commanding a person to perform or refrain from performing an act.
Biographical Notes

Note: These biographies are in chronological order of service on the Supreme Court.

Jay, John (1745–1829). First chief justice; nominated by President Washington. Jay served from 1790 to 1795; he resigned to run for governor of New York. He had been a delegate to the Continental Congress and chief justice of New York, as well as an envoy to England, negotiating the Jay Treaty. The most important decision during his tenure was Chisholm v. Georgia in 1793.

Rutledge, John (1739–1800). Second chief justice; nominated by President Washington. Rutledge served as associate justice from 1790 to 1791, when he resigned to become chief justice of South Carolina. He served a recess appointment as chief justice of the Supreme Court in 1795, but the Senate rejected his confirmation because of his criticism of the Jay Treaty.

Ellsworth, Oliver (1745–1807). Third chief justice; nominated by President Washington. He served from 1796 to 1800, resigning to return to politics in Connecticut. During his tenure, Ellsworth spent much time abroad as an envoy to France. He had been a delegate to the Continental Congress and the Constitutional Convention and a U.S. senator from Connecticut.

Marshall, John (1755–1835). Fourth chief justice; nominated by President John Adams. He served from 1801 until his death in 1835. Marshall had been a Virginia state legislator, U.S. envoy to France, a U.S. representative from Virginia, and secretary of state under Adams. Marshall led the Court with a forceful personality and shaped it into an influential branch of government. His most important opinions include Marbury v. Madison (1803), McCulloch v. Maryland (1819), Dartmouth College v. Woodward (1819), and Gibbons v. Ogden (1824).

Taney, Roger (1777–1864). Fifth chief justice; nominated by President Andrew Jackson. He served from 1836 until his death in 1864. Taney had been a Maryland legislator and attorney general and secretary of the treasury under Jackson. He was a fervent defender of states’ rights and slavery. Taney’s most important opinions include Charles River Bridge Co. v. Warren Bridge Co. (1837) and Dred Scott v. Sandford (1857), in which he declared that no black person could be a citizen.
Chase, Salmon (1808–1873). Sixth chief justice; nominated by President Lincoln. He served from 1864 until his death in 1873. Chase had been governor of Ohio, a U.S. senator, and secretary of the treasury under Lincoln. He was allied with the Radical Republicans in Congress and was a firm opponent of slavery. His most important opinions include *Ex parte McCardle* (1868) and *Hepburn v. Griswold* (1869).

Bradley, Joseph (1813–1892). Associate justice; nominated by President Grant. He served from 1870 until his death in 1892. As a justice, Bradley served on the commission that examined the disputed electoral votes in the 1876 presidential election; he cast the deciding vote to elect President Rutherford Hayes. His most important opinions include the Slaughterhouse Cases (dissent, 1884), *Bradwell v. Illinois* (concurrence, 1872), and the Civil Rights Cases (1883).

Waite, Morrison (1816–1888). Seventh chief justice; nominated by President Grant. He served from 1874 until his death in 1888. Waite had been a corporate lawyer and an Ohio state legislator. He was widely considered a weak chief justice, and he had little sympathy for blacks. His most important opinions include *Cruikshank v. United States* (1876), *United States v. Reese* (1876), and *Munn v. Illinois* (1876).

Harlan, John Marshall (1833–1911). Associate justice; nominated by President Hayes. He served from 1877 until his death in 1911. Harlan had been Kentucky’s attorney general and an unsuccessful candidate for U.S. Congress and governor. He became known for his strong dissents in civil rights cases, arguing that blacks deserved equal rights under the Fourteenth Amendment. His most important opinions include the Civil Rights Cases (dissent, 1883), *Plessy v. Ferguson* (dissent, 1896), and *Hurtado v. California* (dissent, 1884).

Fuller, Melville (1833–1910). Eighth chief justice; nominated by President Cleveland. He served from 1888 until his death in 1910. Fuller had been a corporate lawyer and an Illinois state legislator. He led the Court during one of its most conservative periods and was a firm supporter of corporate interests. His most important opinions include *Pollock v. Farmers’ Loan and Trust Co.* (1895), *United States v. E.C. Knight Co.* (1895), and *Loewe v. Lawlor* (1898).

White, Edward D. (1845–1921). Ninth chief justice; nominated by President Taft. He had been named associate justice by President Cleveland in 1894 and became chief justice in 1910, serving in that post until his death.
in 1921. White had been a Confederate soldier and served as a Louisiana state legislator, state supreme court justice, and U.S. senator. His most important opinion was *Standard Oil Co. v. United States* (1911).

**Holmes, Oliver Wendell, Jr.** (1841–1933). Associate justice; nominated by President T. Roosevelt. Holmes served from 1902 until his retirement in 1932. He was one of the most influential justices in the Court’s history and the greatest writer on the Court. He served in the Union army during the Civil War and was a Harvard law professor and chief justice of Massachusetts. His most important opinions include *Lochner v. New York* (dissent, 1905), *Schenck v. United States* (1919), *Abrams v. United States* (dissent, 1919), and *Buck v. Bell* (1927).

**Brandeis, Louis D.** (1856–1941). Associate justice; nominated by President Wilson. He served from 1916 until his retirement in 1939. Brandeis was the first Jewish justice and had been known as the “people’s lawyer” for representing women and consumers. He argued the case of *Muller v. Oregon* in 1908, introducing the famous “Brandeis brief.” Brandeis also advocated the right to privacy in an influential law review article in 1890. He was a foe of “bigness” in business and government. His most important opinions include *Whitney v. California* (concurrence, 1927), *Olmstead v. United States* (dissent, 1928), and *New State Ice Co. v. Liebmann* (dissent, 1932).

**Taft, William Howard** (1857–1930). Tenth chief justice; nominated by President Harding. He served from 1921 until his retirement in 1930. Taft was a former Republican president, from 1909 to 1913, and had been an Ohio state judge, U.S. solicitor general, governor of the Philippines, and secretary of war. Taft was a staunch conservative and supported business interests; he also firmly led the Court. His most important opinions include *Truax v. Corrigan* (1922), *Stafford v. Wallace* (1922), and *Adkins v. Children’s Hospital* (dissent, 1923).

**Hughes, Charles Evans** (1862–1948). Eleventh chief justice; nominated by President Hoover. Hughes also served as associate justice from 1910 until he resigned in 1916 to run for president as a Republican; he lost to Woodrow Wilson. Hughes was a forceful leader on the Court and played a key role in the Constitutional Revolution of 1937, in which the Court abandoned the substantive due process doctrine in economic regulation. His most important opinions include *Home Building & Loan v. Blaisdell*
(1934), *West Coast Hotel v. Parrish* (1937), and *NLRB v. Jones & Laughlin Steel Co.* (1937).


**Frankfurter, Felix** (1882–1965). Associate justice; nominated by President Franklin Roosevelt. He served from 1939 until his retirement in 1962. Frankfurter had been a Harvard law professor and close advisor to Roosevelt. He became a champion of judicial restraint on the Court but strongly supported civil rights; he played a leading role in shaping the Court’s unanimous decision in *Brown v. Board of Education* (1954). His most important opinions include *Minersville School District v. Gobitis* (1940) and *West Virginia Board of Education v. Barnette* (dissent, 1943).

**Douglas, William O.** (1898–1980). Associate justice; nominated by President Franklin Roosevelt. He served from 1939 until his retirement in 1975. Douglas had been a Columbia and Yale law professor and chair of the Securities and Exchange Commission. He was a firm liberal and supported civil rights and free speech. His important opinions include *Skinner v. Oklahoma* (1942), *Roth v. United States* (dissent, 1957), and *Griswold v. Connecticut* (1965).

**Stone, Harlan Fiske** (1872–1946). Twelfth chief justice; nominated by President Franklin Roosevelt. He served as associate justice from 1925 until 1941, when he replaced Charles Evans Hughes as chief justice, serving until his death in 1946. He had been Columbia law school dean and U.S. attorney general. Stone became a leader of the Court’s liberal bloc and fashioned the strict scrutiny doctrine in 1938. His most important opinions include *United States v. Carolene Products Co.* (1938), *Minersville School District v. Gobitis* (dissent, 1940), and *Hirabayashi v. United States* (1943).

**Vinson, Frederick** (1890–1953). Thirteenth chief justice; nominated by President Truman. He served from 1946 until his death in 1953. Vinson had
been a U.S. representative, a federal appeals judge, and secretary of the 
treasury. He was a political crony of President Truman and was a weak 
leader on the Court. His important opinions include *Sweatt v. Painter* 

**Warren, Earl** (1891–1974). Fourteenth chief justice; nominated by 
President Eisenhower. He served from 1953 until his retirement in 1969. 
Warren had been attorney general and governor of California. He was a 
firm leader of the Court and shaped it into a liberal body during his tenure. 
The Warren Court expanded constitutional rights for racial minorities, 
dissenters, and criminal defendants. His most important opinions include 

**Brennan, William J., Jr.** (1906–1997). Associate justice; nominated by 
President Eisenhower. He served from 1956 until his retirement in 1990. 
Brennan had been a New Jersey supreme court justice. He became the 
intellectual leader of the Warren Court and protected its landmark decisions 
from reversal in later years. Brennan was a firm liberal, who based his 
judicial philosophy on the principle of human dignity. His most important 

**Marshall, Thurgood** (1908–1993). Associate justice; nominated by 
President Lyndon Johnson. He served from 1967 until his retirement in 
1991. Marshall was the first black justice on the Court. He headed the 
NAACP legal staff from 1938 until 1961 and argued many landmark civil 
rights cases before the Court. He was a firm liberal and a consistent 
opponent of capital punishment. His most important opinions include 
*Stanley v. Georgia* (1969), *Furman v. Georgia* (concurrence, 1972), and 

**Burger, Warren Earl** (1907–1995). Fifteenth chief justice; nominated by 
President Nixon. He served from 1969 until his retirement in 1986. Burger 
had been a federal appeals judge. Nixon chose him as a conservative, “law 
and order” judge. Burger was a strong judicial administrator but a weak 
leader on the Court. His most important opinions include *Swann v. 

**Rehnquist, William** (1924– ). Sixteenth chief justice; nominated by 
President Reagan. He was an associate justice, nominated by President
Nixon, from 1972 until he became chief justice in 1986. Rehnquist was a law clerk to Justice Robert Jackson; was later in private practice in Phoenix, Arizona; and served in the Justice Department during the Nixon administration. He has articulated a strong conservative political and judicial philosophy and is a firm opponent of abortion. His Senate confirmation was opposed by liberal Democrats, who considered him too conservative. His most important judicial opinions include *Roe v. Wade* (dissent, 1973), *Texas v. Johnson* (dissent, 1989), and *Planned Parenthood v. Casey* (dissent, 1992).


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———, *Justice at War: The Story of the Japanese American Internment Cases*. New York: Oxford University Press, 1983. This book examines the cases that arose from the mass internment of Japanese Americans during World War II and factors that affected the Court’s decisions upholding the internment, including the government’s suppression of evidence.

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upholding Jim Crow laws and the separate but equal doctrine.

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and September of 1787; this is an invaluable resource and an important
historical document.

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Macmillan, 1963. This biography of the seventh chief justice, who served
from 1874 to 1878, presents an admiring view of a man who showed little
support for the rights of black Americans.

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1946. This first biography of Justice Louis Brandeis, by a noted historian,
provides much detail on his legal career and judicial opinions, but lacks a
larger context of his role as a critic of “bigness” in American business and
government.

This is an excellent biography of an important justice, who served as chief
from 1940 to 1946 and who originated the strict scrutiny test to protect
minorities and dissenters.

Schuster, 1964. This biography of the only man to serve as president and
chief justice is less detailed and insightful than Mason’s biography of
Stone, perhaps reflecting the author’s sympathies.

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with more attention to the delegates’ personalities than their debates over
contentious issues.

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the iconoclastic and liberal justice who served between 1939 and 1975.

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John Marshall forcefully asserted the Court’s power to strike down
congressional statutes.


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collection of essays on the legal issues raised by the 2000 presidential election.


Post reporters, this book provides an inside-the-Court look at the debates over cases decided during the first decade of Chief Justice Burger’s tenure, with a focus on conflicts between the justices.