

The Supreme Court

2018-2019 Topic Proposal

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Introduction

Alexander Hamilton famously noted in the Federalist no. 78 “The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction of either of the strength or of the wealth of the society; and can take no active resolution whatever.” However, Hamilton could be no further from the truth. From the first decision in 1793 up to the most recent decision the Supreme Court of the United States has had a profound impact on the Constitution. Precedents created by Supreme Court decisions function as one of the most powerful governmental actions. Jonathan Bailey argues “those in the legal field treat Supreme Court decisions with a near-religious reverence. They are relatively rare decisions passed down from on high that change the rules for everyone all across the country. They can bring clarity, major changes and new opportunities” (Bailey).

For all of the power and awe that comes with the Supreme Court, Americans have little to no accurate knowledge about the land’s highest court. According to a 2015 survey released by the Annenberg Public Policy Center: 32% of Americans could not identify the Supreme Court as one of our three branches of government, 28% believe that Congress has full review over all Supreme Court decisions, and 25% believe the court could be eliminated entirely if it made too few popular decisions.

Because so few Americans lack solid understanding of how the Supreme Court operates, now is the perfect time for our students to actively focus on the Supreme Court in their debate rounds. Affirmatives on this topic allow students to explore the justification for overturning controversial precedents from 1938 to present. Some of the issues include pressing issues surrounding abortion rights, preventing indefinite detention, the death penalty, religious liberties, property rights, the Voting Rights Act and corporate personhood to name a few. All of these are contemporary hot-button social issues that people seem to be passionate about with little understanding of the legal and Constitutional justifications behind them. All of the cases presented have a thorough defense of both maintaining and/or overturning precedents which makes for good debates with a robust division of ground. Core negative strategies would allow teams to look at various alternatives to the Supreme Court overturning precedents like Congressional or Constitutional Amendment counterplans. Topic-specific disadvantages would focus on threats to stare decisis by overturning precedent or the dangers of creating an overly activist or conservative court.

While the Supreme Court lacks both the power of the purse and the sword, they are not utterly powerless as they are the gatekeepers who interpret the Constitution. Given low levels of public knowledge surrounding the judicial branch, it is our job as a debate community to empower students with a clear understanding of how the highest court in the land

operates to ensure a fuller understanding of the American government which in turn ensures a more robust level of participation in American political discourse.

Table of Contents

<u>INTRODUCTION.....</u>	<u>2</u>
<u>TABLE OF CONTENTS.....</u>	<u>4</u>
<u>SECTION 1: WHY THE SUPREME COURT? WHY NOW?</u>	<u>5</u>
<u>SECTION 2: SPECIFIC CASES TO OVERTURN.....</u>	<u>13</u>
PLANNED PARENTHOOD V. CASEY (1992).....	14
EX PARTE QUIRIN (1942).....	17
HAMDI V. RUMSFELD (2004).....	22
CITY OF BOERNE V. FLORES (1997)	26
GREGG V. GEORGIA (1976)	31
UNITED STATES V. CAROLINE PRODUCTS CO. (1938)	34
KELO V. CITY OF NEW LONDON (2005).....	40
CITIZENS UNITED V. FEC (2010)	45
SHELBY COUNTY V. HOLDER (2013).....	51
BENNIS V. MICHIGAN (1996).....	56
OTHER CASES CONSIDERED	60
<u>SECTION 3: AREAS OF LAW TO OVERTURN</u>	<u>61</u>
<u>SECTION 4: DEFINITIONS</u>	<u>62</u>
<u>SECTION 5: RESOLUTIONS</u>	<u>73</u>
<u>SECTION 6: NEGATIVE GROUND</u>	<u>75</u>
<u>SECTION 7: WHY THIS TOPIC ROCKS!.....</u>	<u>78</u>
<u>SECTION 8: WORKS CITED</u>	<u>80</u>

Section 1: Why the Supreme Court? Why Now?

We as a policy debate community take pride in training the future leaders of America. The level of understanding of how the federal government operates that our students graduate with, is at levels higher than any of their peers. However, year after year, topic after topic we tend to exclusively focus on “federal government” policymaking by looking and creating plans that focus exclusively on Congressional action. To test the benefits of Congressional action negative teams will primarily look at three alternate forms of actions or actors: Executive Orders or Agency Rulemaking, the states counterplan, or international and/or nongovernmental actors. While it would be foolish to argue that no one ever debates about the Supreme Court as a mechanism, these debates are more often the exception and not the rule.

An analysis of High School resolutions from 1928-present shows a lack of focus on judicial themed topics. In our activity’s history here are the legal topics we have debated:

- 1968: Resolved: That Congress should establish uniform regulations to control criminal investigation procedures.
- 1971: Resolved: That the jury system in the United States should be significantly changed.
- 1983: Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the nation.
- 2005: Resolved: The United States federal government should substantially decrease its authority either to detain without charge or search without probable cause.

That’s it. While there have been some topics about prison reform or juvenile justice, the above 4 topics are the most legally focused topics we have discussed. Given our lack of focus on the Supreme Court as an institution there are several compelling arguments as to why we should debate the Supreme Court in 2018-19.

First, while we do take pride in the process knowledge our students have, overall student civic knowledge is at an extremely low level:

Student civic knowledge, especially legal concepts is at a depressingly low level

Mike **Hiestand**, 8-10-2009, "Student Press Law Center," Student Press Law Center,
<http://www.splc.org/blog/splc/2009/08/retired-supreme-court-justice-warns-of-dangerous-state-of-civics-knowledge>

If the various surveys from the last several years pointing out the deplorable state of American civics education and understanding weren't convincing enough, recently retired Supreme Court Justice David Souter – noting that two-thirds of Americans can't name all three branches of the American government — told those attending the American Bar

Association's annual meeting this month that such ignorance is "dangerous" and "something to worry about." It is certainly something that we at the SPLC — where, working with students and school officials, we see the effects of such ignorance and lack of appreciation on a regular basis — have been talking about for years. In addition to the numbers mentioned by Justice Souter, a 2007 survey of American high school students by the John S. and James L. Knight Foundation found that almost 75 percent of those surveyed "don't care much" about the First Amendment. Those numbers, while troubling, weren't especially surprising given that a survey of all Americans by the McCormick Foundation the year before found that while nearly half of those surveyed could name at least two family members from the The Simpsons TV show, only about a quarter could name more than one of the five freedoms protected by the First Amendment.

While that survey is interesting, and is just a blanket indict of our approach to teaching civics/government overall, the Annenberg Center for Public Policy highlights that less than one-third of the American population can show basic understanding of the Supreme Court.

It is not just students with low level of knowledge about the courts, Surveys from the Annenberg Public Policy center show that 32% or less of the American public can accurately identify concepts surrounding the Supreme Court

Scott **Bomboy**, 2-17-2016, "Surveys: Many Americans know little about the Supreme Court," National Constitution Center – [constitutioncenter.org](https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court/), <https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court/>

In the past few years, polling firms have included questions about the Court and its nine Justices among its surveys of popular political and civic knowledge. And not surprisingly, many of those surveyed in the general population couldn't name key players and policies in all three branches of the federal government – and especially the Supreme Court. For example, a poll released in January 2016 fielded by the American Council of Trustees and Alumni showed that about 10 percent of college graduates believed TV's Judith Sheindlin (aka Judge Judy) is on the United States Supreme Court. As of today, Sheindlin is not on the Supreme Court. Among the college graduates, about 62 percent correctly answered that Elena Kagan is on the current Court, and not Sheindlin, John Kerry or retired federal judge Lawrence Pierce. Overall, just 44 percent of all those polled identified Kagan as a Supreme Court Justice. (Another 35 percent of those polled thought impeachment trials took place in the Supreme Court.) A similar survey from the Annenberg Public Policy Center, released in September 2015, showed that many people struggled to answer basic questions about the Court. For example, 32 percent of Americans couldn't identify the Supreme Court as one of the three branches of the federal government, and 28 percent thought Supreme Court case decisions were returned to Congress for reconsideration. And another 25 percent were in favor of eliminating the Supreme Court entirely if it made too many unpopular decisions. The struggles many Americans face with civics knowledge is well-documented. Back in 2011, Newsweek had a group of 1,000 people take a standard citizenship test; only 62 percent passed. In addition, only 37 percent knew that are nine Justices on the Supreme Court.

However, a lack of knowledge doesn't stop us about forming opinions about the court....because this is America...

Scott **Bomboy**, 2-17-**2016**, "Surveys: Many Americans know little about the Supreme Court," National Constitution Center – constitutioncenter.org, <https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court/>

Americans do have opinions about the Supreme Court as an institution. Since 2000, Gallup has fielded a specific public approval poll about the Court. Last September, Gallup said 95 percent of people polled had some opinion about the Supreme Court: 50 percent disapproved of the Court, while 45 percent approved of the job it was doing. In 2000, 62 percent of Americans approved of the Court. But the Gallup numbers show that while current Court approval numbers are lower, as of 2015, the Court has an institution far outranks Congress, which had an approval rating of 14 percent last September. President Obama's approval rating last September was 47 percent.

Therefore, the best way to begin to combat the naiveté that surrounds the Supreme Court is to isolate particular cases/decisions in the Court's history and have students debate about whether or not these constitutional precedents should be maintained or overturned. In choosing the cases described in section 2 of this paper, the author used the following criteria to select cases for debate:

1. Is there a fair defense of the precedent offered by the Supreme Court?
2. Is the precedent that was generated decades ago relevant to contemporary political discussions?
3. Are the subjects of the cases both appropriate for High School students to debate and simple enough for individuals without a law degree to understand?
4. Will these cases generate interesting, diverse debates throughout the course of the season?

These four criteria served as a useful tool in limiting the large number of cases decided throughout the history of the court to a handful of issues that are prominent in today's political discourse.

Before investigating the particular proposed cases for debate, it is necessary to explore a small number of introductory Supreme Court concepts. The first concept is that of a binding precedent. Judge John. M Walker discusses how cases become binding precedent for the "China Guiding Cases Project"

The notion of binding precedent/stare decisis must meet two requirements: 1. The decision must be applicable to a large number of cases asking the same legal question and 2. Courts throughout the tiered judicial system agree on the interpretation of the precedent.

Hon. John M. **Walker**, 2-29-**2016**, "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?," China Guiding Cases Project, <https://cgc.law.stanford.edu/commentaries/15-john-walker/>

The American case system is based on the principle of stare decisis and the idea that like cases should be decided alike.

[1] Each judge, when deciding a matter before him or her, selects the prior cases on which to rely; no external authority designates precedents. Under stare decisis, every case has the potential of being a precedent in some sense. One part of a decision may have persuasive or even binding authority even if a different part of the decision has been discredited or overturned. Yet only the holding or ratio decidendi of a case can be binding; any remarks unnecessary to the result are non-binding dicta. A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases. The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into “circuits” with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. [2] A court may consider decisions by other, non-superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts.

However, precedent does not have to be upheld forever. Judge Walker highlights some generic factors used by justices in questioning and potentially overturning precedent.

Hon. John M. **Walker**, 2-29-2016, "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?," China Guiding Cases Project, <https://cgc.law.stanford.edu/commentaries/15-john-walker/>

In the federal system, the Supreme Court may overturn its own precedent. The courts of appeals may do so at the panel level based upon an intervening Supreme Court decision or by the full court of appeals sitting “en banc” in plenary session. To guide courts in identifying a “special justification” warranting overturning a precedent, the Supreme Court has “identified a cluster of factors, interrelated and overlapping in some respects, [that are] relevant to the decision whether or not to overrule a prior decision.” [15] Courts do not analyze these considerations in any mechanical manner; “[n]one is treated as dispositive; none is identified as essential; the relative weight of each is unclear.” [16] One of the great benefits of this “classic multifactor balancing test of incommensurable considerations,” [17] however, is that it allows for a case-by-case, individualized assessment of the merits of casting aside any particular precedent. Factors particularly relevant to this assessment include (a) workability, (b) reliance, (c) abandonment, and (d) legitimacy. This is not a comprehensive list; additional guiding principles include the fact that the Supreme Court has suggested that less precedential power should attach to cases “decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of [the] decisions,” [18] as well as the fact that the Court “portrays its statutory decisions as entitled to the strongest form of deference.” [19] (This latter principle derives from the Court’s recognition that Congress can alter statutory decisions by enacting a statute, whereas Congress may only alter constitutional decisions through the more complicated process of constitutional amendment.) [20] An examination of the above four factors, however, can help one to understand some of the more prominent instances when the Supreme Court has chosen to break with precedent.

While Judge Walker does an excellent job discussing precedent in theory, the Supreme Court in the 20th century started to offer a clear test for when a precedent can be overturned.

The 1992 Planned Parenthood v. Casey decision offers four factors for courts to use when potentially overturning/abandoning precedent: the workability of the rule, public reliance on current precedent, relevant changes in surrounding legal doctrine and changes in the facts and/or perception of the facts.

Kenji **Yoshino**, 12-5-**2002**, "Can the Supreme Court Change Its Mind?," New York Times, <http://www.nytimes.com/2002/12/05/opinion/can-the-supreme-court-change-its-mind.html>

The question then arises whether there are any practical constraints on the capacity of the Supreme Court to overrule itself. Can the court overrule a precedent simply because it believes the prior case to have been incorrectly decided? In a 1992 case, Planned Parenthood v. Casey, the court answered no, stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." The court went on to outline four factors to be considered in making the decision to overrule itself: the workability of the rule, the extent to which the public has relied on the rule, relevant changes in legal doctrine, and changes in facts or perceptions of facts. But these constraints are less relevant -- and less restrictive -- than they appear. First, there is something puzzling about requiring more of the court than a frank admission that it incorrectly interpreted the Constitution in a prior case. No court can be infallible, and public confidence in the court will not diminish if the court admits this fact. Second, it is doubtful that the test described in the Casey case will ever actually constrain the Supreme Court from overruling a case it finds patently erroneous. In looking not just at whether facts have changed but whether perceptions of facts have changed, this test arguably permits the Supreme Court to overrule precedent whenever the justices come to see things differently. Thus the court need not admit past mistakes explicitly. The Casey test will be problematic if it constrains -- and obfuscatory if it does not. When Justice Powell admitted that he made a mistake in the Bowers case, the man who argued and lost the case for the gay plaintiff reacted generously. "I think it's an admirable thing," observed Laurence Tribe. "All of us make mistakes, and not all of us are willing to admit them." It may be that it is easier for an individual to admit error than it is for an institution. This reluctance to confess past mistakes is especially pronounced in the judiciary, whose legitimacy and power depend on public trust in its pronouncements. Yet it needn't be so. While acknowledging the importance of consistency, we can also ask whether the court's authority would be diminished through greater candor. The answer is no. Americans know that fallible individuals cannot come together to form infallible institutions. If the current Supreme Court agrees with Justice Powell that the Bowers case was incorrectly decided, that should be enough reason for it to say so.

When exploring areas for how/why a precedent can or should be overturned, the easiest starting point is to look at a dissenting opinion offered by Justices who diverge from the opinion of the court.

Debating an overrule topic forces students to read dissents which is a great pedagogical tool.

Leming, Robert S., **1995**, "Teaching about Landmark Dissents in United States Supreme Court Cases. ERIC Digest. ," No Publication, <https://www.ericdigests.org/1995-2/court.htm>

Since the Marshall Court in the early nineteenth century, the U.S. Supreme Court has issued a single opinion indicating its decision in a case. The Court disposes of each case it reviews by majority rule (typically either affirming or reversing) and provides a rationale for its decision. The disposition and rationale are both critical elements of the Court's decision. In providing reasons for its decision, the Court may offer constitutional interpretations which have a significant impact on American law and society. Moreover, what often makes Court cases compelling as human drama is that they typically involve real people engaged in disputes which have been brought to the justice system for resolution. This is the "disposition" of a case. In cases where some justices do not agree completely with the Court's decision, they may write or join concurring and dissenting opinions. In "concurring" opinions, justices agree with the majority regarding the

outcome of the case, but disagree, in some way, with the reasons that support the outcome. In "dissenting" opinions, justices disagree with the outcome of the case and present rationales for their views. Justices offer reasons for their decisions based upon their understanding of law, history, and policy. Unlike the Court's majority opinions, dissents have no legal force. Typically, they simply provide justices disagreeing with the majority an opportunity to express their dissatisfaction with the outcome and explain their disagreement. Nevertheless, dissenting opinions can have a greater impact. For instance, they might encourage federal legislation to reverse or limit the Court's decision. Moreover, dissenting justices may hope to influence, ultimately, the Court itself in future decisions. While the Court typically follows its own precedents in deciding cases (under the established judicial principle of "stare decisis" or "let the decision stand" in Latin), it has, on occasion, overturned or significantly modified its own earlier decisions. In exceptional cases, dissents have attained landmark status in American legal history in that they influenced subsequent reversals by the Court or otherwise have come to articulate revised opinions of the Court on significant matters of constitutional interpretation and public policy.

Additionally, there have been more individuals concerned with the "threat to the rule of law" posed by a court focused on constantly overruling itself. However, there are some scholars who are beginning to debunk the myths of overreliance on stare decisis and superprecedents.

Suprecedents are difficult, it is hard to assume that just because the Courts have acted, the court of public opinion will shift. However, these precedents provide good starting points for our discussions

Peter Augustine **Lawler**, 3-22-2017, "On Super-Precedents," National Review,
<http://www.nationalreview.com/corner/446001/court-and-made-doctrine>

And it's far from clear that it's the job of the Court to end national controversies over issues about which people can reasonably disagree, such as abortion or same-sex marriage or even, in the antebellum context, the place of slavery under the Constitution. Those issues are usually best resolved by legislative deliberation and often compromise. Most importantly, the doctrine of the super-precedent is entirely a judicial invention with no constitutional warrant. The Court now is in no way obliged to honor it, although it can't help but sometimes make prudential judgments about the effects of disruptive decisions. It would have a calming effect on many Americans to be assured that some precedents can't be revisited. And maybe the compromise would be best that allows same-sex marriage to be viewed as settled law while drawing the line at using that precedent to endanger religious liberty. That, of course, legislatures could readily do. But the Court has to be guided by a genuine effort to discern how the Constitution is to be applied in a particular case, whatever the precedents might be.

Additionally, we live in an era where the Supreme Court is more willing to explore past practice, partially debunking the doctrine of stare decisis. However, some argue that the threat to overruling precedent comes with an increased politicization of the judicial branch.

Hon. John M. **Walker**, 2-29-2016, "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?," China Guiding Cases Project, <https://cgc.law.stanford.edu/commentaries/15-john-walker/>

Principles for overturning precedent have evolved significantly from the time of the early judiciary. For example, the Supreme Court rejected until well into the twentieth century the idea that “the constitutional or statutory nature of a precedent” should “affect[] its susceptibility to reversal.” [61] (As noted above, the Court now affords greater deference to its statutory decisions.) [62] Yet the most significant change in the Court’s approach to stare decisis has arguably been the rate at which the Court now casts aside settled case law. Statistical studies reveal that the Court has grown increasingly comfortable with overturning its own precedents. [63] This increase has yielded criticism: Justice Scalia alleged that “the doctrine of stare decisis has appreciably eroded’ in the modern era.” [64] Legal scholars have critically attributed the trend to an increase in politicization of the Court, claiming that stare decisis has been rendered “a matter of ‘convenience, to both conservatives and liberals,’ whose ‘friends . . . are determined by the needs of the moment.’” [65] Yet politicization does not provide the only explanation for the increase in overturned precedents. As other scholars note, in its early years the Court had far fewer precedents and “consistently wrote on a clean slate as it addressed fundamental questions of constitutional law,” whereas “today’s Court routinely is faced with the task of reconciling or distinguishing prior decisions.” [66]

Ultimately, questioning precedent/stare decisis is important because in a clash between legal precedent and the Constitution, priority should be placed on upholding the Constitution.

Damon Root, 1-13-2016, "When Should the Supreme Court Overturn One of Its Own Precedents?," Reason, <http://reason.com/blog/2016/01/13/stare-decisis-when-should-the-supreme-co>

Justice Stephen Breyer raised a similar objection to the teachers' case. "What about the Eighth Amendment?" he asked Carvin. "There's an individual right, some think, perhaps, against capital punishment. The Court has consistently ruled against it. So I guess if that's ever considered again, under your view, the Court would give no weight to stare decisis." But Carvin didn't flinch. "If the Court was convinced that capital punishment was clearly outlawed by the Constitution," he told Breyer, "I think it would be very strange to tell people who were being executed in the future that even though this is an unconstitutional execution, we are bound by our erroneous prior decisions." That's exactly right. And Breyer knows it. After all, Breyer has his own record of voting to overturn precedents that he believes to be wrong. In 2003, for example, Breyer joined Justice Anthony Kennedy's majority opinion in *Lawrence v. Texas*, the gay rights decision that overturned *Bowers v. Hardwick*, the 1986 precedent that affirmed the power of state governments to prohibit homosexual conduct. *Bowers* "was not correct when it was decided," Kennedy declared, "and it is not correct today." To be sure, stare decisis is a venerable doctrine in American law. But it is not the only venerable doctrine. As Justice Clarence Thomas once observed, "stare decisis is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means." Put differently, in a clash between legal precedent and constitutional text, shouldn't judges put the Constitution first?

In conclusion, while this topic paper is not the silver bullet in eliminating the lack of understanding Americans have about the Supreme Court, it offers students the unique opportunity to begin investigating the highest court in the land. If the 2016 Presidential election teaches us anything, focus on the courts will continue to increase. In a world where both major political parties were campaigning not only on the types of justices they would like to appoint to the court but also the types of cases they would like to see the court rule on, there is no time better than the present to begin

increasing our students' understanding of how this body operates so they can be more fully informed when the next round of candidates begin justifying election based on appointments to the legislative branch.

Section 2: Specific Cases to Overturn

There are two ways to make debating the Supreme Court feasible. Option 1 is to give students a list of Supreme Court cases to overturn. Option 2 is to give students areas of the law or legal principles where the Supreme Court should act. The author believes Option 1 is the preferred option to debate for a few reasons:

1. A case list creates a more limited resolution.
2. A case list makes a topic where students and coaches will need to acquire more process knowledge easier to digest.
3. A case list prevents Affirmative teams from running to some of the “worst decisions” in the history of the court that may have no defensible negative ground.
4. A case list may place a check on the bidirectional nature of some of the cases selected to debate.

As noted in Section 1 of this paper, the author used the following criteria to select cases for debate:

1. Is there a fair defense of the precedent offered by the Supreme Court?
2. Is the precedent that was generated decades ago relevant to contemporary political discussions?
3. Are the subjects of the cases both appropriate for High School students to debate and simple enough for individuals without a law degree to understand?
4. Will these cases generate interesting, diverse debates throughout the course of the season?

These four criteria served as a useful tool in limiting the large number of cases decided throughout the history of the court to a handful of issues that are prominent in today’s political discourse.

Each case will be summarized below with a discussion of debatability.

Planned Parenthood v. Casey (1992)

In 1988 and 89 the state of Pennsylvania passed new abortion regulations. These regulations included: informed consent (of the procedure and abortion alternatives), a 24-hour waiting period, parental consent for minors, and consent of the husband/father in marriages. In a 5-4 decision, the court upheld all of the regulations except for spousal consent. The controversy surrounding this case is the new “undue burden” standard for checking regulations. The court defined an undue burden as “a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability” (Oyez-Casey). This case is equally unpopular with both sides of the abortion debate. The pro-life movement argues that the Casey decision further upheld the precedent of Roe by allowing for the institutional protection of abortion while the pro-choice movement believes the newly created “undue burden” standard created a world where the floodgates could be opened for infinite restrictions on abortion creating a defacto rollback of Roe.

In Retrospect, both sides hate the Casey precedent

Meaghan **Winter**, March, **2016**, "Pro-Choice Advocates Fear That Roe v. Wade Could Be Lost. But It Already Happened.," Slate Magazine,
http://www.slate.com/articles/double_x/cover_story/2016/03/how_the_undue_burden_concept_eroded_roe_v_wade.html

At first, both anti-abortion and pro-choice camps lambasted the Casey decision. In her initial statement to reporters, Kolbert said that it was the first time in her life that she agreed with Chief Justice William Rehnquist, who had opposed Roe and who joined Scalia’s Casey dissent, which stated that the undue burden standard was “inherently manipulable.” Casey gave abortion rights advocates the burden of proving that newly introduced abortion restrictions created a “substantial obstacle” for women seeking abortions. In the decades since the Casey decision, much of the media coverage of abortion rights in America has either skimmed over the undue burden standard or described it as a moderate compromise that O’Connor brokered with the other justices for feminist purposes. In the best-seller The Nine: Inside the Secret World of the Supreme Court, Jeffrey Toobin writes that the undue burden standard is O’Connor’s “triumph,” because she “had invented that test and over time persuaded a majority of her colleagues to agree with her. She single-handedly remade the law in the most controversial area of Supreme Court jurisprudence. ... No other woman in United States history, and very few men, made such an enormous impact on their country.”

The biggest problem that most have cited, is that the Casey decision has created an environment that is either more dangerous than before Roe or a world that disproportionately impacts poor and minority women who may not be able to afford conventional abortions and creates a two-tiered system which is net worse for women.

The world of current abortion regulations have created more dangerous abortion practices than the ones that existed pre-Roe

Ian **Millhiser** and Tara **Culp-Ressler**, 12-4-**2013**, "The Greatest Trick The Supreme Court Ever Pulled Was Convincing The World Roe v. Wade Still Exists," ThinkProgress, <https://thinkprogress.org/the-greatest-trick-the-supreme-court-ever-pulled-was-convincing-the-world-roe-v-wade-still-exists-747d3d828ff9>

Low-income women who decide to terminate their pregnancies currently face hardship, humiliation or worse before they can obtain the medical care they seek. Many women risk their own health to have an abortion — and were doing so even when there were more clinics available in Texas. Doctors in the state report that

many women near the Mexico border are resorting to buying illegal abortion-inducing drugs on the black market, since that's cheaper and easier than trying to pay multiple visits to a clinic. Now, thanks to the Fifth Circuit, they expect the number of women opting for that potentially dangerous method to rise even further. This is the landscape facing thousands of women in a nation where the right to choose an abortion is still ostensibly protected by the Constitution itself. "[T]he essential holding of Roe v. Wade should be retained and once again reaffirmed," according to the Supreme Court's seminal decision in Planned Parenthood v. Casey. But for women like Marni Evans in deeply conservative states, the world does not look very different than it would look if Roe had been overruled. In that alternate universe, where Justice Anthony Kennedy joined with his fellow conservatives to end Roe v. Wade, Marni would still be able to seek an abortion in liberal Seattle, while poorer women would still struggle to obtain the cash and the time off necessary to receive safe medical care — or, worse, they would try to end their pregnancies by taking illegal drugs intended to induce stomach ulcers. The real world and this alternative world are far more similar than Casey's promise to reaffirm Roe's "essential holding" would suggest. And neither bears much resemblance to a nation where abortion rights are fully protected.

The Vagueness of the "undue burden standard" has created a world of inconsistent standards for women seeking abortions

Ian Millhiser and Tara Culp-Ressler, 12-4-2013, "The Greatest Trick The Supreme Court Ever Pulled Was Convincing The World Roe v. Wade Still Exists," ThinkProgress, <https://thinkprogress.org/the-greatest-trick-the-supreme-court-ever-pulled-was-convincing-the-world-roe-v-wade-still-exists-747d3d828ff9>

yet, while Casey did not strip women entirely of the rights they gained in Roe, it did qualify those rights significantly. The right to an abortion is no longer treated like a "fundamental" right under Casey. Nor do women in their first trimester of pregnancy enjoy the same robust protection that they once did under Roe. Indeed, where Roe proclaimed that such women enjoy a right to terminate their pregnancies "free of interference by the State," Casey said the opposite — "it is an overstatement to describe [the abortion right] as a right to decide whether to have an abortion 'without interference from the State.'" Under Casey, a new standard would prevail. States are now free to regulate abortion so long as these laws do not impose an "undue burden" on the right to choose. If you're confused by the vagueness of this standard, you aren't the only one. And the Court's description of what constitutes an "undue burden" does little to clear up this confusion. "An undue burden exists, and therefore a provision of law is invalid," according to Casey, "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Abortion regulations would no longer be treated as preemptively unconstitutional, but instead would be weighed according to this highly flexible standard by hundreds of judges throughout the country.

However, some argue that the laws created post-Casey have reduced the number of abortions, increased support for single mothers and/or helped clarify elements of the debate of when life begins

Michael J. New, 6-29-2017, "Casey at 25: Pro-Life Progress Despite a Judicial Setback," National Review, <http://www.nationalreview.com/article/449104/planned-parenthood-vs-casey-25-years-later-abortion-has-declined>

The constitutional protection that Casey granted these laws, coupled with pro-life gains in numerous state legislatures since the 1990s, has led to a substantial increase in the number of state-level pro-life laws. Since 1992, the number of states with parental-involvement laws has increased from 20 to 37. The number of states with informed-consent laws pertaining to abortion has increased from 18 to 35. In recent years, 20 states have banned abortions that take place at

or after 20 weeks' gestation, based on the unborn child's scientifically documented ability to feel pain. Even more important, after Casey, many states strengthened existing pro-life laws. In particular, several states improved their informed-consent laws by including more information about health risks, fetal development, and sources of support for single mothers.

Including Casey in the resolution could be interesting for several reasons. First, there is fruitful debate as to whether or not the decision has been beneficial in either securing access to abortions and/or making the practice safe. Second, there is a robust federalism debate, as the New article proves, states responded to Casey by increasing their abortion laws, and returning to the precedent of Roe would de-facto overturn a large number of state laws. Third, there is access to a large variety of women's rights and women's health literature. Finally, this might be one of the most timely cases to discuss as Trump campaigned on the issue of abortion and promised a justice like Gorsuch to question the patchwork of abortion decisions since Roe.

Ex parte Quirin (1942)

In June 1942, Operation Pastorius was on the verge of being enacted. Pastorius was a Nazi operation where eight conspirators wanted to sabotage a variety of targets in the US. When the second wave of saboteurs arrived on US soil, someone got cold feet and turned himself into the FBI. All eight conspirators were arrested and ordered to face military commissions by President Roosevelt, and were sentenced to death. Believing their rights were infringed, seven individuals filed petition for a writ of habeas corpus believing their Fifth and Sixth amendment rights were infringed. The Supreme Court, in a 9-0 decision held that the saboteurs who were “spies without uniform” were unlawful “enemy combatants” and were subsequently denied access to Fifth and Sixth amendment legal protections. The court argued “because the amendments cannot be read “as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or, what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury,” the rights of the conspirators were not violated” (Oyez-Quirin).

While this seems like an odd precedent to include in the topic proposal, this obscure case has been widely cited since 2004 in the name of the War on Terror.

Noah **Feldman**, 11-18-2016, "Opinion," New York Times, https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html?_r=1

Admittedly, bad decisions have been resurrected by the Supreme Court. In 2004, a doubtful World War II-era precedent, Ex Parte Quirin, which involved the detention, trial and execution of German saboteurs, was relied on by the Supreme Court to justify the detention of unlawful combatants. Ex Parte Quirin has now joined the mainstream of legal doctrine despite almost a half-century of neglect and a problematic legal pedigree.

Additionally, the use of the term “Enemy Combatants” from the Quirin decision may also allow us to evade the Geneva Convention justifying practices like Torture

Peter Jan **Honigsberg**, 1-9-2014, "The Real Origin of the Term 'Enemy Combatant'," HuffPost, http://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html

Many scholars of international law believe that the U.S. deliberately invented the term in order to circumvent the protections of the Geneva Conventions (GC). Under the GC, the universe of combatants are two: lawful (also called prisoners of war) and unlawful. The International Committee of the Red Cross/Red Crescent — whose humanitarian mission is to protect people in armed conflicts from cruel, inhuman and degrading treatment as well as torture, and which bases its principles on the GC — does not recognize the term enemy combatant as legitimate. Many scholars believe that by labeling captives enemy combatants, the Bush administration could claim that the GC did not cover the detainees, and thus the U.S. could mistreat and torture detainees with impunity. If you had asked members of the Bush administration for the origination of the term, they would tell you that it was not invented, and that it was a legitimate term. They would point to a 1942 Supreme Court case, Ex parte Quirin, that uses the term enemy combatant interchangeably with several other terms such as unlawful combatant and unlawful belligerent. However, as our Witness to Guantanamo project recently discovered, Quirin was not the source of the term. In fact there was no legal foundation for the term.

Many also believe the Quirin precedent has led to the increased use of drones, since due process rights aren't considered when drone strikes are authorized

Stephanie **Hessler**, 3-16-2012, "HESSLER: Presidential power to kill?," Washington Times, <http://www.washingtontimes.com/news/2012/mar/16/presidential-power-to-kill/>

In his speech, Mr. Holder relied on Ex Parte Quirin, a World War II case in which the Supreme Court said that "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." That may or may not be right; as Justice Antonin Scalia says, Ex Parte Quirin "was not the court's finest hour." But in any case, the Ex Parte Quirin formulation begs the question of due process. A proven enemy belligerent may indeed forfeit certain rights, but the logically prior question - the question on which judicial process is due - is whether the target is, in fact, an enemy belligerent. The duty now falls to Congress to address this constitutional problem. Congress should provide for judicial review of any executive decision to target and kill a U.S. citizen. Legislation should, of course, specify a significant level of deference to the executive branch. And it should be the Foreign Intelligence Surveillance Court, which is expert in guarding classified and sensitive information, that is given jurisdiction to issue such warrants. This solution would protect our national security and protect our Constitution.

Most recently, the DC Circuit Court used Quirin to uphold convictions of individuals still in Guantanamo Bay

Helen Klein **Murillo**, Alex **Loomis**, 10-21-2016, "A Summary of the Al Bahlul Decision," Lawfare, <https://www.lawfareblog.com/summary-al-bahlul-decision>

Ali Hamza Ahmad Suliman al Bahlul is a Yemeni citizen, currently held in Guantanamo Bay, who was convicted in a military commission under the 2006 Military Commissions Act for "inchoate conspiracy" to commit war crimes. After several rounds of judicial review, a D.C. Circuit panel in 2015 heard a challenge to his conviction on Article I and Article III grounds. Bahlul argued that he must be tried before an Article III civilian court with a jury. Criminal defendants have that right as a general rule. But the Supreme Court in Ex Parte Quirin upheld military commissions convictions for offenses against the laws of war. Bahlul argued that this "law-of-war military commissions" Quirin exception covers only offenses against the international laws of war and that "conspiracy," as a standalone offense, is not an offense under international law. The government conceded that international law does not recognize a standalone conspiracy offense but contended that military commissions may try anything that Congress defines as a "laws of war" offense, in addition to any offense that has historically been tried by military commission in the United States — what the government calls the "U.S. common law of war." The government also argued that Bahlul forfeited his constitutional claims below by failing to raise them, and therefore that the D.C. Circuit should set aside Bahlul's conviction only if there was plain error. Bahlul replied that de novo review was appropriate for structural Article III challenges like his. The panel invalidated Bahlul's conviction in June 2015 under de novo review on the grounds that Congress cannot encroach upon the Article III judicial power by authorizing military commissions to try unlawful enemy combatants for conspiracy. Commissions can try only international law of war offenses, and conspiracy is not an offense against international law (except in relation to genocide). (Lawfare summarized that decision here.) Last fall, the D.C. Circuit granted rehearing en banc on two issues: (1) whether the panel should have exercised de novo or plain error review of Bahlul's conviction, and (2) whether Congress could, under the Define and Punish Clause, make "conspiracy" an offense "triable before a law-of-war military commission" and, if so, "whether the exercise of such power transgresses Article III." Yesterday the D.C. Circuit sitting en banc overturned the panel decision and upheld Bahlul's conviction in a short per curiam. But the six-judge majority relied on three different rationales. Four judges (Henderson, Brown, Griffith, and Kavanaugh) believed that Articles I and III permitted Congress to make conspiracy to commit war crimes punishable in a military commission. Judge Millett affirmed Bahlul's conviction under plain error review only, without reaching whether Congress may make conspiracy an offense triable by military commission. And Judge Wilkins concluded that Bahlul was not convicted of a standalone conspiracy offense. Conspiracy is both "a stand-alone crime, and also a theory of liability" for joint criminal enterprises. Commissions might not be able to try Bahlul for the former (sometimes referred to as "inchoate conspiracy"), but Judge Wilkins believed the military commission really convicted him of substantive war crimes adopting a conspiracy theory of liability. Judges Rogers, Tatel, and Pillard jointly dissented, arguing that Bahlul's prosecution and conviction by way of a commission violated Article III. Both Chief Judge Garland and Judge Srinivasan recused themselves.

Additionally, President Trump has indicated he would be ok with trying Americans in military commissions, and the Quirin precedent allows him to do so

Quinta **Jurecic**, 8-12-2016, "The Legality of Donald Trump's Proposal to Try US Citizens by Military Commission," Lawfare, <https://www.lawfareblog.com/legality-donald-trumps-proposal-try-us-citizens-military-commission>

Republican presidential nominee Donald Trump made headlines once again yesterday by saying that he would be "fine" with trying American citizens accused of terrorism in military commissions at Guantanamo Bay. Trump stated that, "I want to make sure that if we have radical Islamic terrorists, we have a very safe place to keep them." When asked by the Miami Herald whether he would seek to have U.S. citizens who are also terrorist suspects tried by commission at Guantanamo, Trump responded: Well, I know that they want to try them in our regular court systems, and I don't like that at all. I don't like that at all. I would say they could be tried there, that would be fine.

Quinta **Jurecic**, 8-12-2016, "The Legality of Donald Trump's Proposal to Try US Citizens by Military Commission," Lawfare, <https://www.lawfareblog.com/legality-donald-trumps-proposal-try-us-citizens-military-commission>

As a matter of constitutional law, the situation is more complicated. There actually is no clear constitutional jurisprudence expressly prohibiting the trial of American citizens by military commission. Across the span of a century, the Supreme Court has held both that the trial of a noncombatant U.S. citizen by military commission is unconstitutional when civilian courts are still available and operational (in *Ex parte Milligan*), and that the trial by military commission of a U.S. citizen who is also an unlawful enemy combatant is constitutional (in *Ex parte Quirin*).

The secondary problem with the Quirin precedent being applied to the War on Terror, is that lower court application of Quirin authority lacks unified explanation of opinions, threatening the rights of some suspects.

Benjamin **Wittes** and Robert M. **Chesney**, 5-22-2013, "Protecting U.S. Citizens' Constitutional Rights During the War on Terror," Brookings, <https://www.brookings.edu/testimonies/protecting-u-s-citizens-constitutional-rights-during-the-war-on-terror/>

The end of the Padilla litigation did not end the opportunity for courts to struggle with the question of detention authority in the United States. There was one other domestic military detainee in the Bush years, a Qatari man named Ali Saleh Kahlal al-Marri. As in Padilla's case, the government first used civilian authorities to detain al-Marri after concluding that he might be an al Qaeda agent. As in Padilla's case, it eventually moved him into military custody. And as in Padilla's case, the resulting habeas litigation was a mess, with a variety of judges embracing a broad array of different theories. First, the district judge concluded that there was no obstacle to detaining al-Marri, as he was not a citizen and thus the AUMF need not be more explicit in providing for detention in his case. The Fourth Circuit disagreed, however, with the initial panel opinion concluding that as a lawful resident, al-Marri had Fifth Amendment rights, that those rights precluded detention beyond what the law of war might allow in this case, and that the law of war did not permit detention in this circumstance. This in turn led to an en banc review by the full court, which splintered wildly across an array of opinions. A slim majority sided with the government, but without a single unifying theory to explain that result. Once more, the Supreme Court might have resolved the matter, and it did grant certiorari in an apparent bid to do so. But following the Padilla path once again, the government—now the Obama administration—transferred al-Marri to the civilian criminal justice system, mooted the issue and leaving the question of detention authority for domestic captures under the AUMF in doubt.

The judicial strategies used by Bush and Obama were wildly different, but a huge litigation risk threatens the rights of any suspect, muddying the waters of the criminal justice system. As Trump has stepped his rhetoric up in prosecuting anyone suspected of terror, the Quirin precedent should be re-examined.

Benjamin Wittes and Robert M. Chesney, 5-22-2013, "Protecting U.S. Citizens' Constitutional Rights During the War on Terror," Brookings, <https://www.brookings.edu/testimonies/protecting-u-s-citizens-constitutional-rights-during-the-war-on-terror/>

To put the matter simply, military detention for citizens or for terrorist suspects captured domestically, was tried a handful of times early in the Bush administration; the strategy was abandoned; it has been many years since there was any appetite in the executive branch—under the control of either party—for trying it again; and it has for some time been the stated policy of the executive branch not to attempt it under any circumstances. We do not expect any administration of either party to break blithely with the consensus that has developed absent some dramatically changed circumstance. The litigation risk is simply too great, and the criminal justice system's performance has been too strong to warrant assuming this risk. But ironically, even as this strong executive norm against military detention of domestic captures and citizens has developed, a fierce commitment to this type of detention has also developed in some quarters. The fact that the norm against detention is not currently written into law has helped fuel this commitment, enabling the persistent perception that there is greater policy latitude than functionally exists. The result is that every time a major terrorist suspect has been taken into custody domestically in recent years—the arrest of Djokhar Tsarnaev is only the most recent example—the country explodes in the exact same unproductive and divisive political debate. To caricature it only slightly, one side argues that the suspect should have been held in military custody, instead of being processed through the criminal justice system; it decries the reading of the suspect his Miranda rights; and it criticizes the administration, more generally, for a supposed return to a pre-9/11 law enforcement paradigm. The other side, meanwhile, defends the civilian justice system, while also demanding the closure of Guantánamo and attacking the performance of military commissions for good measure. This kabuki dance of a debate is not merely a matter of rhetoric. Separate and apart from the U.S. citizen detention language we described above, in the course of producing the 2012 NDAA Congress also explored the option of mandating military detention for suspects (citizen or not) taken into custody within the United States. The administration resisted these efforts, and the resulting language in conference committee ultimately stopped far short of requiring military detention. The administration further softened the effects of that language, moreover, through its subsequent interpretation of the new language. All of which brings us back to our point: there is a big gulf between the real, functional state of play (in which the criminal justice system provides the exclusive means of processing terrorist suspects captured within the United States) and the perception in some quarters that military detention remains a viable option, perhaps even a norm, for domestic and citizen terrorist captures. That gulf has real costs. Most obviously, it generates significant political friction every time a major terrorist arrest happens in the United States. It increases the apparent political polarization of an area that should be above politics—and in which the counterterrorism reality is far less polarized than the inter-branch relations over the issue would suggest. And it reinforces the perception that domestic military detention remains a viable option, needlessly alarming those who fear it and needlessly misleading those who wish to see it. The resulting confusion fuels sharp debate over something that is no longer meaningfully an option in functional terms. That debate even spills over at times into litigation, most notably—and disruptively—in the context of the Hedges case in New York (in which journalists and activists persuaded a district judge to enjoin enforcement of detention authority, despite the utter implausibility of the claim that they might be subjected to it).

However, there is still a great fruitful area for debate, as fully eliminating the ability for detention and military commissions could also lead to stalling in the civilian justice system

Benjamin Wittes and Robert M. Chesney, 5-22-2013, "Protecting U.S. Citizens' Constitutional Rights During the War on Terror," Brookings, <https://www.brookings.edu/testimonies/protecting-u-s-citizens-constitutional-rights-during-the-war-on-terror/>

To be clear, closing off the possibility of the executive branch's trying such detention again in the future is not without potential costs. Consider the Padilla case once more. Contrary to the mythology that has developed about it over the years, the decision to move Padilla into military custody did not result from some ideological commitment on the part of the Bush administration to domestic military detention or to expanding executive power. It was, rather, a least-bad alternative in a circumstance in which options within the criminal justice system appeared to have run out. Recall that the government initially held Padilla in the criminal justice system. As then-Deputy Attorney General James Comey explained in 2004: Padilla was arrested by the FBI in Chicago on a material witness warrant authorized by a federal judge in New York. And he was transferred to Manhattan where I was then the United States attorney. He was appointed a lawyer at public expense. And we set about trying to see if he would tell the grand jury what he knew about al Qaeda. With time running out in that process, on June 9th of 2002, just about two years ago, the president of the United States ordered that Padilla be turned over to the custody of the Department of Defense as an enemy combatant, where he remains. . . . Had we tried to make a case against Jose Padilla through our criminal justice system, something that I, as the United States attorney in New York, could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right. He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week, and hope—pray, really—that we didn't lose him. It is certainly possible that we will one day again confront a case in which strong evidence exists that an individual member of an AUMF-covered group poses a huge threat within the United States, but in which the evidence supporting this view is either too sensitive to disclose or inadmissible for any of several reasons. In such a situation, legislation prohibiting the military detention of suspects captured in the United States in theory could precipitate an outcome like the one that Comey feared in 2002. From that perspective, the option of at least attempting to sustain military detention, despite the legal uncertainty we described above, would be attractive.

Including *Ex parte Quirin* is a near-must for any resolution. First, the war on terror is an ever-present issue in contemporary political discussions. Since “radical Islamic terror” was one of the key areas Trump and other Republicans campaigned on in 2016, we know that the use of the *Quirin* precedent could be a huge reversal from elements of Obama's strategy. Secondly, while this case seems like there is a singular issue about due process rights for terror suspects, it is quite multifaceted. Debating the *Quirin* precedent allows students to access a variety of War on Terror issues, a discussion of the rights of American citizens that could be labeled “enemy combatants” for a litany of reasons, and a discussion of adherence to international law. This case also has a depth of arguments justifying both keeping and reversing the precedent even if many jurists call the *Quirin* decision one of the dark days of the court. Finally, this offers fruitful ground between an overturn aff and a Congress counterplan, as they could always clarify AUMF agreements, or other defense policies to solve elements of the affirmative.

Hamdi v. Rumsfeld (2004)

This entire section is from my 2014 paper on Civil Rights-Civil Liberties with an updated conclusion.

The Fifth Amendment to the U.S. Constitution provides for due process rights to prevent some aspects of long-term detention without being charged with a crime. The Sixth Amendment to the U.S. Constitution provides for the right to a speedy public trial. The hot debate since the inception of the War on Terror has been the question of whether or not terror suspects who are detained on American soil should be given Constitutional protections. In 2004 the Supreme Court handed down its decision in the case Hamdi v. Rumsfeld arguing that terror suspects should have the right to question their detention status.

Oyez Project, 2004 ("Hamdi v. Rumsfeld" Oyez Project from the University of Chicago-Kent Law School, http://www.oyez.org/cases/2000-2009/2003/2003_03_6696, Accessed 7/13/14)

Yes and no. In an opinion backed by a four-justice plurality and partly joined by two additional justices, Justice Sandra Day O'Connor wrote that although Congress authorized Hamdi's detention, Fifth Amendment due process guarantees give a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decisionmaker. The plurality rejected the government's argument that the separation-of-powers prevents the judiciary from hearing Hamdi's challenge. Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, concurred with the plurality that Hamdi had the right to challenge in court his status as an enemy combatant. Souter and Ginsburg, however, disagreed with the plurality's view that Congress authorized Hamdi's detention. Justice Antonin Scalia issued a dissent joined by Justice John Paul Stevens. Justice Clarence Thomas dissented separately.

While this decision gives terror suspects the right to challenge their detention status and maybe little beyond that, many have argued that the case gives terror suspects some claim to habeas corpus rights. However, new congressional actions have denied that right. In the 2012 version of the National Defense Authorization Act, Congress gave the President the right to indefinitely detain terror suspects. This provision was immediately challenged, and in 2013 the federal courts cleared the provision as Constitutional.

The Federal Courts have given back Presidential power to indefinitely detain terror suspects

Russia Today, July 17, 2013 ("Obama wins back the right to indefinitely detain under NDAA," Russia Today, <http://rt.com/usa/obama-ndaa-appeal-suit-229/>, Accessed 7/7/2014)

The Obama administration has won the latest battle in their fight to indefinitely detain US citizens and foreigners suspected of being affiliated with terrorists under the National Defense Authorization Act of 2012. Congress granted the

president the authority to arrest and hold individuals accused of terrorism without due process under the NDAA, but Mr. Obama said in an accompanying signing statement that he will not abuse these privileges to keep American citizens imprisoned indefinitely. These assurances, however, were not enough to keep a group of journalists and human rights activists from filing a federal lawsuit last year, which contested the constitutionality of Section 1021, the particular provision that provides for such broad power. A federal judge sided with the plaintiffs originally by granting an injunction against Section 1021, prompting the Obama administration to request an appeal last year. On Wednesday this week, an appeals court in New York ruled in favor of the government and once again allowed the White House to legally indefinitely detain persons that fit in the category of enemy combatants or merely provide them with support.

Many civil rights activists have made the argument that the language in the NDAA is overly broad, authorizing the President to detain anyone who commits a "belligerent act" against the United States. However there is no clear definition of this term. Many people believe that this provision is an assault on First Amendment rights, because criticizing any action of the government during times of hostilities could be labeled as an "enemy of the state."

The NDAA is broad and overly increases the President's detention power, which could threaten free speech rights

Russia Today, July 17, 2013 ("Obama wins back the right to indefinitely detain under NDAA," Russia Today, <http://rt.com/usa/obama-ndaa-appeal-suit-229/>, Accessed 7/7/2014)

Section 1021 of the NDAA reads in part that the president of the US can indefinitely imprison any person who was part of or substantially supported al-Qaeda, the Taliban or associated forces engaged in hostilities against the US or its coalition partners, as well as anyone who commits a "belligerent act" against the US under the law of war, "without trial, until the end of the hostilities." The power to do as much was allegedly granted to the commander-in-chief after the Authorization to Use Military Force was signed into law shortly after the September 11, 2001 terrorist attacks, but a team of plaintiffs have argued that Section 1021 provides the White House with broad, sweeping powers that put the First Amendment-guaranteed rights to free speech and assembly at risk while also opening the door for the unlawful prosecution of anyone who can be linked to an enemy of the state. Only two weeks after the 2012 NDAA was signed into law, Hedges filed a lawsuit against the Obama administration challenging the constitutional validity of Section 1021. *"I have had dinner more times than I can count with people whom this country brands as terrorists ... but that does not make me one,"* he said at the time. Naomi Wolf, an American author, told the Guardian last year that she has skipped meetings with individuals and dropped stories that she believed are newsworthy "for no other reason than to avoid potential repercussions under the bill."

In 2014, Congress was still debating elements of the 2012 NDAA, and the provision of indefinite detention. Congress extended the indefinite detention powers to detain any American citizen that may be affiliated with a terror organization. Many alarmists believe that this power may snowball into indefinitely detaining any American given an arbitrary label.

In May, Congress extended Presidential Authority to allow these powers to be used against any American citizen.

Russia Today, May 22, 2014 ("Congress reaffirms indefinite detention of Americans under NDAA," Russia Today, <http://rt.com/usa/160832-ndaa-gitmo-detention-approved/>, Accessed 7/7/14)

The US House of Representatives approved an annual defense spending bill early Thursday after rejecting a proposed amendment that would have prevented the United States government from indefinitely detaining American citizens. An amendment introduced in the House on Wednesday this week asked that Congress repeal a controversial provision placed in the National Defense Authorization Act of 2012 that has ever since provided the executive branch with the power to arrest and detain indefinitely any US citizen thought to be affiliated with Al-Qaeda or associated organizations.

"This amendment would eliminate indefinite detention in the United States and its territories," Rep. Adam Smith (D-Washington), a co-author of the failed amendment, said during floor debate on Wednesday, "So basically anybody that we captured, who we suspected of terrorist activity, would no longer be subject to indefinite detention, as is now, currently, the law."

What may be the most troubling is the refusal of the United States Supreme Court to grant a writ of cert to any of the cases dealing with indefinite detention. The highest profile of cases coming from journalist Chris Hedges.

The Supreme Court refuses to rule on the issues of Indefinite Detention from the NDAA

Russia Today, May 1, 2014 ("Supreme Court refuses to stop indefinite detention of Americans under NDAA," Russia Today, <http://rt.com/usa/156172-scotus-ndaa-hedges-obama/>, Accessed 7/7/2014)

The United States Supreme Court this week effectively ended all efforts to overturn a controversial 2012 law that grants the government the power to indefinitely detain American citizens without due process.

On Monday, the high court said it won't weigh in on challenge filed by Pulitzer Prize-winning journalist Chris Hedges and a bevy of co-plaintiffs against US President Barack Obama, ending for now a two-and-a-half-year debate concerning part of an annual Pentagon spending bill that since 2012 has granted the White House the ability to indefinitely detain people "who are part of or substantially support Al-Qaeda, the Taliban or associated forces engaged in hostilities against the United States."

Finally, Congress passed the 2014 NDAA with no change to the indefinite detention provision, and several members of congress, and several notable academics wanted clarifications on the detention language which never happened. Many people believe the NDAA can be used to indefinitely detain any American citizen, which is a huge blow to our civil liberties.

The 2014 NDAA does nothing to change Detention Powers

Natasha **Lennard**, December 27, **2013** ("Obama signs NDAA 2014, indefinite detention remains," Salon, http://www.salon.com/2013/12/27/obama_signs_ndaa_2014_indefinite_detention_remains/, Accessed 7/7/2014)

Meanwhile the troubling NDAA provision first signed into law in 2012, which permits the military to detain individuals indefinitely without trial, remains on the books for 2014. Efforts to quash or reform the provision (especially with regard to the indefinite detention of U.S. citizens) have failed and have been fiercely fought by the administration. Most notably, a lawsuit filed by plaintiffs including journalist Chris Hedges, Noam Chomsky and Daniel Ellsberg against the provision has been aggressively fought at every turn by the president's attorneys. The plaintiffs argue that the NDAA provision constitutes a significant expansion of the laws regarding indefinite detention already established by Authorization for Use of Military Force (AUMF). And we can all be concerned when it is Tea Party blowhard Sen. Ted Cruz who best expresses civil liberties concerns on an issue. Cruz voted against the 2014 NDAA, stating, "I voted against the National Defense Authorization Act. I am deeply concerned that Congress still has not prohibited President Obama's ability to indefinitely detain U.S. citizens arrested on American soil without trial or due process..." Although this legislation does contain several positive provisions that I support, it does not ensure our most basic rights as American citizens are protected."

In Conclusion, overturning Hamdi would allow debaters to explore indefinite detention and habeas corpus rights. There is balance in both sides as to whether or not indefinite detention plays a positive role in the war on terror.

City of Boerne v. Flores (1997)

In 1993 Congress nearly unanimously passes the Religious Freedom Restoration Act (RFRA). The goal was to ensure that interests in religious freedom are protected. When the Archbishop of San Antonio attempted to apply for a permit to expand his church in Boerne, he was denied as the church was in a "historic preservation district." The archbishop argued his church should be allowed to expand under the RFRA while the city of Boerne argued the RFRA is unconstitutional because it overrode their ability to manage historic areas of their city. In a 6-3 decision, the Supreme Court found in favor of the City of Boerne, and the application of RFRA's drafted by the Federal Government to the states are unconstitutional. Specifically they "held that while Congress may enact such legislation as the RFRA, in an attempt to prevent the abuse of religious freedoms, it may not determine the manner in which states enforce the substance of its legislative restrictions. This, the Court added, is precisely what the RFRA does by overly restricting the states' freedom to enforce its spirit in a manner which they deem most appropriate. With respect to this case, specifically, there was no evidence to suggest that Boerne's historic preservation ordinance favored one religion over another, or that it was based on animus or hostility for free religious exercise" (Oyez-Boerne).

First, the Boerne precedent has been used by the court as an attempt to block legislative action from surpassing court action

Linda **Greenhouse**, 6-28-2000, "A Turf Battle's Unlikely Victim," New York Times,
<http://www.nytimes.com/2000/06/28/us/a-turf-battle-s-unlikely-victim.html>

One precedent Chief Justice William H. Rehnquist cited in his opinion was telling: City of Boerne v. Flores, the 1997 decision that overturned the Religious Freedom Restoration Act. Congress had passed that law in 1993 to give more official protection to religious practice than the court had said, in a decision three years earlier, the First Amendment's free exercise clause provided for. "The power to interpret the Constitution in a case or controversy remains in the judiciary," Justice Anthony M. Kennedy wrote for the court in the Boerne case. In that instance, Congress was being more protective of individual rights than the court, while in the anti-Miranda statute, known as Section 3501, it was less protective. The outcome was the same. "Congress may not legislatively supersede our decisions interpreting and applying the Constitution," Chief Justice Rehnquist said on Monday in the Miranda case, *United States v. Dickerson*.

While many believe in Congressional restraint, some argue that the pendulum swung too far in the Boerne decision. Paulsen argues there are four fundamental flaws in how the court interprets checks and balances in comparison with the legislature and he believes that the court may effectively gut the application of the 14th amendment.

Michael Stokes Paulsen, 6-26-2017, "This Week in Judicial Supremacist Arrogance: City of Boerne v. Flores at Twenty," National Review, <http://www.nationalreview.com/bench-memos/448975/judicial-supremacy-arrogance-boerne-flores-free-exercise-section-five>

How many different ways is City of Boerne wrong? Put to one side for a moment the fact that Employment Division v. Smith was a deeply questionable decision on the merits of its interpretation of the Free Exercise Clause in the first place. (The broad understanding of Free Exercise is the better view. But that is not my primary point here.) The core problem with City of Boerne is the judicial supremacist conceit that the Court is the only truly authoritative constitutional interpreter. The Constitution's meaning, under the approach of the Boerne opinion, actually goes up (and down) with the Supreme Court's decisions. Congress's power "to enforce" generally-stated limitations on state governments "by appropriate legislation" is limited to implementing the Court's diktats. Congress's enforcement power is hitched to the Court's activist wagon, wherever it goes at any particular point in time. Congress has no independent interpretive power in enforcing the Fourteenth Amendment. The Supreme Court is the boss. Congress is the assistant or adjunct. There are at least four related reasons why this is conception is way off the mark. 1. The first is that it rests on a basic misunderstanding concerning judicial power to invalidate legislative acts when the Constitution is indeterminate (or "under-determinate"). Here's the right answer, simply put: where the Constitution's broad or unspecific language admits of a range of possible actions by government, each consistent with the language, government action falling within that range cannot rightly be held by the courts to be "unconstitutional," because it does not violate a rule supplied by the text. Unspecific texts are not grants of enlarged judicial power. Just the opposite: the Constitution's default rule is representative democracy. Unspecific texts, to the extent of their un-specificity, permit a range of legitimate interpretation and application by political decision-makers. The only question is which level of representative democracy – Congress or state governments – has the superior claim of representative power. With respect to the Fourteenth Amendment, the answer is easy. The Fourteenth Amendment enlarges federal power over state action. That enlargement primarily increases the power of Congress, not that of the courts. (Toward the end of this post, I will quote the leading Reconstruction-era case of Ex parte Virginia for much the same proposition.) In principle, then, the consequences of textual ambiguity thus have starkly different implications for the powers of different institutions. Courts cannot rightfully invalidate state laws that fit within the range of meaning afforded by a broadly worded, indefinite text. (That is probably the best argument for the holding in Smith, though I still think it unsatisfactory.) But by the same token, courts should uphold federal laws enforcing the Fourteenth Amendment's general terms if Congress's understanding and application of those terms fits within the range of meaning of the text that Congress is empowered to enforce. The enforcement power conferred by Section Five looms large in this regard. The Fourteenth Amendment is a sweeping power-grant to Congress – a power-grant keyed to the enforcement of broadly and generally worded prohibitions on state action denying (unspecified) privileges or immunities, (undefined) due process, and (vaguely stated) equal protection of the laws. It follows that Congress has significant discretion to enforce its understanding of what these concepts require. And it has more discretion – and thus more power – than the Court does. This is simply because of the different consequences of indeterminate language for the exercise of judicial power and for a broad grant of legislative power to enforce that indeterminate language. Put another way: The broader one's understanding of the language of section one of the Fourteenth Amendment, the less one can say that it authorizes federal judicial invalidation of state action that fits within the range of meaning admitted by such broad language; but the more one can say that the grant of federal legislative power over such a broadly-described subject matter authorizes broad congressional choice in such matters. The merits or demerits of Smith remain relevant in this respect: Was Congress enforcing a view of the Fourteenth Amendment fairly within the range of meaning afforded by its broad language? Was Congress' view of religious liberty within the legitimate range of meaning of the Free Exercise Clause, as made applicable to the states? Obviously if Smith is flat-out wrong in its interpretation of Free Exercise, and RFRA right, this is an easy case. But even if Smith's rule were thought to be somewhat the better reading of Free Exercise, that does not resolve the question of whether Congress's enforcement power might legitimately be premised on a broader reading. Unless, that is, one first assumes that the Court, above and essentially to the exclusion of everybody else, is the single authoritative expounder of the Constitution's meaning. That is the premise Boerne takes as its starting point and its ending point. And that is the core error, and arrogance, of the opinion. 2. Second, this fundamental proposition about judicial versus legislative power finds specific confirmation in the structure and history of the Fourteenth Amendment. As a matter of history, the amendment's text had its origins in the desire to empower Congress – not the Court – to legislate in matters concerning rights, privileges, and equality. In part, the motive was simply to provide a more secure constitutional basis for what Congress had already done in enacting the Civil Rights Act of 1866 (which originally was based, more questionably, on the power to enforce the

Thirteenth Amendment's prohibition of slavery). The means originally chosen was a sweeping, *McCulloch v. Maryland*-echoing power to enact laws Congress deems "appropriate" to the protection of rights stated in broad, generic categories, originally proposed as a freestanding power-grant provision. That expansive grant of power survived (in slightly revised form) the various drafting alterations in the amendment's text, including the addition of what became sections two, three, and four of the amendment and the reformulation of what became section one of the amendment to limit state action (and thus not to empower Congress to legislate directly on individuals absent some violation or default of duty by the state). The broad grant of legislative power became embodied in section five's grant of enforcement power covering all four previous sections of the amendment. The Fourteenth Amendment, in its final form, thus became more than a simple grant of broad congressional power, as in earlier drafts. But the amendment did not thereby become less than a fully sweeping empowerment of Congress. To the extent sections one through four state determinate rules of law, they became constitutionally self-executing and therefore judicially enforceable commands. But that did not diminish the scope of legislative power otherwise vested by section five. Section five, as written, and as it operates within the structure of the amendment as a whole, is a sweeping grant of legislative power. 3. Third, it is, frankly, historically implausible to read the Fourteenth Amendment as primarily committing to the judiciary the power to fill in the broad outlines of general prohibitions of state denials of privileges, immunities, equal protection of law, and fair legal procedures. The amendment was proposed by a Radical Republican Reconstruction Congress bent on dominating the post-Civil War legal order, concerned with protecting congressional primacy, and intent on dealing itself most of the relevant power. The Fourteenth Amendment was all about enhancing congressional power, validating Congress's Reconstruction enactments, and entrenching its actions against possible future backsliding to the greatest extent possible. Of course, such a legislative-power-maximizing purpose would not matter if the text as actually enacted failed to reflect and embody such a purpose. But it rather plainly does. The amendment's text is most naturally read as a set of general and specific principles, coupled with a broad grant of power to Congress to enforce such general and specific principles in an appropriate manner left largely to Congress's choices. Unless one comes to the text already corrupted by an ahistorical, modern, post-*Cooper v. Aaron* judicial supremacist mindset (as the Court in *City of Boerne* did), it is impossible to read the amendment in historical context as primarily a grant of judicial power. What's more, the amendment was proposed and adopted in the still-recent shadow of the infamous *Dred Scott* decision, of 1858. In that shadow, it is unrealistic to think of the amendment as intending a broad delegation of gap-filling and creative-interpreting power to the Supreme Court. Recent, stinging experience with misuse of judicial power very nearly forecloses any such understanding. 4. Fourth, and finally, the primacy of congressional power appears to have been the original, near-contemporaneous early understanding of the amendment – including early judicial understanding. In *Ex parte Virginia* (1879), the Court recognized a broad understanding of Congress's enforcement power under section five as the core of what the Fourteenth Amendment is all about. The opinion merits quotation at length: The Thirteenth, Fourteenth, and Fifteenth amendments, the Court explained, "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. [Emphasis added.] They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation."

One of the biggest advantages to maintaining the precedent of *Boerne* is maintaining the balance of federalism

Jeffrey S. Sutton, 12-1-1997, "City of Boerne v. Flores: A Victory for Federalism," No Publication, <http://www.fed-soc.org/publications/detail/city-of-boerne-v-flores-a-victory-for-federalism>

The decision also strikes a welcome blow for States' rights. Together with *Printz v. United States*, 117 S.Ct. 2365 (1997) (which invalidated a portion of the Brady Bill), the case serves as a reminder that federalism remains a vital, not a quaint, component of the Court's jurisprudence. It now ought to be clear that preserving the Constitution's structural delegations of power matters to this Court, whether due to the importance of securing a separation of powers among the three branches of the federal government or due to the importance of preserving the dual sovereignty of the federal government and the States. The failure to invalidate RFRA would have been devastating to these views and to the underlying end of federalism itself: the protection of individual liberties by dividing government and limiting its aggregation in any one body. Left intact, the RFRA version of section five power would effectively have transformed the federal government from one of limited powers to one of unlimited powers. For if Congress were allowed to enforce constitutional values, as opposed to constitutional violations, it is hard to fathom any limiting principle to its power. Congress could federalize all law

enforcement in the name of Fourth and Fifth Amendment values, all punishment in the name of Eighth Amendment values, all speech-related regulations in the name of First Amendment values, to say nothing of an assortment of family and social issues in the name of substantive due process values.

However, the resurgence of state-level RFRA legislation is a veiled attempt of discrimination in the eyes of many—Alabama is an example

Mark R. **Killenbeck**, 6-22-**2017**, "Alabama's Religious Freedom: Natural Rights, Social Duties," No Publication, <http://www.jurist.org/forum/2017/06/Mark-Killenbeck-alabamas-religious-freedom.php>

Fifty years later, Alabama is once again trying to "induce, encourage and promote" private acts of discrimination, this time on the basis of sexual orientation and/or gender identification. The Alabama Child Placing Agency Inclusion Act (H.B. 24) does not mention these traits. Nor does it invoke a central tenet in the law of child custody and care in Alabama, the "best interests of the child." Rather, it speaks simply and repeatedly of the need to protect "sincerely held religious beliefs," invoking as its central legal premise "the inherent, fundamental, and inalienable right to free exercise of religion protected by the First Amendment to the United States Constitution."

Several other states have RFRA's on the books that have been used to discriminate against gay couples

Scott **Bomboy**, 6-30-**2014**, "What is RFRA and why do we care?," National Constitution Center – constitutioncenter.org, <https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care>

In addition to the Hobby Lobby case, RFRA was at the center of a controversy in Arizona and New Mexico over the rights of same-sex couples. Republican lawmakers in Arizona in February 2014 had decided to pass a state RFRA law that potentially legalized discrimination against gays by businesses that sold goods and services, but Governor Jan Brewer vetoed the law, after a national debate. The Arizona legislature acted after a court in neighboring New Mexico in 2013 decided that a photographer who refused to document a same-sex couple's commitment ceremony had violated New Mexico's public accommodations laws. RFRA was also involved in that case, which was declined by the Supreme Court.

The ultimate issue with Boerne and RFRA statutes is they manufacture rights, that can be a variety of areas for advantage ground, Women's Rights, Women's Health Issues, LGBTQ Rights, Pharmaceuticals, Vaccines and more

Marci A. Hamilton, 1-24-2017, "The Religious Liberty Shell Game Needs to End Now Before the Civil Rights of Women and LGBTQ Recede into History," Justia, <https://verdict.justia.com/2017/01/24/religious-liberty-shell-game-needs-end-now-civil-rights-women-lgbtq-recede-history>

What are the rights that have been made up through statute, with no constitutional back up? They are in large part "rights" to discriminate, and they are mostly derived from the federal (and state) Religious Freedom Restoration Acts. (The deep irony here is that RFRA was held unconstitutional on multiple theories in *Boerne v. Flores* in 1997 but that is an inconvenient fact they prefer to ignore.) Some of these manufactured rights have harmed women, for example: the Hobby Lobby multi-million-dollar corporation's "right" to discriminate against female employees in their health care benefits by picking and choosing what healthcare the plan would cover according to the owners' beliefs in *Hobby Lobby v. Burwell*. More have targeted LGBTQ, for example the first Indiana RFRA's "right" to exclude LGBTQ from the marketplace and then the amended Indiana RFRA's "right" of employers to discriminate against LGBTQ employees. Or then there is the Mississippi RFRA-generated "right" to discriminate against LGBTQ consumers. None of these so-called rights are constitutionally required. Others are derived from expansive and harmful "exemptions" for believers from the laws that govern everyone else, e.g., the "right" of a pharmacist to refuse to sell to a customer any medicine that conflicts with the pharmacist's faith, like birth control. There is also the "right" of a parent who believes in healing by faith alone to let his child suffer and even die from a medically treatable ailment. And, of course, the "right" of a parent to refuse to vaccinate her children. Again, these are statutory constructions, not constitutional guarantees. As I have documented in *God vs. the Gavel: The Perils of Extreme Religious Liberty*, there are thousands of statutory exemptions, or "rights," in the United States that harm others. Few Americans have come to grasp the harm that is done through these seemingly benign exemptions. In fact, the status quo is so bad that we should be discussing which exemptions to roll back, not how to pile on more "rights" to harm. Still, the religious forces pulling Trump's strings are intent on discriminating against LGBTQ in every arena they can and are busily crafting statutory vehicles to marginalize, discriminate against, and harm LGBTQ individuals and youth. In this era Oklahoma is leading the way in manufacturing these wish lists for conservative Christians to marginalize LGBTQ. Congress also has a bill, the First Amendment Defense Act, which I discussed here, which tills new ground in one discrimination free-for-all bill. This misnamed bill is the most brazen attempt to date by conservative Christians to pretend that their drive to discriminate is required by the First Amendment.

Including Boerne in the resolution opens students up to not only discussions of religious freedom, federalism, or checks and balances. But it also opens the debate to many categories of rights that could directly relate to the lives of our students. If someone is intrigued by this as a topic area, but is afraid to get into debates about religion, then federalism allows them an out, who should have the right to interpret the legislative provisions of the 14th amendment, the courts or Congress? Who is more effective at protecting religious liberties, the states or the federal government? This multi-faceted decision merely uses religion as a vehicle into several pertinent areas of debate.

Gregg v. Georgia (1976)

On July 2, 1976 the Supreme Court released its decision in Gregg v. Georgia and 4 other cases, collectively known as the “July 2nd cases.” The Supreme Court was forced to grapple with the constitutionality of the death penalty on 8th Amendment grounds. In a 7-2 decision, they held that the death penalty is constitutional (Oyez-Gregg) as long as it meets two distinct criteria: “First, the scheme must provide objective criteria to direct and limit the death sentencing discretion. The objectiveness of these criteria must in turn be ensured by appellate review of all death sentences. Second, the scheme must allow the sentencer (whether judge or jury) to take into account the character and record of an individual defendant” (Wikipedia). However, in the 41 years since the precedent was established, critics have always questioned the constitutionality of the death penalty.

First, many believe the court’s initial precedent in Furman v. Georgia was the correct in asserting that the death penalty is discriminatory, violates due process rights and is a cruel and unusual punishment.

Ben **Grimes**, 6-26-**2014**, "Furman v. Georgia Turns 42," National Coalition To Abolish The Death Penalty, <http://www.ncadp.org/blog/entry/furman-v.-georgia-turns-42>

The Furman ruling examined three capital cases and evaluated them against the Eighth Amendment, which protects against “cruel and unusual punishment,” and the Fourteenth Amendment, which ensures due process under the law. Despite a multitude of conflicting positions and arguments, even among those on the same side, it was decided that the death penalty violated constitutional protections by a 5-4 margin and it’s practice was halted. Three justices found that the application of the death penalty showed a pattern of discrimination and bias, making the punishment both “unusual” and lacking in due process. Justice Douglas said: "These discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." And two other justices went even further to declare that the death penalty is unconstitutional in all forms, regardless of its application, because it was not consistent with “evolving standards of decency” and thus was definitively “cruel and unusual punishment.” Justice Stewart issued a complete rejection of the practice, saying: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Secondly, Gregg overturned Furman and in the years since, we have seen a death penalty which disproportionately targets Black Men. Additionally, a recent string of botched executions show the increased cruelty of the death penalty.

Ben **Grimes**, 6-26-**2014**, "Furman v. Georgia Turns 42," National Coalition To Abolish The Death Penalty, <http://www.ncadp.org/blog/entry/furman-v.-georgia-turns-42>

Unfortunately, the moratorium brought on by this decision did not stand for long. In a series of cases culminating in Gregg v. Georgia, the death penalty was reinterpreted to be a matter of state's rights, reopening an old wound, and restoring power to the prejudice and bias surrounding capital punishment. Ever since, practice of the death penalty has continued in the United States. Today, it is legal in 32 states. Despite being overturned, Furman continues to be relevant to today's dialogue on capital punishment. Both arguments made by the majority opinion still stand true. Racial discrimination remains an overwhelming factor in capital sentencing, documented in almost every state that uses the death penalty with frequency. This June, we saw the execution of three African American men within 24 hours. And, according to statistics recently published in The Atlantic, blacks make up a disproportionate share of death row seats relative to state population in all three states where these executions occurred. Nationally, 42 percent of death row is black, while blacks make up only 13 percent of the general population. Also, the death penalty continues to become more and more out of line with our "evolving standards of decency." The gory details of the botched execution in Oklahoma and resulting public outcry have shown that this form of punishment is no longer consistent with our values as American citizens. And further, the US remains one of the last developed democracies to use capital punishment, making our justice system an outlier among global standards of decency.

Some people may wonder if discussions of the death penalty are that big of a deal since the number of annual executions is on the decline. However, with some states using the death penalty quickly (and some say excessively) maybe the court needs to step in.

Economist, 6-12-2017, "Why America still executes people," <https://www.economist.com/blogs/economist-explains/2017/06/economist-explains-10>

AMERICA is one of only a few countries in the Western world that still puts criminals to death. Even there, executions are on the wane: just 20 were carried out in 2016, down from a peak of 98 in 1999. Popular support is declining, too. Just 60% of Americans approve of the death penalty for murder, down from 80% in the 1990s. Only eight states have carried out an execution since 2015, and around two-thirds either have abolished capital punishment or have a moratorium on its use. But it has not disappeared altogether: during an eight-day stretch in April, Arkansas executed four people, so as not to waste its expiring supply of a lethal-injection drug. And last month in Alabama, a man who spent 35 years on death row—and eluded seven execution dates—was finally put to death. Why does America continue to execute people?

The courts have limited who/what is death penalty eligible, however the death penalty may not be on a course to be struck down at a national level.

Economist, 6-12-2017, "Why America still executes people," <https://www.economist.com/blogs/economist-explains/2017/06/economist-explains-10>

One way to understand why America still executes people is to look at the Fifth Amendment, which provides that nobody will "be deprived of life...without due process of law". How could the framers of the constitution have banned capital punishment in the Eighth Amendment when, in the Fifth, they specifically contemplated its existence? In Gregg, the court cited two justifications for the death penalty: retributive justice and deterrence. Retribution, "an expression of society's moral outrage at particularly offensive conduct", Justice Stewart wrote, is "essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help, to vindicate their wrongs".

In other words, an abhorrent crime deserves an equally grave penalty. He acknowledged that scholars disagree about how well capital punishment discourages crime, but insisted that “the death penalty undoubtedly is a significant deterrent” for some potential criminals. Since Gregg, the Supreme Court has steadily narrowed the pool of miscreants eligible for the death penalty. Rape was nixed as a capital crime in 1977. People with intellectual disabilities and juveniles were spared the ultimate punishment in 2002 and 2005, respectively. But any prospects for the oft-curbed penalty being killed off completely are dim—despite a crusade led by Justice Stephen Breyer, who dissented sharply in *Glossip v Gross*, a 2015 case asking whether a drug used in lethal injections entailed the risk of torturing prisoners to death. Rather than “try[ing] to patch up the death penalty’s legal wounds one at a time”, he wrote, it is time for a “full briefing on a more basic question: whether the death penalty violates the constitution”. It was 23 years ago that the late Justice Harry Blackmun predicted in *Callins v Collins* that America’s system of capital punishment was “doomed to failure” and that while he “may not live to see that day”, he had “faith that eventually it will arrive”. With the Supreme Court’s recently reinforced five-justice conservative majority, that day of reckoning seems far off still.

However, pressing the Court to act may not be the best grounds for change as the states could ultimately re-write laws to push the acceptability of the death penalty

Marshall Project, 3-30-2016, "It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty — Here's How It Failed," <https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed#.wy5Tbh8VU>

Collectively, aggravating factors fail to accomplish Furman’s fundamental goal of limiting the circumstances in which the penalty may be applied. A California study found that 87% of murders are potentially eligible for the death penalty under the state’s definitions. In Colorado, the rate is 91.1%. Some abolitionists fear that pushing the court on this point would lead to another death penalty reset, and that states would respond, as they did after Furman, by yet again rewriting their laws. What would happen is impossible to know, of course. Perhaps the court would see that 40 years of history shows that the political temptation to protect every category of murder victims is irresistible — once a state legislature has decided to make police killers death eligible, how, for example, does it refuse corrections officers or firefighters? Perhaps the court would conclude that writing a meaningfully nuanced death penalty law is therefore impossible. Or, perhaps, we’d live another generation with slightly narrower but still grossly imperfect statutes. The only thing that can be said conclusively is that states have failed to engage in the kind of “limiting” exercise Furman intended to require.

Ultimately, including Gregg in the resolution could give students access to a spirited debate over the death penalty, which rarely pops up under any resolution. This case could equip debaters to have stronger still sets to access future legal topics or assessment of the law. While this is a debate about the permissibility of the death penalty, negative teams would have the ability to discuss what level states should have control over their sentencing guidelines, and have a spirited discussion of the extent of due process. Teams can also argue about whether or not a full ban would achieve anything outside of a symbolic action. As evidence above shows, the death penalty is on the decline and the courts have been willing to minimize categories surrounding the eligibility for the death penalty.

United States v. Carolene Products Co. (1938)

The Carolene Products decision feels like a quirky addition to the list considering the depth of the other cases proposed, however the precedent in Carolene Products has far reaching implications. In 1938 the Court upheld a 1923 law banning the interstate shipment of “filled milk” finding that Congress’ ban violates neither elements of the Commerce Clause nor the Due Process Clause (Oyez-Carolene). However, it’s not the holding in the case which makes Carolene influential, it is the infamous “footnote four.”

Footnote Four sets up a new level of judicial restraint over most legislation, especially economic legislation

The Free Legal Dictionary, ND (<http://legal-dictionary.thefreedictionary.com/Footnote+4>)

In upholding the constitutionality of the Filled Milk Act, the Supreme Court drew a distinction between legislation that regulates ordinary economic activities and legislation that curtails important personal liberties. The constitutional authority of state and federal legislatures over economic matters is plenary, the Court said, and laws passed to regulate such matters are entitled to a presumption of constitutionality when reviewed by the judicial branch of government. Courts must pay great deference to legislation that is principally aimed at economic affairs, the Court continued, and judges should refrain from questioning the wisdom or policy judgments underlying such legislation. Although some commercial laws may seem undesirable or unnecessary to a particular judge, the Court cautioned, the judicial branch may not overturn them unless they fail to serve a rational or legitimate purpose. This deferential posture toward the legislative branch represents the crux of judicial self-restraint, a judicial philosophy that advocates a narrow role for courts in U.S. constitutional democracy. Because state and federal legislatures are constitutionally authorized to make the law, proponents of judicial self-restraint argue, courts must limit their role to interpreting and applying the law, except in the rare instance where a piece of legislation clearly and unequivocally violates a constitutional provision, in which case they may strike it down. In footnote 4 the Supreme Court indicated that this presumption of constitutionality might not apply to certain categories of noneconomic legislation. Legislation that restricts political processes, discriminates against minorities, or contravenes a specifically enumerated constitutional liberty, the Court said, maybe subject to "more searching judicial scrutiny."

The challenge with footnote four is that there is an inconsistent application of rational basis v. strict scrutiny in the application of the law. The “changed circumstances” doctrine can also be problematic as it allows the court to potentially eliminate precedents with minimal review.

Randy Barnett, 9-14-2014, "Ensuring that laws remain “rational” when enforced," Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/14/ensuring-that-laws-remain-rational-when-enforced/?utm_term=.241d9eb22841

For the New Deal Court (and all courts before), then, the rationality of a statute was a meaningful standard. What changed even before the New Deal was who bore the burden of proof for showing that a restriction on liberty was irrational or arbitrary. In *Lochner* and other cases, the Court appeared to place the burden on the government (as I favor doing); by the time of Carolene Products, the burden had already been shifted to the challenger (as Justice

Harlan had advocated in his *Lochner* dissent). What we think of as the meaningless “rational basis” test actually comes from a 1955 Warren Court case of *Williamson v. Lee Optical*, in which the Supreme Court reversed the lower court’s realistic appraisal that restrictions placed on opticians were irrational means of protecting the health and safety of the public. In an ironic repudiation of realism, Justice Douglass replaced a realistic rationality review by instead accepting any hypothetical reason for a law that a court might imagine. Yet the Court has never expressly repudiated the *Carolene Products* approach, and has since oftentimes employed a “rational basis with teeth” approach that seems inconsistent with *Williamson*. Now comes a cert petition from the Institute for Justice that gives the Court an opportunity to reaffirm the reasoning of *Carolene Products*, which allows individuals to challenge the “the constitutionality of a statute predicated upon the existence of a particular state of facts . . . by showing to the court that those facts have ceased to exist.” In *Heffner v. Murphy*, the Institute for Justice is challenging the rationality of several restrictions on the ownership and operation of funeral homes in Pennsylvania. While the lower court had ruled that, in light of changing circumstances, these rules were irrational, the Third Circuit rejected the principle that the rationality of a statute depends on the rationality of its application now: “As a threshold matter, we surmise that much of the District Court’s conclusions regarding the constitutionality of the [Funeral Law], enacted in 1952, stem from a view that certain provisions of the [Funeral Law] are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw.” But if “rationality” is what constitutionally justifies a restriction on liberty, there is no good reason why a law should not still be rational when applied to a particular person, and why that person should not be able to show why the law was irrational as applied to his activity, the way it was to *Milnot*. As the Institute points out in its brief: The rule of *Carolene Products* protects our constitutional rights by ensuring that the enforcement of a statute must be rational, and not merely that the statute itself was rational at some distant point in the past. The changed-circumstances doctrine is a particularly important protection because the separation-of powers principles at the heart of rational-basis review are attenuated when the factual circumstances of a law’s passage bear little resemblance to the real world many years later. This is the appropriate way for constitutional law to “live” and adjust to changing circumstances in the context of a written constitution with a fixed original meaning.

The second challenge with footnote four is the inconsistent determination of what “fundamental rights” are. A change in this standard creates division amongst the lower courts.

Randy Barnett, 9-14-2014, "Ensuring that laws remain “rational” when enforced," Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/14/ensuring-that-laws-remain-rational-when-enforced/?utm_term=.241d9eb22841

It bears emphasizing that the rule of *Carolene Products* is not a rule about how the Constitution itself changes, a rule about how courts ought to strike down unpopular laws when public sentiment shifts, or a rule allowing courts to institute their own social and economic policies. The meaning of the Constitution remains the same, public sentiment is irrelevant, and courts may not substitute their preferences for those of the elected branches. Instead, the modest rule of *Carolene Products* simply ensures that when government officials take away a liberty interest today, they do so for reasons that are rational today, not merely for reasons that were rational long ago. Allowing as applied challenges to the rationality of a statute based on changing circumstances is an approach that both originalists and “living constitutionalists” can and should embrace. And a realistic rationality review allows for the protection of liberty without the heightened scrutiny that results from finding a particular liberty to be a “fundamental right.” Under existing doctrine, elevating a liberty to “fundamental rights” status creates a virtual “trump” over legislative power, so must be only sparingly employed. The much easier-to-satisfy rationality review allows both greater exercise of governmental powers while still protecting liberty, and that is so even when following a presumption of constitutionality in favor of the statute. The difference between *Carolene Products* and *Williamson* is whether or not the presumption of constitutionality is rebuttable. The New Deal Court insisted it was; the Warren Court suggested it was not. Lower courts have been divided ever since, which would make this a very useful, as well as very important, grant of cert. By taking seriously a showing that a restriction of liberty is irrational, the Court can get itself out of the business of recognizing some “preferred

freedoms” as so “fundamental” that they merit protection while other liberties do not — while avoiding the super scrutiny that interferes with the proper discretion of legislatures. Ironically, the Court can accomplish both objectives simply by following its New Deal precedent.

The use of the rational basis test in the Carolene decision also creates a challenge of disproving “every conceivable basis to justify the government’s actions” which could be an impossible standard to meet.

Evan **Bernick**, 7-10-**2016**, "Justice Thomas' Abortion Dissent And The Decline Of The Rule of Law," HuffPost, <http://www.huffingtonpost.com/evan-bernick/justice-thomas-abortion-d_b_10915136.html>

The rational-basis test applied in *Carolene Products* was deferential to the government but not toothless. The Carolene Products Court expressly stated that evidence mattered; that constitutional challengers could demonstrate that a statute held to be rational at time A could be invalidated as irrational at time B if circumstances changed; that “a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.” It afforded the government’s actions a rebuttable presumption of constitutionality. But the Supreme Court would in subsequent cases articulate and apply the rational-basis test in a manner that afforded the government’s actions an effectively irrebuttable presumption of constitutionality (really, not a true presumption at all). Instead of allowing constitutional challengers to prevail by adducing evidence that the government’s actions did not serve any public-oriented end that the government claimed to be pursuing, the Court would uphold legislation by hypothesizing justifications for the government’s actions that had no basis in the record. In *FCC v. Beach Communications*, the Court stated that judges applying rational-basis review must uphold legislation “if there is any conceivable state of facts that could provide a rational basis” for them and that constitutional challengers must “negative every conceivable basis which might support [the government’s actions].” A requirement that constitutional challengers perform the logically impossible feat of disproving a potentially infinite number of claims for which there is no evidentiary support in order to prevail under our default standard of constitutional review would be laughable, were the consequences for our freedom not so grave.

Additionally, the application of judicial restraint has been problematic for two reasons: an inconsistent use of the rational basis test and the courts at time have abdicated too much authority to Congress, which threatens the rule of law

Evan **Bernick**, 7-10-**2016**, "Justice Thomas' Abortion Dissent And The Decline Of The Rule of Law," HuffPost, <http://www.huffingtonpost.com/evan-bernick/justice-thomas-abortion-d_b_10915136.html>

The *Carolene Products* Court was on solid ground in affirming that a statute that deprived constitutional challengers of the ability to demonstrate the unconstitutionality of an assertion of government power over them would itself violate the Constitution. A rule governing the process of constitutional decision-making that has the same effect should be regarded similarly, for reasons articulated by none other than Justice Thomas in several cases involving federal

administrative power. Justice Thomas has repeatedly and stridently called for the Court to reconsider “Auer deference” — an Court-fashioned doctrine that commands sweeping judicial deference to federal agencies’ interpretations of regulations that the agencies themselves issue. Drawing upon the scholarship of Professor Philip Hamburger, Justice Thomas has explained that judges who draw their power from Article III have a duty of independent judgment — a duty that requires them to “decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources.” “External sources” include “the political branches, the public, or other interested parties.” Rather than independently seeking to determine “the best meaning of a regulation,” judges applying Auer deference must generally accord “controlling weight” to agency’s interpretations of their regulations. Thus, Justice Thomas has argued that Auer deference requires judges to violate Article III because it requires them to abdicate their duty of independent judgment and defer to the political branches’ will. To the extent that judges applying the modern rational-basis test assist government officials in imposing their will by conceiving of justifications for their actions have no evidentiary support, they abdicate their duty of independent judgment. They also deprive constitutional challengers of due process of law, which guarantees impartial adjudication. Giving a particular party in a case — the party asserting power over the other — the benefit of an irrebuttable presumption in favor of its legal position is the antithesis of impartial adjudication. There is no threat to the rule of law that the Constitution is designed to establish that is more grave than that posed by the absence of the adjudication required by Article III and the Constitution’s guarantees of due process of law. The unavailability of a “known and indifferent judge” was identified by John Locke as one of the chief deficiencies of the state of nature absent government. The Framers established an independent judiciary in order to ensure that judges insulated from the will of executive and legislative branch officials, as well as from popular majorities, would stand ready to serve as “guardians of [our] rights” against the mere will of the powerful. The rule of law cannot be maintained and our rights cannot be secured if judges reflexively defer to the government in most constitutional settings.

Conversely, some conservative legal scholars believe the abdication to Congress has created too much “big government” through an exhaustive expanse of commerce authority.

Mark Pulliam, 4-8-2015, "The Quandary of Judicial Review," National Review,
<http://www.nationalreview.com/article/416590/quandary-judicial-review-mark-pulliam>

In a now-controversial series of decisions during what is often described as “the Lochner era” — that is, the period from 1897 (*Allgeyer v. Louisiana*) through 1937 (*West Coast Hotel Co. v. Parrish*), the Supreme Court repeatedly overturned state and federal laws that interfered with the “freedom of contract” of employers and employees in the regulation of working conditions. Were these decisions “activist”? Justice Oliver Wendell Holmes thought so. Holmes acerbically dissented in *Lochner v. New York* (1905), in which the majority struck down a state law regulating the maximum hours bakers could work, stating that the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Holmes’s view ultimately prevailed. Cowed by FDR’s threat to “pack” the Court in retaliation for striking down key pieces of New Deal legislation, the Court in 1937 abandoned its protection of economic liberties (“the switch in time that saved nine”) and laid the groundwork for the “judicial passivity” in that area that continues to this day. Shortly after reversing the “substantive due process” doctrine represented by *Lochner*, the Court in *United States v. Carolene Products Co.* (1938) introduced the “rational basis” standard of review, pursuant to which economic regulation would henceforth be accorded a presumption of constitutionality and upheld as long as it was not arbitrary or irrational. The Court’s reversal of the *Lochner* line of cases enabled the New Deal legislation, the alphabet soup of administrative agencies, and the limitless interpretation of Congress’s power under the commerce clause, as in *Wickard v. Filburn* (1942), which have developed into the Leviathan that is our present federal government.

Finally, some argue that the use of judicial activism to protect minority groupings have pushed other forms of rights, like economic liberties to the back burner.

Mark Pulliam, 4-8-2015, "The Quandary of Judicial Review," National Review,

<http://www.nationalreview.com/article/416590/quandary-judicial-review-mark-pulliam>

Some libertarians, such as the Institute for Justice's Clark Neily, in *Terms of Engagement* (2013), argue that courts should approach all legislation with a presumption of unconstitutionality, which the government should have the burden of overcoming by showing that the law is the least restrictive means to achieve an actual, bona-fide governmental objective. This process, which Neily terms "judicial engagement," would replace the deferential "rational basis" review that courts now use to review the constitutionality of laws when no "fundamental rights" are involved. (Unfortunately — and here I agree with Neily — most economic liberties and property rights unjustifiably lost their status as "fundamental rights" in the 1938 *Carolene Products* decision, and the Court has improperly abdicated its duty to protect those rights.) Neily's model would surely constrain the executive and legislative branches, but at the expense of unduly enlarging the power of the judiciary. It would also be unworkably inefficient. Neily advocates strict scrutiny across the board, because he views the exercise of majoritarianism (i.e., the right of political majorities to enact laws) as an infringement on individuals' inherent (and not necessarily enumerated) constitutional rights. Neily's argument is well intentioned, but — in addition to representing what he admits is a "radical change" — utterly impractical. Imagine that a driver got a speeding ticket for going 80 in a 65 MPH zone. Imagine further that the driver challenged the ticket on the grounds that it violated his "inherent" and "reserved" constitutional right to drive as fast as he wanted. Should the government really have to prove that a 65 MPH speed limit on the road where the driver was ticketed is the least restrictive means to achieve an actual, bona-fide governmental objective? Now imagine the same process for every criminal law, every municipal ordinance, every administrative regulation, every exercise of the state's police power — health and safety, zoning, noise regulation, abatement of nuisances, and so forth. All legislative enactments would, in theory, have to be justified to a reviewing court under a strict-scrutiny standard. Judges would have more power than legislators, rendering democratic self-government a feeble charade. The legal challenges would be interminable. The result would be a judicially managed state of anarchy.

Ultimately, footnote four creates a sticky situation. While it has been used to protect individuals who need it the most, it has been inconsistently applied post the Warren court which threatens the rule of law.

Lincoln Caplan, 9-13-2013, "Ruth Bader Ginsburg and Footnote Four," New Yorker,

<http://www.newyorker.com/news/news-desk/ruth-bader-ginsburg-and-footnote-four>

To her, the footnote meant that the Court should refrain from scrutinizing a government policy that favors minorities, because, when the majority approves it, it means that the political process is working. But her comments came across as a history lesson rather than a reminder about a vital doctrine, because that's what it was. The Warren Court, which followed the principles of the footnote to make democracy more effective and robust, ended in 1969. Despite the importance of Ely's book, the footnote has slipped in prominence and influence. Watershed rulings of the Roberts Court, in particular, run flatly counter to footnote four: the Court has struck down voluntary school-integration plans, major campaign-finance regulations, and a critical provision of the Voting Rights Act, for example, in each case undermining rather than enhancing American democracy. Those rulings, and many others by the current Court, lack what the footnote strikingly provided: a coherent justification for unelected justices to overturn legal decisions of elected officials when the fairness of the Constitution, and of democracy, is at stake.

Ultimately a case that started off with something as simple as milk distribution, has opened individuals up to the potential to debate core legal issues. If this is included in a resolution, it allows debaters to debate the rational basis test vs. strict scrutiny. It allows students to interrogate levels of judicial deference. It allows us to explore what should be considered “fundamental rights. There is a clear division in the literature base (across the ideological spectrum) as to what the right course of action is to correct the challenges of *Carolene* (if something needs to be done).

Kelo v. City of New London (2005)

On the day before Thanksgiving in 2000, the city of New London, CT started distributing condemnation notices to some of its citizens, citing an Eminent Domain claim to take their homes in the name of selling land for commercial development. The city believed they could use eminent domain for commercial development because increased commercial development would increase the tax base, increasing their economic development, thus benefiting the citizens of New London. In a 5-4 decision, the Supreme Court found in favor of the city of New London re-interpreting the Fifth Amendment by arguing “The takings here qualified as “public use” despite the fact that the land was not going to be used by the public. The Fifth Amendment did not require “literal” public use, the majority said, but the “broader and more natural interpretation of public use as ‘public purpose’” (Oyez-Kelo).

The reinterpretation of eminent domain in Kelo created public backlash on both sides of the spectrum. In the case of New London, homes were bulldozed and nothing had been built, questioning the prevailing theory of economic development

Charlotte Allen, 2-10-2014, “Kelo’ Revisited,” Weekly Standard, <http://www.weeklystandard.com/kelo-revisited/article/776021>

That is, the city and the NLDC were entitled to condemn and then bulldoze people’s homes solely in order to have something else built on the land that would produce higher property taxes—such as the office buildings, luxury condos, five-star hotel, spacious conference center, a “river walk” to a brand-new marina, and high-end retail stores that were part of an elaborate “economic development” plan for Fort Trumbull that the NLDC had launched in 1997. The Constitution’s Fifth Amendment bars governments from taking private property unless the taking is for a “public use.” Historically “public use,” as courts had interpreted it, meant a road, a bridge, a public school, or some other government structure. But in the Kelo decision, the High Court majority declared that “economic development” that would involve using eminent domain to transfer the property of one private owner to a different but more economically ambitious private owner—such as a hotel—qualified as a public use just as much as, say, a new city library. The nationwide outrage that followed in the wake of the Kelo decision spanned from left to right and back again on the political spectrum. It didn’t help that one of the chief beneficiaries of the NLDC’s economic development plan would have been the pharmaceutical giant Pfizer, Inc., which New London had lured into the city via an 80-percent, 10-year property-tax abatement for a \$300 million research facility—an expansion of the company’s research operations in Groton, Connecticut, across the Thames. The properties seized from Kelo, the Cristofaros, and others would be adjacent to Pfizer’s facility. It also didn’t help that Susette Kelo, a feisty working-class woman who had raised five sons and put herself through nursing school by working as an emergency medical technician, was an appealing lead plaintiff, and that her 900-square-foot Victorian house, lovingly refurbished by Kelo and painted a vintage shade of salmon pink with white trim, was a showplace of devoted homeownership. Nor did it help that the Fort Trumbull tract where the razed homes once stood never did get built on, despite a \$78 million incentive package from the state of Connecticut. In 2008, after the nationwide real-estate bubble burst, the construction company, Boston-based Corcoran Jennison, that the NLDC had engaged to develop the site announced that it couldn’t obtain enough financing for the ambitious enterprise and pulled out. In 2009 Pfizer itself left New London, abandoning its new digs only eight years after the building had been completed. In 2010 Pfizer sold the New London facility for a reported \$55 million—a small fraction of what it had spent to build it—to General Dynamics’s Groton-based Electric Boat division, a submarine manufacturer. Few of the 1,400 or so Pfizer employees who worked there had chosen to live in New London, so its contribution to the city’s economic base had always been questionable.

Dissenting Justices O'Connor and Thomas highlight the impact of increased eminent domain on poor communities

Jason **Pye**, 6-23-2015, "Kelo v. New London: How the Supreme Court Gutted Constitutional Protections for Private Property," Freedomworks, <http://www.freedomworks.org/content/kelo-v-new-london-how-supreme-court-gutted-constitutional-protections-private-property>

Justice Sandra Day O'Connor wrote a scathing dissent in the case, which was joined by Chief Justice William Rehnquist and Justice Antonin Scalia. "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random," O'Connor wrote. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." "The Founders cannot have intended this perverse result," she added. In a separate but equally scathing dissent, Justice Clarence Thomas blasted the majority's "perverse" opinion, writing that the "consequences of today's decision are not difficult to predict, and promise to be harmful." "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities," Thomas explained. "Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."

The importance of Kelo will only continue to grow as many entities are turning to eminent domain claims for commercial oil and gas pipelines

Wilson Times, 6-21-2017, "Our Opinion: Pipeline land grab sets stage for limit on eminent domain," <http://wilsontimes.com/stories/pipeline-land-grab-sets-stage-for-limit-on-eminant-domain,87145>

Unless deals are struck with about 60 landowners, private developers will resort to eminent domain in order to stitch together a Wilson County corridor for the Atlantic Coast Pipeline. Doyle Land Services, which is working with Dominion Energy and Duke Energy Progress to secure land for the natural gas pipeline stretching from West Virginia to Robeson County, has threatened 89-year-old Pearl Finch with an involuntary taking if she doesn't accept a preliminary offer, according to Finch's daughter, who happens to be an attorney. Not only is the ACP's agent negotiating in bad faith, but representatives are also presuming which way a court would rule if Finch digs in her heels. "They would say things like, 'We have the right of eminent domain' or 'You know that it's going to be approved,'" said Jane Finch, who is representing her mother. "Well, in my mind, if they tell the landowner that it's going to be approved, that's a legal opinion. That's the unauthorized practice of law." Pearl Finch has seen the specter of eminent domain carve up her property one parcel at a time since the 1970s, with one sale and three takings. She plans to fight the latest bid in court. Even if offers meet or exceed a piece of property's assessed market value, selling off a portion of the homestead can be a lifelong inconvenience for landowners. "Duke Energy is going to reap profits from this forever and we are going to get paid once," said Tim Bissette, another Wilson County resident in the pipeline's path. Derived from the Latin words for "supreme lordship," eminent domain has always been at odds with American private property rights. Land can be taken not only for public use such as the construction of a road, hospital or school, but also for economic development. The U.S. Supreme Court cemented that principle in Kelo v. New London, a poorly reasoned 2005 ruling. Under Kelo jurisprudence, it's likely pipeline planners will prevail. But federal law notwithstanding, states can choose to limit eminent domain powers, reserving them for government and cutting private developers out.

Additionally, restoring property rights by reversing Kelo is the only way to ensure economic liberty

Jason **Pye**, 6-23-2015, "Kelo v. New London: How the Supreme Court Gutted Constitutional Protections for Private Property," Freedomworks, <http://www.freedomworks.org/content/kelo-v-new-london-how-supreme-court-gutted-constitutional-protections-private-property>

Property rights are, as constitutional scholar Timothy Sandefur has said, the cornerstone of liberty. Property is one of our most basic economic freedoms and a valuable means to prosperity. Restoring the promise of individual liberties protected by the Fifth Amendment is the only way to undo the wrong done to Susette Kelo and her neighbors by the Supreme Court.

Property rights are the largest internal link to many other rights like privacy, family, and self expression.

Jonathan **Wood**, 6-30-2017, " On Independence Day, Celebrate Property Rights—the Foundation of the Pursuit of Happiness," Townhall, <https://townhall.com/columnists/jonathanwood/2017/06/30/on-independence-day-celebrate-property-rightsthe-foundation-of-the-pursuit-of-happiness-n2348737>

People express their values through their property. Environmentalists may set aside land for conservation. The religious may construct a church or youth camp. Someone else may construct an art gallery to share their work with the world. Property rights also give us a small sphere of privacy in the world. In our homes, we can do what makes us happy without interference or worrying about what others might think. Like Thoreau at Walden's Pond, solitude and peaceful reflection may be your bliss. Perhaps, instead, it's a private hobby or time alone with close friends and family. Whatever makes you happy, private property enables you to pursue it, free of judgment or prying eyes. Property also brings us together by allowing us to choose whom we hold close. It lets us build a family under a single roof. It allowed three friends to form a modest company in a parent's garage—and eventually grow it into Apple. Property allows us to behave cooperatively with, and apart from, others. It gives us a means of both putting up boundaries and sharing with others. It is particularly fitting that the Supreme Court decided Murr on the anniversary of the widely reviled Kelo v. New London decision, which allowed government to seize people's homes to give them to politically powerful corporations. Both share the same fundamental flaw—they ignore the central role that property plays in all of our lives and why its protection is essential to the pursuit of happiness.

The potential bright side in a post-Kelo world is a majority of states have passed laws restricting Kelo-style eminent domain revision.

Charlotte **Allen**, 2-10-2014, "'Kelo' Revisited ," Weekly Standard, <http://www.weeklystandard.com/kelo-revisited/article/776021>

After Kelo, more than 40 state legislatures passed laws that banned or restricted the use of eminent domain for the purpose of economic rejuvenation, especially when it meant displacing homeowners. At least seven states amended their constitutions to ban the use of eminent domain for economic development, and some state courts explicitly rejected the Kelo ruling as precedent for interpreting those states' own taking laws.

Despite these new state laws, some still crafted new development policies using Kelo's precedent, threatening individual property rights.

Charlotte **Allen**, 2-10-2014, "'Kelo' Revisited," Weekly Standard, <http://www.weeklystandard.com/kelo-revisited/article/776021>

In the end, though, it is hard to say exactly what the universal denunciation of the Kelo ruling accomplished over the long run. Eminent domain in the name of economic development ought to be dead letter, but it is in fact alive and well. In 2006, a year after Kelo, New York City mayor Michael Bloomberg unveiled the Atlantic Yards Project, a massive mixed commercial/residential/recreational use project, including 16 high-rise buildings, for 22 acres in Brooklyn's Prospect Heights, an already gentrifying neighborhood that needs no public boost—all to be financed in part with some \$2 billion in taxpayer aid. The city used eminent domain to demolish well-maintained condominiums over the protests of their residents. Thanks to the real estate collapse, ground was not broken until 2012, and large portions of the project may never be built. In California two measures—a ballot initiative and a pending bill in the state senate—would, among other things, broaden the definition of “blight” for eminent domain purposes and revive in altered form the state's local redevelopment agencies, which used to receive up to 12 percent of state tax revenues until California governor Jerry Brown abolished them in 2011. The redevelopment agencies were notorious for their failure to generate actual economic improvement.

While state legislatures were successful in challenging Kelo, Congress has not been successful in restoring property rights

Jason **Pye**, 6-23-2015, "Kelo v. New London: How the Supreme Court Gutted Constitutional Protections for Private Property," Freedomworks, <http://www.freedomworks.org/content/kelo-v-new-london-how-supreme-court-gutted-constitutional-protections-private-property>

Congress has sought to address the Kelo decision through legislation. In May 2013, Rep. Jim Sensenbrenner (R-Wis.) introduced the Private Property Rights Protection Act. This bill, which has been introduced in every Congress since 2005, would have protected Americans from Kelo-style takings. The Private Property Rights Protection Act passed the House of Representatives by a vote of 353 to 65. Unfortunately, the Senate, then controlled by Democrats, never took it up. The bill has not yet been reintroduced in the current Congress.

Additionally, the state challenges to Kelo have their wings clipped as some state and cities work to solve for “blighted” communities

Richard A. **Epstein**, 6-23-2015, "Kelo v. City of New London Ten Years Later," National Review, <http://www.nationalreview.com/article/420144/kelo-v-city-new-london-ten-years-later-richard-epstein>

Yet, once it was decided, the outrage did not subside. Since that time, the Supreme Court has ducked the issue, even though some local governments have done things just as foolish and unnecessary as what the city of New London did. Some state courts, and some state legislatures, have tried to clip the wings of the decision, but even that has been a

hard battle. It is difficult to get anyone to attack general planning for economic development, because sometimes in blighted communities it actually works. But “blight” can easily become a term of art, so that weeds in the garden may trigger a government takeover.

While there has been some state level action on overruling Kelo, there is still ground for much debate as to whether or not the Supreme Court should act to overturn this precedent. The debates offered are fairly straightforward in discussing property rights, and how the role of eminent domain should be used under the Fifth Amendment.

Citizens United v. FEC (2010)

Citizens United may be the case students, coaches, and judges alike will be the most familiar with as there was a great deal of public outcry after the decision, and it was one of the largest judicial issues Clinton and Sanders both campaigned on. Citizens United is an interest group that created Hillary: The Movie, a long-form documentary arguing that Hillary Clinton would not make a good President. However, the Bipartisan Campaign Reform Act (BRCA) was used to block some distribution of the film as an “electioneering communication.” Citizens United responded by arguing that the BRCA is an unconstitutional limit on free speech. In a 5-4 decision, the Supreme Court offered multiple holdings, however the largest one the public was concerned with is that “corporate funding of independent political broadcasts in candidate elections cannot be limited” (Oyez-Citizens United).

The Decision in Citizens United eliminated the BRCA ban on independent expenditures on corporations and unions opening the spending floodgates, while still limiting direct contributions.

John **Dunbaremail**, 10-18-**2012**, "The ‘Citizens United’ decision and why it matters," Center for Public Integrity, <https://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters>

The Citizens United ruling, released in January 2010, tossed out the corporate and union ban on making independent expenditures and financing electioneering communications. It gave corporations and unions the green light to spend unlimited sums on ads and other political tools, calling for the election or defeat of individual candidates. In a nutshell, the high court’s 5-4 decision said that it is OK for corporations and labor unions to spend as much as they want to convince people to vote for or against a candidate. The decision did not affect contributions. It is still illegal for companies and labor unions to give money directly to candidates for federal office. The court said that because these funds were not being spent in coordination with a campaign, they “do not give rise to corruption or the appearance of corruption.”

Citizens United also overruled part of FECA which gives corporations the same free speech rights as individuals.

John **Dunbaremail**, 10-18-**2012**, "The ‘Citizens United’ decision and why it matters," Center for Public Integrity, <https://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters>

It wasn’t until 1971 that Congress got serious and passed the Federal Election Campaign Act, which required the full reporting of campaign contributions and expenditures. It limited spending on media advertisements. But that portion of the law was ruled unconstitutional — and that actually opened the door for the Citizens United decision. Spending is speech, and is therefore protected by the Constitution — even if the speaker is a corporation.

The precedent set allowing corporate financing distorts democracy

Liz Kennedy, 1-19-2012, "10 Ways Citizens United Endangers Democracy," No Publication,
<http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>

The Court turned its back on the reality recognized by political actors for a century: concentrated wealth has a distorting effect on democracy, therefore, winners in the economic marketplace should not be allowed to dominate the political marketplace. Before Citizens United, the Supreme Court recognized in Austin v Michigan Chamber of Commerce that the government had a compelling interest in protecting our democracy from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The Court that decided Austin was rightly worried that corporate wealth can dominate the political process and "unfairly influence elections." Citizens United disavowed this understanding. The public supports the prior consensus of the Court. Shortly after the Citizens United decision, 78% of poll respondents agreed that the amount that corporations are allowed to spend in order to influence campaigns should be limited, and 70% believed that corporations have too much control over elections already. It's hard to escape the conclusion that Government of and by big money supporters can only be for big money supporters.

Secondly, Citizens United threatens the notion that each person has a vote, and we lose citizen input into democratic practice

Liz Kennedy, 1-19-2012, "10 Ways Citizens United Endangers Democracy," No Publication,
<http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>

The Supreme Court required electoral districts to be drawn with roughly equal populations because the Constitution "demands" that each citizen have "an equally effective voice." Hence, "one person, one vote." When corporations, or other big money spenders, are able to flood the airwaves with their messages, they can effectively drown out the voices of other citizens, whose democratic right to political speech deserves no less protection than those with financial resources. This undermines the political equality that gives our government legitimacy. A town hall meeting, or Congress for that matter, has rules so that each person who wants to is able to speak. Otherwise the discourse would be in danger of being overwhelmed by a "Heckler's veto," where one voice overwhelms other rightful participants. Montana recently upheld its restrictions on corporate political spending in part to defend the engagement of the electorate. One Judge wrote that "it is utter nonsense to think that ordinary citizens or candidates can spend enough to place their experience, wisdom, and views before the voters and keep pace with the virtually unlimited spending capability of corporations to place corporate views before the electorate. In spending ability, bigger really is better; and with campaign advertising and attack ads, quantity counts. In the end, candidates and the public will become mere bystanders in elections." In a prior case defending contribution limits Justice Breyer wrote that "by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process." With huge corporations and the richest 1% given free reign to dominate elections through unlimited spending, political equality suffers a huge setback. What's ultimately at stake is how much say the average citizen has over the policies that govern her life. The answer is clear: much less than before Citizens United.

Additionally, unchecked corporate spending could hurt shareholders as they may be unaware of political contributions made by the companies they hold stock in. It also may create a culture of rent-seeking which hurts the economy.

Liz **Kennedy**, 1-19-2012, "10 Ways Citizens United Endangers Democracy," No Publication,
<http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>

The Court said that procedures of shareholder democracy would allow shareholders to know how their money was being spent and ensure accountability. But most publicly-held corporations don't disclose their political spending even to their shareholders. Investor money is being used in politics without their knowing or agreeing to it. Now that corporations have the right to spend unlimited amounts of money on politics, they have a responsibility to disclose any money they spend to the owners of the company. Getting involved in politics can present risks to the company's brand, reputation, and shareholder value, as Target Corp. experienced in 2010. Domination of politics and government by certain big spending corporate interests is not in the interest of the broader business community. If government contracts and regulations (some of which can serve as barriers to entry for start-ups and potential competitors) are awarded as a result of rent-seeking, that benefits only the current dominant economic players, not the economy as a whole. In fact, a recent poll found that two-thirds of small business owners say Citizens United is bad for small businesses, and 88% think money in politics plays a negative role overall. The Committee for Economic Development makes the point that without rules, corporations may find themselves shaken-down for financial support. Responsible corporate actors may come to feel they are trapped in a prisoners' dilemma - disadvantaged if they don't play the political spending game, even if they would prefer not to.

Finally, not overturning Citizens United threatens the overall legitimacy of the court.

Liz **Kennedy**, 1-19-2012, "10 Ways Citizens United Endangers Democracy," No Publication,
<http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>

The Supreme Court risks delegitimizing itself when it creates a legal fiction – that purportedly independent political spending cannot corrupt democratic government – and sets it loose on the citizenry. In Citizens United the Court struck down hard won political reforms enacted after much Congressional deliberation about the need for common sense rules to prevent money in politics from corrupting democracy. The five- member majority responsible for Citizens United overturned a section of the Bipartisan Campaign Reform Act that the Supreme Court had just upheld in 2003's *McConnell v. FEC*. In his dissent from Citizens United Justice Stevens noted that "[t]he only relevant thing that has changed since [the Court's controlling precedents were decided] is the composition of this Court." Polls taken in the weeks after the decision showed widespread strong disagreement with the decision across party lines; a Washington Post-ABC News poll found that "eight in ten poll respondents opposed the decision, with 65% 'strongly' opposed." A recent Pew Research center poll shows that almost two-thirds of voters who've heard of Citizens United say it is having a negative effect on the 2012 presidential election; of those who've heard a lot about them 78% say the effects of the new campaign finance rules have been negative. By abruptly changing Constitutional decrees on issues central to our democratic government, ignoring political reality as determined by co-equal elected branches, and entrenching political power in undemocratic ways instead of opening it up to broader citizen participation, the Court runs the risk of reducing Americans' respect for the highest court in the land.

However, overturning Citizens United may not be the answer. Overturning the decision may unravel all campaign finance laws threatening all free speech.

Steve **Simpson**, 9-6-2016, "Overturning Citizens United would be a disaster for free speech," TheHill, <http://thehill.com/blogs/pundits-blog/campaign/294665-overturning-citizens-united-would-be-a-disaster-for-free-speech>

Campaign finance laws also inevitably expand to cover more and more speech. The reason is simple. When the law eliminates one way to influence politics, resourceful individuals find other ways. Limit direct contributions to candidates, and people will buy newspaper ads. Limit those, and they will turn to television, radio, films, books and the internet. Under the campaign finance laws, every new way to speak about politics becomes a "loophole" that must be closed. It's no answer to claim that overturning Citizens United would only affect corporations. True, "corporations aren't people," as the familiar refrain goes. They are groups of people. When a corporation "speaks," the individuals who run it are really doing the speaking. They are exercising their right of association, which follows from the right to free speech — if individuals have the right to speak alone, they have the right to speak in groups. The same principle protects the right to speak through many groups, from political parties to public demonstrations. There's no logical reason to limit the reach of campaign finance laws to corporations. Any entity that can spend money can spend it to influence politics. Indeed, before Citizens United was decided, supporters of campaign finance laws targeted unincorporated associations such as Swift Boat Veterans for Truth and wealthy individuals who spent their own money on political speech. If Citizens United is overturned, everyone's political speech will be subject to regulation. Even the media aren't safe. Most media entities are corporations, and they certainly spend money to influence politics. The media are currently exempt from campaign finance laws, but that exists at the pleasure of Congress. The idea that Congress would go after the media may sound crazy, but is it any crazier than government restricting films? Trump wants to use the libel laws to silence the press. Is it really farfetched to think politicians would use the campaign finance laws for the same purpose?

Overturning Citizens United may be net-worse for our free speech rights.

Steve **Simpson**, 9-6-2016, "Overturning Citizens United would be a disaster for free speech," TheHill, <http://thehill.com/blogs/pundits-blog/campaign/294665-overturning-citizens-united-would-be-a-disaster-for-free-speech>

It's true that Citizens United led to billions more in political spending. But all of it was spent to produce speech promoting political views. From the standpoint of free speech, that's a good result, not a bad one. True, much of that money is spent by people who want to feed from the public trough. But freedom to spend money on political speech is not the cause of cronyism any more than freedom of the press is the cause of libel. Overturning Citizens United won't eliminate government corruption. But it will allow government to limit our speech — and with it, our right to affect the course of our government.

Counterplan ground may be the most interesting for the Citizens United portion of the resolution, as there are a dozen situations to solve the campaign finance problem.

Incremental change may be better to solve the problems posed by Citizens United

David **Cole**, 4-1-2016, "How to Reverse Citizens United," Atlantic,

<https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/>

Recent history suggests a more reliable means of constitutional change. A quarter century ago, the idea that gay and lesbian couples had a constitutional right to marry was at least as far-fetched as campaign-finance reform has seemed in recent years. And in 1991, former Chief Justice Warren Burger dismissed as fraudulent the notion that the Second Amendment protects an individual right to bear arms. But in 2008, in *District of Columbia v. Heller*, the Supreme Court recognized an individual right to bear arms, overturning almost 70 years of settled law. And in 2015, the Court declared in *Obergefell v. Hodges* that gay and lesbian couples have a right to marry. Both changes came about gradually, through decades of work by citizens' groups—such as Freedom to Marry and the National Rifle Association—committed to an alternative constitutional vision. If campaign-finance reform similarly succeeds, it will not be through dramatic measures like the current proposals to pass a constitutional amendment overturning Citizens United. Nor will it be through a quixotic presidential campaign, like Lawrence Lessig's short-lived run on a platform devoted almost exclusively to electoral reform. Constitutional law is more typically changed through a long process of smaller, incremental steps. If the various groups now seeking to fix the problem of money in politics are to prevail, they would do well to take a page from the gun-rights and marriage-equality playbooks.

State and local ordinances may send a better message to pressure the courts from the bottom-up instead of top-down Court reforms

David **Cole**, 4-1-2016, "How to Reverse Citizens United," Atlantic,

<https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/>

Some promising campaign-finance initiatives are already appearing at the state and local levels. Maine, Connecticut, Arizona, Seattle, and New York City have each adopted generous public-financing schemes to reduce the influence of private wealth. New York City, for example, matches small donations six-to-one for those candidates who agree to contribution and spending limits. Maine offers a public grant to candidates who raise a qualifying number of \$5 donations and then agree to abstain from further private fund-raising. In November, Seattle voters approved a first-of-its-kind ballot initiative that will provide every voter with four \$25 "democracy vouchers," to be distributed as they wish among candidates who agree to abide by spending limits. By amplifying the contributions of ordinary citizens, reducing candidates' reliance on Big Money, and enticing candidates to accept voluntary limits on their spending, these laws are meant to encourage politicians to pay attention to all their constituents, not just the wealthy ones. And by making realistic amounts of public financing available, the reforms have made it possible for a wider range of candidates—including, so far, waitresses, teachers, and a convenience-store clerk—to run for office and win. As the gun-rights and marriage-equality campaigns demonstrate, movements begun in the states can, if they develop sufficient momentum, jump the track and influence federal constitutional law. The normative arguments for a right to same-sex marriage, for example, are largely the same whether one is arguing in a Massachusetts state court, on behalf of a ballot initiative in Maine, or before the U.S. Supreme Court. In this way, state-law developments can ease the way for a Supreme Court decision. The Court did not recognize the right of indigent criminal defendants to free legal representation until 35 states had provided such representation. And the Court did not strike down anti-miscegenation laws until interracial marriage had been legalized in 34 states.

Even if state and local initiatives have been successful, they may have pushed enough momentum to pressure the court into an Overturn scenario.

David **Cole**, 4-1-2016, "How to Reverse Citizens United," Atlantic,

<https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/>

In a powerful dissent in 2014, Justice Stephen Breyer demonstrated how the Court's recent 5–4 decisions striking down campaign-finance laws are out of step with the Court's own precedents, thus laying out the logic for a reversal. In theory, he just needs one more vote. And yet, even if Scalia's replacement shifts the ideological balance of the Court, the effort to undo Citizens United will still face daunting hurdles. The Court hesitates to overturn any past decision, but it is especially reluctant when a reversal means cutting back on a constitutional right, rather than establishing a new one (as pro-life opponents of Roe v. Wade have learned). In at least one regard, campaign-finance reformers do have a head start as compared with gun-rights and gay-rights advocates in the 1980s: Public opinion is already on their side. A September 2015 Bloomberg poll found that about 80 percent of Republicans and Democrats alike oppose Citizens United. But even so, reformers must combat what may be their biggest obstacle to meaningful change: public skepticism that anything can be done to fix the problem.

Citizens United as part of the resolution gives students the opportunity to debate campaign finance as part of the electoral system, which we rarely give debaters the opportunity to engage in. Debating both sides of the campaign finance literature will open students up to arguably a new body of literature and educate them in one of the largest areas of disagreement in contemporary politics. There is a balance in both overturning and retaining Citizens United, there is a balance in the literature on various approaches to dealing with campaign finance, thus offering a robust series of debates on this court case.

Shelby County v. Holder (2013)

The right to vote is nowhere explicitly written into the Constitution. However, there are specific Amendments that prevent establishing barriers to someone's right to vote. In the case of Shelby County, there is an interesting confluence of constitutional elements at play "The Fourteenth Amendment protects every person's right to due process of law. The Fifteenth Amendment protects citizens from having their right to vote abridged or denied due to "race, color, or previous condition of servitude." The Tenth Amendment reserves all rights not expressly granted to the federal government to the individual states. Article Four of the Constitution guarantees the right of self-government for each state" (Oyez-Shelby County). In looking at these conflicting provisions, Shelby County, Alabama filed an injunction against two provisions of the 1965 Voting Rights Act arguing that Section 5 and Section 4(b) are now unconstitutional. In a 5-4 decision along ideological lines the Supreme Court held that Section 4 is unconstitutional as it imposes burdens that are no longer responsive to modern times and that Section 5 is meant to prevent voter discrimination which no longer happens. In her dissent, Justice Ruth Bader Ginsburg noted "The legislative history and text of the Amendments as well as previous judicial precedent support Congress' authority to enact legislation that specifically targets potential state abuses. However, Congress does not have unlimited authority but must show that the means taken rationally advance a legitimate objective, as is the case with the Voting Rights Act. The evidence Congress gathered to determine whether to renew the Voting Rights Act sufficiently proved that there was still a current need to justify the burdens placed on the states in question" (Oyez-Shelby County).

Chief Justice Roberts argues that the VRA is no longer necessary as voter discrimination is exponentially down compared to the 1960s

Robert Barnes, 6-25-2013, "Supreme Court stops use of key part of Voting Rights Act," Washington Post, https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-f248b21f94c4_story.html?utm_term=.1cca1253fab0

Roberts, too, was ready with history lessons. In his opinion, he noted that in 1965, white voter registration in Mississippi was nearly 70 percent and black registration stood at 6.7 percent. By 2004, a greater percentage of blacks than whites were registered to vote in the state, and that was true in five of the six states originally covered by Section 5. "These are the numbers that were before Congress when it reauthorized the act in 2006," he said. Roberts cited the deaths of men registering others to vote in Philadelphia, Miss., and "Bloody Sunday" in Selma, Ala. "Today both of these towns are governed by African-American mayors," Roberts wrote. Yet the "extraordinary and unprecedented features" of Section 5, along with the coverage formula, were reauthorized "as if nothing had changed."

In response to the Shelby County decision, states immediately implemented restrictive voter ID policies and new redistricting changes that had been challenged by the VRA

Robert **Barnes**, 6-25-**2013**, "Supreme Court stops use of key part of Voting Rights Act," Washington Post, https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-f248b21f94c4_story.html?utm_term=.1cca1253fab0

Proponents of the law, which protects minority voting rights, called the ruling a death knell. It will be almost impossible for a Congress bitterly divided along partisan lines to come up with such an agreement, they said. There could be immediate consequences from the court's ruling. Just hours after the ruling, Texas Attorney General Greg Abbott said his state will move forward with a voter-identification law that had been stopped by a panel of federal judges and will carry out redistricting changes that had been mired in court battles.

These actions only exacerbate problems with racially motivated voter obstruction that exist in the status quo

Bill **Mears and Greg Botelho**, Cnn, 6-26-**2013**, "Supreme Court makes historic voting rights law harder to enforce," CNN, <http://www.cnn.com/2013/06/25/politics/scotus-voting-rights/index.html>

Holder also said the Voting Rights Act changed how South Carolina will implement a law requiring photo identification before being allowed to vote. Those changes, he said, protected black voters who would have been "disproportionately" affected. Obama characterized Tuesday's ruling as a "setback," even as he vowed his "administration will continue to do everything in its power to ensure a fair and equal voting process." Voting discrimination, he said, still exists, and the decision "upsets decades of well-established practices that help make sure voting is fair." Others offered even stronger language. Sen. Kirsten Gillibrand of New York called Tuesday's decision a "devastating blow for civil rights and voting rights," New York Gov. Andrew Cuomo described it as "deeply troubling," and NAACP President Ben Jealous called the decision "outrageous," because it makes minority voters "more vulnerable to the flood of attacks we have seen in recent years." Rep. Marcia Fudge, chairwoman of the Black Congressional Caucus -- in a statement that included remarks from the heads of Hispanic and Asian groups in Congress -- slammed the high court for its choice "to ignore" reports that "racial discrimination in voting districts continues to exist."

Additionally a year after the Shelby County decision 53% of the VRA states implemented new voting restrictions

Dana **Liebelson**, 4-8-**2014**, "The Supreme Court gutted the Voting Rights Act. What happened next in these 8 states will not shock you.," Mother Jones, <http://www.motherjones.com/politics/2014/04/republican-voting-rights-supreme-court-id/>

We looked at how many of these 15 states passed or implemented voting restrictions after Section 5 was invalidated, compared to the states that were not covered by the law. (We defined "voting restriction" as passing or implementing a voter ID law, cutting voting hours, purging voter rolls, or ending same-day registration. Advocates criticize these kinds of laws for discriminating against low-income voters, young people, and minorities, who tend to vote for Democrats.) We found that 8 of the 15 states, or 53 percent, passed or implemented voting restrictions since June 25, compared to 3 of 35 states that were not covered under Section 5—or less than 9 percent. Additionally, a number of states not covered by the Voting Rights Act actually expanded voting rights in the same time period. States that were previously covered in some part by Section 5 moved quickly after it was invalidated. Within two hours of the Shelby decision, Republican Texas Attorney General Greg Abbott announced that the state's voter identification law—which had previously been blocked by a federal court—would be immediately implemented. Alabama Attorney General Luther Strange, another Republican, also immediately instated his state's voter ID law. About one month after the Shelby

decision, Republicans in North Carolina pushed through a package of extreme voting restrictions, including ending same-day registration, shortening early voting by a week, requiring photo ID, and ending a program that encourages high schoolers to sign up to vote when they turn 18. In October, Virginia purged more than 38,000 names from the voter rolls. Mississippi's Republican secretary of state, Delbert Hosemann, told the Associated Press in November that the state was going to start implementing its voter ID law by the June 2014 elections. (This proposal was undergoing Justice Department review when the Shelby decision came down.) In January, Republican Gov. Rick Scott attempted again (unsuccessfully) to purge noncitizens from Florida's voting rolls, a move he had tried previously in 2012, before being blocked by Section 5. And thanks to the Supreme Court ruling, South Carolina was able to implement a stricter photo identification requirement.

Supporters of the Shelby county decision argue that it is now fairer states all have equal application of the laws to them.

Bill Mears and Greg Botelho, Cnn, 6-26-2013, "Supreme Court makes historic voting rights law harder to enforce," CNN, <http://www.cnn.com/2013/06/25/politics/scotus-voting-rights/index.html>

But the sentiments were markedly different in Alabama, where Gov. Robert Bentley said the decision "reflects how conditions have improved." "The justices correctly acknowledged that the covered jurisdictions should no longer be punished by the federal government for conditions that existed over 40 years ago," said Frank Ellis, the county attorney for Shelby County, where 11% of residents are African-American compared to 28% statewide. "The South is an altogether different place than it was in 1965." Edward Blum, a conservative and director of the Project on Fair Representation, said Tuesday he's happy that no government is now singled out. "This decision restores an important constitutional order to our system of government," he said. "And that requires that all 50 states and every jurisdiction have the laws applied equally to them."

Supporters also argue that other provisions of the VRA---section 2, or the US constitution---15th amendment prevent voter discrimination from occurring.

The National Review, 8-12-2015, "Leave the Voting Rights Act Alone," National Review, <http://www.nationalreview.com/article/422408/leave-voting-rights-act-alone-editors>

That isn't a bad thing. Under Section 2, it remains illegal for states to pass racially discriminatory election laws, and the scope of prohibition is very liberal, forbidding not only those laws passed with insidious racial intent but also those having "disparate impact," which is to say those that produce racially unbalanced outcomes without discriminatory intent. If it could be shown that a jurisdiction stubbornly refuses to stop discriminating, there's another provision — Section 3 — that allows a judge to require its changes to be precleared. And, of course, there is the U.S. Constitution itself, including the Fifteenth Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." Previously encumbered states are no longer considered guilty until proven innocent, and Democrats want to reverse that. These protections are quite strong, and the Justice Department has been anything but passive in pursuing voting-rights cases when the interests of minority voters are in question. The difference is that without Section 5 operational, discrimination or disparate impact must be proved in a court of law, just like complaints under any other civil-rights statute, whereas before the suspect jurisdictions would have been obliged to prove that their changes were acceptable before the fact. The previously encumbered states are no longer considered guilty until proven innocent, and Democrats want to

The Voting Rights Act had already succeeded at solving the problems that the VRA was passed to eliminate (like the poll tax and literacy tests), people who argue that the VRA justify strict voter ID laws are false

The National Review, 8-12-2015, "Leave the Voting Rights Act Alone," National Review, <http://www.nationalreview.com/article/422408/leave-voting-rights-act-alone-editors>

The forms of discrimination that the Voting Rights Act was passed to eliminate have been — this may surprise you — eliminated. Poll taxes and literacy tests have vanished. Black Americans' rates of voter registration and election turnout used to be a tenth or less of white Americans' rates; today it is not unusual for blacks to be registered at higher rates than whites, and in the 2012 election, black turnout exceeded white turnout — including in states with strict voter-ID laws. Which isn't to say that federal nondiscrimination law should be eliminated entirely, only that complainants should be required to prove their cases in court and that all jurisdictions should be treated equally rather than relegating some to second-class status based on practices eliminated 40 or 50 years ago. Under normal circumstances our constitutional order leaves most decisions about the conduct of elections to the states; the Voting Rights Act recognizes that the situation facing black Americans in the 1950s and 1960s was anything but normal. But it is also the case that Section 5 was never intended to be permanent. Originally it was scheduled to sunset in five years; it was renewed in 1970 and repeatedly since. The end of the preclearance regime is in harmony with the progress we have made.

However, many believe The Impact from the Shelby County decision was seen in the 2016 election, voter turnout was down in states and districts with a history of voter suppression.

Ryan **Cooper**, 11-7-2016, "This is the first election without the full Voting Rights Act — and it's already a disaster," The Week, <http://theweek.com/articles/659599/first-election-without-full-voting-rights-act--already-disaster>

Overall, Roberts' decision means more than 860 fewer polling stations in places with a history of disenfranchisement. State governments in Wisconsin, Texas, Ohio, and North Carolina are ignoring federal court orders to provide proper voting facilities. These efforts are paying dividends. Black early voting is off sharply in several states compared to 2012 — undoubtedly in large part the result of vote suppression. Some of that might be chalked up to Barack Obama no longer heading the ticket, but it beggars belief to think that explains all of it. In North Carolina, where such restrictions are worst, black turnout is down 16 percent. Right now these efforts are mainly centered around making voting more of a pain in the neck for the poorer and browner people who tend to vote Democratic (as illustrated in a darkly hilarious video game produced by The New York Times). But I have little doubt at this point they would re-institute fully systematic disenfranchisement if they got the chance. Best to exercise that franchise now, while you still can.

Overturing Shelby County to reinstate the VRA may not be the best remedy as the will to suppress voting may be inevitable

Ryan **Cooper**, 11-7-2016, "This is the first election without the full Voting Rights Act — and it's already a disaster," The Week, <http://theweek.com/articles/659599/first-election-without-full-voting-rights-act--already-disaster>

As Scott Lemieux points out, when Roberts wrote his decision he had already been working to destroy the Voting Rights Act for a quarter-century. The way to understand this is as a sustained effort by conservatives to fool the country and themselves into thinking that state-level Republican officials wouldn't snatch the first chance they got to suppress Democratic-leaning voters. This effort has had two prongs. First, a constant reference to imaginary in-person voter fraud. The fact that this is all but nonexistent and indeed doesn't even make sense as a strategy — as Lyndon Johnson could tell you, an election is stolen by controlling the count, not by getting thousands or millions of people to individually commit serious felonies — is ignored, because it's a pretext. Second, conservatives crossed their hearts and hoped to die that racist disenfranchisement was a part of the

misty past, not something that needs protection against anymore. Now, Roberts' legal reasoning was so ludicrous that he did not even cite part of the Constitution to justify it, and flat ignored the clear authorization for racial suffrage protections in the 15th Amendment. Indeed, the only clear precedent for his decision was Dred Scott v. Stanford(which he did not mention, for obvious reasons). Unfortunately, that sort of thing is an inescapable part of our legal system. If you get enough partisan hacks installed in the highest court, where what they say is the very definition of what the Constitution means, then there's no stopping them.

Bennis v. Michigan (1996)

**This may not be the best case to open a debate on civil asset forfeiture, and if there is a better case, it would create an easy replacement for the same debate. Additionally, all of the information on Bennis is new, all of the generic CAF information comes from my 2013-14 paper on Civil Liberties.*

In the early 1990's a Bennis' husband was arrested for sleeping with a prostitute in a car owned by he and his wife. Michigan used their CAF laws to seize and sell the car as it was part of a "public nuisance." Bennis' wife believed she should be entitled to keeping the car as she was not an accessory to the crime. In a 5-4 decision, the Supreme Court sided with Michigan arguing "the vehicle's forfeiture did not violate Bennis's property rights without due process. Michigan's abatement policy, aimed at deterring criminal uses of property, lawfully transferred her's vehicle to the state. As such, Michigan is not required to compensate Bennis for the vehicle's forfeiture" (Oyez-Bennis).

Civil Asset Foreiture laws need to be reigned in as many see forfeiture as the government stealing your property

Antony **Davies and** James R. **Harrigan, 6-13-2017**, "Our Government Overlords," US News & World Report, <https://www.usnews.com/opinion/economic-intelligence/articles/2017-06-13/eminient-domain-and-civil-asset-forfeiture-are-too-easy>

The most egregious property rights violations, though, undoubtedly come in the form of civil asset forfeiture laws. It might seem astounding to some, but the police in the United States actually confiscate more property than is stolen in robberies. In 2015, \$4.5 billion worth of property was confiscated, while \$3.9 billion was stolen. One might argue that \$8.4 billion was stolen. Simply put, civil asset forfeiture laws shift the burden of proof from the accuser to the accused by allowing law enforcement to bring charges against property instead of people. Functionally, the police can arrest your car, your house and even your money, and there is precious little you can do about it. This makes life easier for law enforcement, as inanimate objects are not protected by the same legal principles that protect human beings. Everywhere one looks, it is easy, far too easy, for government simply to take its citizens' property. And when it is easy, it will happen. A government that can, at will, take anything it wants from its citizens is not a government that "derives its just powers from the consent of the governed," to quote the Declaration of Independence. It is, for lack of a better word, simply an overlord. And that sort of government will neither enjoy nor deserve the respect of its people for long.

In 1983 the United States codified into U.S. law the practice of asset forfeiture. The policy was written into the Bank Secrecy Act to target individuals who may be either laundering funds as part of a drug ring or to identify potential tax evaders. The original legal provision reads as follows:

Stephen J. **Dunn**, February 18, **2013** ("Nothing Civil About Asset Forfeiture," Forbes Magazine, <http://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>, Accessed 7/13/14)

18 USC § 5317(c)(2) provides in part:

"Civil forfeiture. Any property involved in a violation of section 5313 . . . or 5324 of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code."

This act changed earlier usages of asset forfeiture. Criminal asset forfeiture had occurred since the beginnings of our nation, however the government only had the right to seize assets after someone was convicted of a crime. However the Banking Secrecy Act changed some of the requirements for forfeiture. Another section of the secrecy act changes the requirements from conviction to a low degree of pre-trial probable cause.

Stephen J. **Dunn**, February 18, **2013** ("Nothing Civil About Asset Forfeiture," Forbes Magazine, <http://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>, Accessed 7/13/14)

18 USC § 5317(c)(2) broadens forfeiture beyond its traditional criminal realm, into civil cases. To prevail in a civil case, the plaintiff need only persuade the trier of fact by a mere preponderance of evidence that the elements of the cause of action have been proved.

Even with some reforms, the practice of Civil Asset Forfeiture has become a tool to strip due process rights, and in some extreme instances CAF is used to seize property from innocent citizens. Stephen Dunn highlights how CAF is used in circumvention of due process rights.

Stephen J. **Dunn**, February 18, **2013** ("Nothing Civil About Asset Forfeiture," Forbes Magazine, <http://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>, Accessed 7/13/14)

Civil forfeiture remains a travesty of due process. The property owner receives no advance notice; he is not afforded an opportunity to participate in the District Court warrant hearing. Once the property is seized, the owner may file a claim, at peril of being indicted, or of incurring heavy civil litigation costs. The spectre of these unappealing potential consequences undoubtedly persuades many victims of civil forfeiture to do what the AUSA suggested here—go away without filing a claim.

Sarah Stillman, in a piece from the New Yorker, highlights several problems with how CAF is used now throughout the US. She continues to highlight many of the flaws that Stephen Dunn finds. Her first argument is that CAF is used and granted under some of the flimsiest circumstances.

Civil Asset Forfeiture is used even if you are not charged with a crime

Sarah **Stillman**, August 12, **2013** ("Taken", The New Yorker,
http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all, Accessed 7/7/14)

In general, you needn't be found guilty to have your assets claimed by law enforcement; in some states, suspicion on a par with "probable cause" is sufficient. Nor must you be charged with a crime, or even be accused of one. Unlike criminal forfeiture, which requires that a person be convicted of an offense before his or her property is confiscated, civil forfeiture amounts to a lawsuit filed directly against a possession, regardless of its owner's guilt or innocence. One result is the rise of improbable case names such as United States v. One Pearl Necklace and United States v. Approximately 64,695 Pounds of Shark Fins. (Jennifer Boatright and Ron Henderson's forfeiture was slugged State of Texas v. \$6,037.) "The protections our Constitution usually affords are out the window," Louis Rulli, a clinical law professor at the University of Pennsylvania and a leading forfeiture expert, observes. A piece of property does not share the rights of a person. There's no right to an attorney and, in most states, no presumption of innocence. Owners who wish to contest often find that the cost of hiring a lawyer far exceeds the value of their seized goods. Washington, D.C., charges up to twenty-five hundred dollars simply for the right to challenge a police seizure in court, which can take months or even years to resolve.

Therefore the continued use of this practice has made it easy for law enforcement agencies to seize property and many will simply give up on their battle to re-claim their own property because the legal battles are too expensive. This is a clear violation of our civil liberties.

The Process of CAF has been used to strip average citizens of their Civil Liberties

Sarah **Stillman**, August 12, **2013** ("Taken", The New Yorker,
http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all, Accessed 7/7/14)

"We all know the way things are right now—budgets are tight," Steve Westbrook, the executive director of the Sheriffs' Association of Texas, says. "It's definitely a valuable asset to law enforcement, for purchasing equipment and getting things you normally wouldn't be able to get to fight crime." Many officers contend that their departments would collapse if the practice were too heavily regulated, and that a valuable public-safety measure would be lost. But a system that proved successful at wringing profits from drug cartels and white-collar fraudsters has also given rise to corruption and violations of civil liberties. Over the past year, I spoke with more than a hundred police officers, defense attorneys, prosecutors, judges, and forfeiture plaintiffs from across the country. Many expressed concern that state laws designed to go after high-flying crime lords are routinely targeting the workaday homes, cars, cash savings, and other belongings of innocent people who are never charged with a crime.

In some instances, some local police departments will use the practice of asset forfeiture to fill voids in their budgets.

Local law enforcement agencies use CAF to fill budget deficits

Sarah **Stillman**, August 12, **2013** ("Taken", The New Yorker,

http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all, Accessed 7/7/14)

But civil-forfeiture statutes continued to proliferate, and at the state and local level controls have often been lax. Many states, facing fiscal crises, have expanded the reach of their forfeiture statutes, and made it easier for law enforcement to use the revenue however they see fit. In some Texas counties, nearly forty per cent of police budgets comes from forfeiture. (Only one state, North Carolina, bans the practice, requiring a criminal conviction before a person's property can be seized.) Often, it's hard for people to fight back. They are too poor; their immigration status is in question; they just can't sustain the logistical burden of taking on unyielding bureaucracies.

These problems are throughout the nation with very little success in regulating the practices. Unfortunately the practice has a disproportionate impact of targeting either those in the most financial need or targeting minority populations.

Real-Estate Forfeitures often target the poor and/or minorities

Sarah **Stillman**, August 12, **2013** ("Taken", The New Yorker,

http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all, Accessed 7/7/14)

The public records I reviewed support Rulli's assertion that homes in Philadelphia are routinely seized for unproved minor drug crimes, often involving children or grandchildren who don't own the home. "For real-estate forfeitures, it's overwhelmingly African-Americans and Hispanics," Rulli told me. "It has a very disparate race and class impact." He went on to talk about Andy Reid, the former coach of the Philadelphia Eagles, whose two sons were convicted of drug crimes in 2007 while living at the family's suburban mansion in Villanova. "Do you know what the headline read? It said, 'THE HOME WAS AN "EMPORIUM OF DRUGS." ' An emporium of drugs!" The phrase, Rulli explained, came directly from a local judge. "And here's the question: Do you think they seized it?"

While the practice of asset forfeiture was created with the intention of stopping drug trafficking, tax evasion, and other monetary crimes. However in the 31 years since it was codified into US law, the practice has become a practice that can potentially strip anyone of their Fourth and Fifth Amendment rights, and the right to own property. This is a practice that is clearly ripe with ground for debate, because as the process has been highly criticized, it has also been highly effective in charging its intended targets with crimes.

Other Cases Considered

There were several other cases explored by the author, but were omitted from specific resolutions. The author is prepared to discuss any of the following cases at the Topic Selection Meeting:

- U.S. v. Morrison (2000)
- Milliken v. Bradley (1974)
- Gratz/Grutter v. Bollinger (2003)
- Terry v. Ohio (1968)
- American Booksellers Association v. Hudnut (1986)
- Gossip v. Gross (2015)
- Korematsu v. United States (1944)
- Helvering v. Davis (1937)
- Flemming v. Nestor (1960)
- District of Columbia v. Heller (2008)
- Burwell v. Hobby Lobby (2014)

Section 3: Areas of Law to Overturn

As noted in Section 2 of the paper, this is the direction the author does not prefer to head into, as it may create some worse debates. However, focusing on areas of the law may solve one large problem people have with a “list-style” resolution, it prevents a smaller resolution in scope from looking too large and unwieldy in comparison to a topic with “more words” in it. If the Topic Selection Committee believes this type of resolution is preferable to a case list style topic, then the bulk of this work would have to happen at the Topic Selection Meeting.

A “legal area” resolution would look something like this:

6. The United States Supreme Court should curtail the protection provided for free speech by the First Amendment of the United States’ Constitution by overruling one or more of its decisions on obscenity, hate speech, free expression, and or campaign finance.

In limiting a resolution based on “legal areas” the wording committee could look at Constitutional Amendments that Supreme Court decisions have been tethered to (like the suggestion above). Or the wording committee could look at tests used in cases to determine constitutionality (rational basis, strict scrutiny, undue burden etc.) and have the courts overrule decisions where those tests have been used. Finally, the wording committee could look at other legal areas like “due process” or “equal protection” as potential resolutive limiters.

Section 4: Definitions

Authority

Dictionary.com (<http://dictionary.reference.com/browse/authority>)

1. the power to determine, adjudicate, or otherwise settle issues or disputes; jurisdiction; the right to control, command, or determine.
2. a power or right delegated or given; authorization: Who has the authority to grant permission?
3. a person or body of persons in whom authority is vested, as a governmental agency.

Merriam Webster's Dictionary (<http://www.merriam-webster.com/dictionary/authority>)

The power to give orders or make decisions : the power or right to direct or control someone or something

Business Dictionary.Com (<http://www.businessdictionary.com/definition/authority.html#ixzz37O3LGuiG>)

1. Institutionalized and legal power inherent in a particular job, function, or position that is meant to enable its holder to successfully carry out his or her responsibilities.
2. Power that is delegated formally. It includes a right to command a situation, commit resources, give orders and expect them to be obeyed, it is always accompanied by an equal responsibility for one's actions or a failure to act.
3. An agency or body created by a government to perform a specific function, such as environment management, power generation, or tax collection.
4. Judgment of a court or judicial opinion quoted in support of a legal argument.

Law.com (<http://dictionary.law.com/Default.aspx?selected=2478>)

permission, a right coupled with the power to do an act or order others to act. Often one person gives another authority to act, as an employer to an employee, a principal to an agent, a corporation to its officers, or governmental empowerment to perform certain functions. There are different types of authority, including "apparent authority" when a principal gives an agent various signs of authority to make others believe he or she has authority; "express authority" or "limited authority," which spells out exactly what authority is granted (usually a written set of instructions) "implied authority," which flows from the position one holds and "general authority," which is the broad power to act for another.

Civil Asset Forfeiture

Fred E. Foldvary, 2007 (<http://www.progress.org/tpr/civil-asset-forfeiture-2/>)

Civil asset forfeiture means the confiscation of property by the government when it considers it a civil rather than a criminal case. Seizure occurs when the government takes property. Forfeiture means the legal title is transferred to the

government. The perpetrator is the property rather than the person. In normal civil cases, one person sues another person for something the other did, such as not fulfil a contract. But when the government uses civil forfeiture, there is no contract violation. The government also does not need to prove guilt. There is only some property which is considered to be an offense or associated with an offense, and the government just seizes it. Sometimes the police just keep it; usually, they sell it and keep the money.

Civil forfeiture is usually used for drug-law enforcement, but increasingly it is used for other laws, such as prostitution, shoplifting, or even legal activities. The government only has to suspect that the property is being used in connection with some activity that is either illegal or claimed to be illegal. The government sues the property, not the owner, and it is then up to the former owner to prove that the property was not used illegally. The former owner has to pay a nonrefundable bond of 10 percent of the value of the property and pay attorney fees that can amount to up to \$100,000. And if the government thinks the money you use to pay your lawyer is also tainted, it can seize that too, so it becomes impossible to hire a lawyer.

The property seized can be cash, cars, real estate, or a business. Often, the owner was not aware that a tenant or one's child or even a stranger was using drugs in one's property. Sometimes, just having the property, such as a large amount of cash, is sufficient to have it seized. Cash is especially vulnerable, since most paper money has traces of cocaine or other drugs.

FBI (http://www.fbi.gov/about-us/investigate/white_collar/asset-forfeiture)

The forfeiture sanction is a legal concept that involves the application of procedures resulting in the transfer of the ownership of property to the government. Many of the criminal laws enforced by the Federal Bureau of Investigation (FBI) contain forfeiture provisions. Some of these forfeiture provisions are excellent deterrents, for example, forfeiture under federal drug laws and under money-laundering laws. Other provisions may be used infrequently, including forfeiture of prison-made goods illegally transported in interstate commerce.

The seizure of property by law enforcement authorities generally is permissible when the property is evidence of a crime or is subject to forfeiture. The seizure of property for forfeiture implicates tenets of the Fourth and Fifth Amendments of the United States Constitution. The proper method of seizure of property, for example in a civil forfeiture action, depends upon the methods permitted in the relevant statute, the location of the property, Department of Justice and FBI policy, and whether or not exigent circumstances are present. It is FBI policy to seize property for forfeiture pursuant to a seizure warrant.

Civil liberties

Law.com (<http://dictionary.law.com/Default.aspx?selected=201>)

Rights or freedoms given to the people by the First Amendment to the Constitution, by Common Law, or legislation, allowing the individual to be free to speak, think, assemble, organize, worship, or petition without government (or even private) interference or restraints. These liberties are protective in nature, while civil rights form a broader concept and include positive elements such as the right to use facilities, the right to an equal education, or the right to participate in government.

Merriam Webster Dictionary (<http://www.merriam-webster.com/dictionary/civil%20liberty>)

Freedom from arbitrary governmental interference (as with the right of free speech) specifically by denial of governmental power and in the United States especially as guaranteed by the Bill of Rights —usually used in plural

Conor Gearty, January 27, 2004(Centre for the Study of Human Rights, LSE, DEMOCRACY AND CIVIL LIBERTIES: A REAPPRAISAL, http://www.lse.ac.uk/Depts/human-rights/Documents/27.01.04_CG.pdf, Accessed 7/7/2014)

Let me start with the idea of ‘civil liberties’. On the Left and among liberals generally, ‘civil liberties’ and the need for their ‘protection’ are almost taken for granted as ‘a good thing’, but the term is not at all unproblematic. In a recent valuable article on the relationship between liberty and security in the post 11 September age, the political philosopher Jeremy Waldron identifies four meanings to the term ‘civil liberties’.

They are as follows:

- (a) In its straightforward meaning ‘civil liberties’ refers to certain freedoms understood as actions that individuals might wish to perform, which (it is thought) the state should not restrict. Free speech, religious freedom, freedom of travel fall into this category.
 - (b) We also use the phrase ‘civil liberties’ to refer to more diffuse concerns about government power, which are not necessarily driven by any sense of a privileged type of action which individuals should be left free to perform. For example the government’s ability to listen in on telephone conversations is a civil liberties concern, even though the ‘liberty’ in question – sometimes referred to as ‘privacy’ – does not amount to very much more than the condition of not being subjected to this scrutiny.
 - (c) Sometimes ‘civil liberties’ refers to procedural rights and powers which we think individuals should have when the state detains them or brings charges against them or plans to punish them. These are rights like the right not to be detained without trial, the right to a fair trial process, the right to counsel, etc.
- In an almost throwaway line, justifiable in the context of the paper, Waldron then remarks that there is a fourth possible approach to civil liberties, ‘the rights associated with democracy and civic participation.’

CIVIL LIBERTIES Ratings from Freedom Works

Freedom House 2014 ("Freedoms in the World 2014" <http://freedomhouse.org/report/freedom-world/freedom-world-2014#.U8GbUY1dWxU>, Accessed 7/12/14)

1 – Countries and territories with a rating of 1 enjoy a wide range of civil liberties, including freedoms of expression, assembly, association, education, and religion. They have an established and generally fair legal system that ensures the rule of law (including an independent judiciary), allow free economic activity, and tend to strive for equality of opportunity for everyone, including women and minority groups.

2 – Countries and territories with a rating of 2 have slightly weaker civil liberties than those with a rating of 1 because of such factors as limits on media independence, restrictions on trade union activities, and discrimination against minority groups and women.

3, 4, 5 – Countries and territories with a rating of 3, 4, or 5 either moderately protect almost all civil liberties or strongly

protect some civil liberties while neglecting others. The same factors that undermine freedom in countries with a rating of 2 may also weaken civil liberties in those with a rating of 3, 4, or 5, but to a greater extent at each successive rating.

6 – Countries and territories with a rating of 6 have very restricted civil liberties. They strongly limit the rights of expression and association and frequently hold political prisoners. They may allow a few civil liberties, such as some religious and social freedoms, some highly restricted private business activity, and some open and free private discussion.

7 – Countries and territories with a rating of 7 have few or no civil liberties. They allow virtually no freedom of expression or association, do not protect the rights of detainees and prisoners, and often control or dominate most economic activity.

Merriam Webster's Dictionary (<http://www.merriam-webster.com/dictionary/civil%20liberty>)

Freedom from arbitrary interference in one's pursuits by individuals or by government. The term is usually used in the plural. Civil liberties are protected explicitly in the constitutions of most democratic countries. (In authoritarian countries, civil liberties are often formally guaranteed in a constitution but ignored in practice.) In the U.S., civil liberties are guaranteed by the Bill of Rights and the 13th, 14th, and 15th Amendments to the Constitution of the United States. The Constitution's 13th Amendment prohibits slavery and involuntary servitude; the 14th bars the application of any law that would abridge the "privileges and immunities" of U.S. citizens or deprive any person of "life, liberty, or property...without due process of law" or deny any person equal protection under the law; and the 15th guarantees the right of all U.S. citizens to vote. The related term civil right is often used to refer to one or more of these liberties or indirectly to the obligation of government to protect certain classes of people from violations of one or more of their civil liberties (e.g., the obligation to protect racial minorities from discrimination on the basis of race). In the U.S., civil rights are protected by the Civil Rights Act of 1964 and subsequent legislation.

Civil rights

Cornell University Law School Legal Information Institute—(http://www.law.cornell.edu/wex/civil_rights)

A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places. Discrimination occurs when the civil rights of an individual are denied or interfered with because of their membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation.

Law.com (<http://dictionary.law.com/Default.aspx?selected=204>)

n. those rights guaranteed by the Bill of Rights, the 13th and 14th Amendments to the Constitution, including the right to due process, equal treatment under the law of all people regarding enjoyment of life, liberty, property, and

protection. Positive civil rights include the right to vote, the opportunity to enjoy the benefits of a democratic society, such as equal access to public schools, recreation, transportation, public facilities, and housing, and equal and fair treatment by law enforcement and the courts.

Merriam Webster's Dictionary (<http://www.merriam-webster.com/dictionary/civil+rights?show=0&t=1405289078>)

1. the nonpolitical rights of a citizen; especially : the rights of personal liberty guaranteed to United States citizens by the 13th and 14th amendments to the Constitution and by acts of Congress
2. The rights that every person should have regardless of his or her sex, race, or religion

Due Process

Law.com (<http://dictionary.law.com/Default.aspx?selected=595>)

n. a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. While somewhat indefinite, the term can be gauged by its aim to safeguard both private and public rights against unfairness. The universal guarantee of due process is in the Fifth Amendment to the U.S. Constitution, which provides "No person shall...be deprived of life, liberty, or property, without due process of law," and is applied to all states by the 14th Amendment. From this basic principle flows many legal decisions determining both procedural and substantive rights.

Bill of Rights Institute (http://www.usconstitution.net/consttop_duep.html)

Generally, due process guarantees the following (this list is not exhaustive):

- Right to a fair and public trial conducted in a competent manner
- Right to be present at the trial
- Right to an impartial jury
- Right to be heard in one's own defense
- Laws must be written so that a reasonable person can understand what is criminal behavior
- Taxes may only be taken for public purposes
- Property may be taken by the government only for public purposes
- Owners of taken property must be fairly compensated

West's Encyclopedia of American Law (<http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law>)

A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, Arbitrary, or capricious.

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The due process clause of the Fifth Amendment, ratified in 1791,

asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). This clause limits the powers of the states, rather than those of the federal government.

The Due Process Clause of the Fourteenth Amendment has also been interpreted by the U.S. Supreme Court in the twentieth century to incorporate protections of the Bill of Rights, so that those protections apply to the states as well as to the federal government. Thus, the Due Process Clause serves as the means whereby the Bill of Rights has become binding on state governments as well as on the federal government.

The concept of due process originated in English Common Law. The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England. The Magna Charta, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares, "No free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land" (ch. 39). This concept of the law of the land was later transformed into the phrase "due process of law." By the seventeenth century, England's North American colonies were using the phrase "due process of law" in their statutes.

First Amendment

Princeton Word Net (<http://wordnetweb.princeton.edu/perl/webwn?s=first%20amendment>)

An amendment to the Constitution of the United States guaranteeing the right of free expression; includes freedom of assembly and freedom of the press and freedom of religion and freedom of speech

Fourth Amendment

Cornell Law (http://www.law.cornell.edu/constitution/fourth_amendment)

The Fourth Amendment originally enforced the notion that "each man's home is his castle", secure from unreasonable searches and seizures of property by the government. It protects against arbitrary arrests, and is the basis of the law regarding search warrants, stop-and-frisk, safety inspections, wiretaps, and other forms of surveillance, as well as being central to many other criminal law topics and to privacy law.

Fifth Amendment

Cornell Law (http://www.law.cornell.edu/constitution/fifth_amendment)

The Fifth Amendment creates a number of rights relevant to both criminal and civil legal proceedings. In criminal cases, the Fifth Amendment guarantees the right to a grand jury, forbids "double jeopardy," and protects against self-incrimination. It also requires that "due process of law" be part of any proceeding that denies a citizen "life, liberty or property" and requires the government to compensate citizens when it takes private property for public use.

Eighth Amendment

Fourteenth Amendment

Library of Congress (<http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html>)

The 14th Amendment to the Constitution was ratified on July 9, 1868, and granted citizenship to “all persons born or naturalized in the United States,” which included former slaves recently freed. In addition, it forbids states from denying any person “life, liberty or property, without due process of law” or to “deny to any person within its jurisdiction the equal protection of the laws.” By directly mentioning the role of the states, the 14th Amendment greatly expanded the protection of civil rights to all Americans and is cited in more litigation than any other amendment.

US Legal (<http://definitions.uslegal.com/i/indefinite-detention/>)

Indefinite detention is the practice of detaining an arrested person by a national government or law enforcement agency without a trial. It may be made by the home country or by a foreign nation. Indefinite detention is a controversial practice, especially in situations where the detention is by a foreign nation. It is controversial because it seems to violate many national and international laws. It also violates human rights laws.

Wikipedia (http://en.wikipedia.org/wiki/Indefinite_detention)

The incarceration of an arrested person by a national government or law enforcement agency without a trial. It is a controversial practice on the part of any government or agency that is in violation of many national and international laws, including human rights laws.[1] In recent years, governments have indefinitely held those suspected to be involved in terrorism, declaring them as enemy combatants.

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Infringing

Oxford Dictionaries (http://www.oxforddictionaries.com/us/definition/american_english/infringe)

Actively break the terms of (a law, agreement, etc.)

The American Heritage Dictionary(<http://www.thefreedictionary.com/infringing>)

1. To transgress or exceed the limits of; violate
2. To encroach on someone or something' engage in trespassing

Merriam Webster (<http://www.merriam-webster.com/dictionary/infringe>)

1. To do some thing that does not obey or follow
2. To wrongly limit or restrict

Precedent

Duhaime Legal Dictionary, <http://www.duhaime.org/LegalDictionary/P/Precedent.aspx>

A case which establishes legal principles to a certain set of facts, coming to a certain conclusion, and which is to be followed from that point on when similar or identical facts are before a court.

Precedents form the basis of the theory of stare decisis which prevent "reinventing the wheel" and allows citizens to have a reasonable expectation of the legal solutions which apply in a given situation.

When one talks of a Court establishing a precedent, it refers to the first such conclusion of a Court to such a set of facts.

2. In procedural matters, the word is also used from time to time to refer to an official court form, or a sample of a Court or other legal form or contract. For example, when one attorney asks another for a precedent on a certain matter, say a personal injury or a divorce action, they are not necessarily or likely referring in that context to a significant legal decision of judgment on divorce. What they are talking about is a standard or sample form or a boilerplate for initiating a personal injury or divorce action, which can then be used to fashion a similar document, with changes on points of detail.

Private law book publishers offer binders full of proposed precedents or "boilerplates" on virtually every type of contract or court document available.

Probable cause

Law.com (<http://dictionary.law.com/Default.aspx?selected=1618>)

Sufficient reason based upon known facts to believe a crime has been committed or that certain property is connected with a crime. Probable cause must exist for a law enforcement officer to make an arrest without a warrant, search without a warrant, or seize property in the belief the items were evidence of a crime. While some cases are easy (pistols and illicit drugs in plain sight, gunshots, a suspect running from a liquor store with a clerk screaming "help"), actions "typical" of drug dealers, burglars, prostitutes, thieves, or people with guilt "written across their faces," are more difficult to categorize. "Probable cause" is often subjective, but if the police officer's belief or even hunch was correct, finding stolen goods, the hidden weapon or drugs may be claimed as self-fulfilling proof of probable cause. Technically, probable cause has to exist prior to arrest, search or seizure.

Lectric Law Library (<http://www.lectlaw.com/def2/p089.htm>)

A reasonable belief that a person has committed a crime. The test the court of appeals employs to determine whether probable cause existed for purposes of arrest is whether facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime. *U.S. v. Puerta*, 982 F.2d 1297, 1300 (9th Cir. 1992). In terms of seizure of items, probable cause merely requires that the facts available to the officer warrants a "man of reasonable caution" to conclude that certain items may be contraband or stolen property or useful as evidence of a crime. *U.S. v. Dunn*, 946 F.2d 615, 619 (9th Cir. 1991), cert. Denied, 112 S. Ct. 401 (1992).

Findlaw.com (<http://criminal.findlaw.com/criminal-rights/probable-cause.html>)

"Probable cause" generally refers to the requirement in criminal law that police have adequate reason to arrest someone, conduct a search, or seize property relating to an alleged crime.

The probable cause requirement comes from the Fourth Amendment of the U.S. Constitution, which states that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched."

Cornell Law School (http://www.law.cornell.edu/wex/probable_cause)

The requirement, found in the Fourth Amendment to the Constitution, that must usually be met before police make an arrest, conduct a search or receive a warrant. Courts usually find probable cause when there is a reasonable basis for believing that a crime may have been committed (for arrest) and that evidence of the crime is present in the place to be searched (for search).

Reasonable Suspicion

Findlaw Legal Dictionary (<http://dictionary.findlaw.com/definition/reasonable-suspicion.html>)

an objectively justifiable suspicion that is based on specific facts or circumstances and that justifies stopping and sometimes searching (as by frisking) a person thought to be involved in criminal activity at the time see also reasonable cause at cause compare probable cause at cause,

West's Encyclopedia of American Law (<http://legal-dictionary.thefreedictionary.com/Probable+Cause+and+Reasonable+Suspicion>)

"Probable cause" means that the officer must possess sufficiently trustworthy facts to believe that a crime has been committed. In some cases, an officer may need only a reasonable suspicion of criminal activity to conduct a limited search. Reasonable suspicion means that the officer has sufficient knowledge to believe that criminal activity is at hand. This level of knowledge is less than that of probable cause, so reasonable suspicion is usually used to justify a brief frisk in a public area or a traffic stop at roadside. To possess either probable cause or reasonable suspicion, an officer must be able to cite specific articulable facts to warrant the intrusion. Items related to suspected criminal activity found in a search may be taken, or seized, by the officer.

Stare Decisis

Duhaime Legal Dictionary, <http://www.duhaime.org/LegalDictionary/S/StareDecisis.aspx>

Latin: stay with what has been decided.

A basic principle of the law whereby once a decision (a precedent) on a certain set of facts has been made, another Court of the same rank or lower, must apply that decision in cases presenting the same set of facts.

The precedent becomes binding and must be followed by courts of like rank.

Extracted from *Stuart v Bank of Montreal* (1916):

"To say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is that the decision of a superior court is binding on an inferior court and on a court of co-ordinate jurisdiction so far as it is a statement of the law which the court is bound to accept....

"Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before."

The adherence to stare decisis is not absolute, as these two USA cases, in chronological order, demonstrate:

1. Vasquez v Hillery (1986):

"Today's decision is supported, though not compelled, by the important doctrine of stare decisis, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained."

2. Lawrence v Texas (2003)

"Today's approach to stare decisis invites us to overrule an erroneously decided precedent (including an intensely divisive decision) if its foundations have been eroded by subsequent decisions; it has been subject to substantial and continuing criticism; and it has not induced individual or societal reliance that counsels against overturning."

Black's Law Dictionary defines *stare decisis* as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." The phrase is Latin, and it means "to stand by things decided."

Section 5: Resolutions

1. The United States Supreme Court should overrule one or more of the following decisions:

- Planned Parenthood v. Casey (1992)
- Ex parte Quirin (1942)
- City of Boerne v. Flores (1997)
- Kelo v. City of New London (2005)
- Citizens United v. Federal Election Commission (2010)

2. The United States Supreme Court should overrule one or more of the following decisions:

- Gregg v. Georgia (1976)
- Ex parte Quirin (1942)
- City of Boerne v. Flores (1997)
- Kelo v. City of New London (2005)
- Citizens United v. Federal Election Commission (2010)

3. The United States Supreme Court should overrule one or more of the following decisions:

- Gregg v. Georgia (1976)
- Ex parte Quirin (1942)
- United States v. Carolene Products Co. (1938)
- Kelo v. City of New London (2005)
- Citizens United v. Federal Election Commission (2010)

4. The United States Supreme Court should overrule one or more of the following decisions:

- Planned Parenthood v. Casey (1992)
- Hamdi v. Rumsfeld (2004)
- City of Boerne v. Flores (1997)
- Gregg v. Georgia (1976)
- Kelo v. City of New London (2005)
- Citizens United v. Federal Election Commission (2010)
- Shelby County v. Holder (2013)

5. The United States Supreme Court should overrule one or more of the following decisions:

- Planned Parenthood v. Casey (1992)
- Ex parte Quirin (1942)
- Hamdi v. Rumsfeld (2004)
- City of Boerne v. Flores (1997)
- Gregg v. Georgia (1976)
- United States v. Carolene Products Co. (1938)
- Kelo v. City of New London (2005)
- Citizens United v. Federal Election Commission (2010)
- Shelby County v. Holder (2013)
- Bennis v. Michigan (1996)

6. The United States Supreme Court should curtail the protection provided for free speech by the First Amendment of the United States' Constitution by overruling one or more of its decisions on obscenity, hate speech, free expression, and or campaign finance.

7. The United States Supreme Court should curtail the protection provided for free speech by the First Amendment of the United States' Constitution by overruling one or more of its decisions on obscenity, hate speech, and or campaign finance. (model resolution 6 with different areas of law)

The college debate community debated the exact wording of resolution 1 with four specific cases to overturn. The style of resolution 1 is the preferred option of the author, however he has no preference for the number of cases or the specific cases selected.

Section 6: Negative Ground

Affirmatives

Most of the cases described above articulate the level of negative ground in responding to each case. More time will be spent describing other elements of negative ground. But a majority of the cases described above have good definitive arguments on both sides to either overturn or maintain the precedent.

Counterplan Ground

There is a variety of process counterplan ground on this topic. First would be court process counterplans like: make the ruling a 9-0, 5-4 etc (where the net benefit would be a court politics disad). You can have a lower court rule on a case which de-facto reverses a precedent. Additionally, other agencies/processes that could clarify elements of the decision like Congress clarifying provisions of a law, executive agencies clarifying/altering implementation of policies.

Empirically Congress has clarified legislation to de-facto overrule Supreme Court decisions

Leon **Friedman**, 12-19-**2001**, "Overruling the Court," American Prospect, <http://prospect.org/article/overruling-court>

The Supreme Court often insists that Congress cannot really "overrule" its decisions on what a law means: The justices' interpretation has to be correct since the Constitution gives final say to the highest court in the land. But Congress certainly has the power to pass a new or revised law that "changes" or "reverses" the meaning or scope of the law as interpreted by the Court, and the legislative history of the new law usually states that it was intended to "overrule" a specific Court decision. Often the reversal is in highly technical areas, such as the statute of limitations in securities-fraud cases, the jurisdiction of tribal courts on Indian reservations, or the power of state courts to order denaturalization of citizens. But in the last 20 years, a main target of congressional "overruling" has been the Supreme Court's decisions in the area of civil rights. In 1982, for example, Congress amended the Voting Rights Act of 1965 to overrule a narrow Supreme Court holding in Mobile v. Bolden, a 1980 decision that addressed whether intentional discrimination must be shown before the act could be invoked. In 1988, Congress overruled another Supreme Court decision (in the 1984 case Grove City College v. Bell) by passing the Civil Rights Restoration Act, which broadened the coverage of Title VI of the Civil Rights Act of 1964. The legislative history of that law specifically recited that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon" a number of federal civil rights statutes and that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretations" of those laws. And in 1991, Congress passed a broad, new Civil Rights Act that specifically reversed no fewer than five Supreme Court cases decided in 1989--decisions that severely restricted and limited workers' rights under federal antidiscrimination laws. Led by Massachusetts Democrat Edward Kennedy in the Senate and New York Republican Hamilton Fish, Jr., in the House, Congress acted to undo those rulings, as well as make other changes to federal law that strengthened the weapons available to workers against discrimination. Despite partisan contention over the language of certain provisions (which led to last-minute-compromise language), President George Bush the elder supported the changes. The new law recited in its preamble that its purpose was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

Competition with a congress CP will be interesting as Congress can create laws to extend protections offered by the court but they cannot restrict protections created by a court ruling.

The **Economist**, 7-28-2015, "Can Congress over-ride a Supreme Court decision?," Economist,
<https://www.economist.com/blogs/democracyinamerica/2015/07/rights-and-legislation>

Is Mr Santorum at all accurate in believing that Congress—as an extension of the “final say” of the American people—has the power to overturn the Supreme Court? As it happens, yes. Congress can indeed expand rights beyond those recognised by the Supreme Court, as it did in reaction to Employment Division v Smith when it passed the Religious Freedom Restoration Act in 1993. And if the constitution does not safeguard a certain right, Congress can create or amend laws to ensure such protection itself. For example in 1976 the court ruled in General Electric v Gilbert that pregnant women could be discriminated against in the workplace, as such discrimination was neither unconstitutional nor legislated against. So Congress came back two years later with the Pregnancy Discrimination Act, thereby legally adding this protection. When the court put sharp limits on bosses' liability for under-paying female employees, Justice Ruth Bader Ginsburg noted in her dissent that "the Legislature may act to correct this". It did: Congress passed the Lily Ledbetter Fair Pay Act of 2009. Indeed, lawmakers regularly craft laws in response to narrow or undesired rulings based on existing statutes, as Matthew R. Christiansen and William N. Eskridge junior show in a recent study in the Texas Law Review. But Congress is not entitled to scale back on rights the Supreme Court says are protected by the constitution.

The states counterplan could play a role on this topic (with examples seen on some of the cases above). Finally, constitutional amendments become a legitimate policy outcome as that is a quick way to pull the rug out from under the court.

There will also be a handful of unique advantage counterplans based on the cases selected. For example if Hamdi is in the resolution, closing Guantanamo Bay solves the impacts to indefinite detention by closing WOT prisons. Changing campaign finance laws would impact Citizens United. Banning voter ID laws would solve parts of Shelby County etc. The advantage/case specific counterplans will be a good timely approach to dealing with any case selected.

Disadvantages and Generic Negative Ground

The first type of disadvantages that negative teams would have access to would be process disads. This would include things like court politics, judicial deference, inter branch relations, court stripping, hollow hope etc. Any standard legal disad will work. You also have “theoretical” disads like a stare decisis disad, or criticisms of constructivism vs activism as a legal philosophy (which would function as either a DA or a case turn).

Secondly, you should still have access to standard domestic topic area disadvantages. If affirmatives have to defend the implementation of the legal change, then there is access to arguments like politics, federalism, and/or spending.

Finally, the amount of literature that questions the success of any of symbolic changes produced by the court would also allow negative teams to dive into deeper debates about if we the Court should act. There is also a robust defense of status quo policies in many of these areas, where negatives could really question the desirability of the affirmative.

Critical Ground

The critical ground available in a generic fashion would still link to general normative defenses of the law (like regular USFG topics).

Section 7: Why This Topic Rocks!

Resources Available

As seen throughout the paper, there is a wide variety of resources available to help students research the topic. First, there are a growing base of pedagogical resources to assist in the teaching of basic legal concepts. Students and coaches could turn to assets like Street Law, the Constitution Center, the Bill of Rights Institute, PBS, CSPAN and several other areas that have increased their tools on teaching the courts. There are also law schools that are dedicated to making case briefs more accessible. Debaters could turn to Chicago-Kent's Oyez project of Cornell University's LII database. However, as seen throughout the paper, most of the citations were generated by basic Google searches on individual Supreme Court cases. Additionally, depending on which cases are chosen, most of them have connections to timely political discussions (like voter ID laws, abortion regulations and/or corporate personhood) and while they may not all specifically name the particular Supreme Court case, they will connect to the precedents discussed. Needless to say, there is a wealth of literature available for both researching cases and teaching our students about the processes used by the Supreme Court.

Topic Balance

As noted in the discussion of individual cases, the cases selected have a wealth of defensible positions on both sides of the Supreme Court precedent. While defending some cases may run into some challenges in certain areas of the country (generating an artificial side bias), either generic process arguments will check or choosing an alternate case in the resolution also solves that problem. Second, the cases chosen are robust enough to ensure a variety of affirmatives stemming from each precedent overturned, which keeps the topic relatively fresh throughout the year, without totally eliminating access to generic negative arguments. Additionally, while affirmatives may have a strong defense in why the Supreme Court needs to be the actor to overturn a precedent, there are excellent counterplans to test the desirability of court action. Finally, there is plenty of ground for critical teams on both the affirmative and negative, as the resolution is rooted in a normative defense of the law, which will generate solid link ground to those arguments.

Timeliness

Timeliness is a challenge to this topic (as some of the cases come from several decades ago). However, the connection of these Supreme Court cases to relevant political discussions today makes the topic infinitely more timely. Additionally, we are living in a world with a brand new justice (Gorsuch) and by the time we debate this topic there could be one or two potential new appointments (as people discuss the looming retirement of Kennedy and the age/health of Ginsburg) which means media coverage of the courts will stay relatively fresh, providing great uniqueness ground for both disadvantages and advantages.

Interest

There are two simple reasons why this topic will generate interest. First, as noted in Section 1, the High School debate community has never explicitly debated the Supreme Court as a topic. In our activity's history there have been only four ties to legal processes in explicit resolutional wordings. The college community has debated something similar to this topic in 2006, and that is it. The second reason this topic should generate interest is because the courts are becoming part of a larger mainstream political dialogue, and this topic forces students to interrogate one of the branches of government that they may not get the opportunity to learn about until they take a government course as a graduation requirement. This topic forces everyone to focus on a new actor, a new mechanism, and a new process, and if we as a community truly want to explore an "alternate actor" resolution, the Supreme Court may be the best way to test those waters as it doesn't fully run away from the "USFG" as an actor, but it forces teams to adopt new strategies and explore some new arguments within this legal topic.

Section 8: Works Cited

This excludes the terms defined in the "definitions" section.

Allen, Charlotte. "'Kelo' Revisited." *Weekly Standard*. The Weekly Standard

[Http://assets.weeklystandard.com.s3.amazonaws.com/tws15/images/logo-large.png](http://assets.weeklystandard.com.s3.amazonaws.com/tws15/images/logo-large.png), 10 Feb. 2014. Web. 05

July 2017. <<http://www.weeklystandard.com/kelo-revisited/article/776021>>.

Bailey, Jonathan. "Why You Should Care About Supreme Court Decisions." *Performancing*. N.p., 18 July 2014. Web. 03

July 2017. <<http://performancing.com/why-you-should-care-about-supreme-court-decisions/>>.

Barnes, Robert. "Supreme Court Stops Use of Key Part of Voting Rights Act." *The Washington Post*. WP Company, 25

June 2013. Web. 06 July 2017. <[https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-](https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-f248b21f94c4_story.html?utm_term=.fe5d07673dde)

[part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-](https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-f248b21f94c4_story.html?utm_term=.fe5d07673dde)

[f248b21f94c4_story.html?utm_term=.fe5d07673dde](https://www.washingtonpost.com/politics/supreme-court-stops-use-of-key-part-of-voting-rights-act/2013/06/25/26888528-dda5-11e2-b197-f248b21f94c4_story.html?utm_term=.fe5d07673dde)>.

Barnett, Randy. "Ensuring That Laws Remain "rational" When Enforced." *The Washington Post*. WP Company, 14 Sept.

2014. Web. 05 July 2017. <[https://www.washingtonpost.com/news/volokh-](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/14/ensuring-that-laws-remain-rational-when-enforced/?utm_term=.241d9eb22841)

[conspiracy/wp/2014/09/14/ensuring-that-laws-remain-rational-when-enforced/?utm_term=.241d9eb22841](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/14/ensuring-that-laws-remain-rational-when-enforced/?utm_term=.241d9eb22841)>.

"Bennis v. Michigan." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 06 July 2017.

<<https://www.oyez.org/cases/1995/94-8729>>.

Bernick, Evan. "Justice Thomas' Abortion Dissent And The Decline Of The Rule of Law." *The Huffington Post*.

TheHuffingtonPost.com, 10 July 2016. Web. 05 July 2017. <[http://www.huffingtonpost.com/evan-](http://www.huffingtonpost.com/evan-bernick/justice-thomas-abortion-d_b_10915136.html)

[bernick/justice-thomas-abortion-d_b_10915136.html](http://www.huffingtonpost.com/evan-bernick/justice-thomas-abortion-d_b_10915136.html)>.

Bomboy, Scott. "National Constitution Center." *National Constitution Center – Constitutioncenter.org*. N.p., 30 June

2014. Web. 05 July 2017. <<https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care>>.

Bomboy, Scott. "Surveys: Many Americans Know Little about the Supreme Court." *National Constitution Center – Constitutioncenter.org*. N.p., 17 Feb. 2016. Web. 07 July 2017. <<https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court/>>.

"Can Congress Over-ride a Supreme Court Decision?" *The Economist*. The Economist Newspaper, 28 July 2015. Web. 07 July 2017. <<https://www.economist.com/blogs/democracyinamerica/2015/07/rights-and-legislation>>.

Caplan, Lincoln. "Ruth Bader Ginsburg and Footnote Four." *The New Yorker*. The New Yorker, 13 Sept. 2013. Web. 05 July 2017. <<http://www.newyorker.com/news/news-desk/ruth-bader-ginsburg-and-footnote-four>>.

Cirilli, Kevin. "10 Facts about Enemy Combatants." *POLITICO*. N.p., 22 Apr. 2013. Web. 04 July 2017. <<http://www.politico.com/story/2013/04/what-is-an-enemy-combatant-090436>>.

"Citizens United v. Federal Election Commission." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 05 July 2017. <<https://www.oyez.org/cases/2008/08-205>>.

"City of Boerne v. Flores." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 04 July 2017. <<https://www.oyez.org/cases/1996/95-2074>>.

Cohen, David S. "Where Did People Get the Idea That Justice Anthony Kennedy Will Provide a Swing Vote for Abortion Rights?" *Slate Magazine*. N.p., 22 Nov. 2013. Web. 03 July 2017. <http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/justice_anthony_kennedy_abortion_swing_vote.html>.

Cole, David. "How to Reverse Citizens United." *The Atlantic*. Atlantic Media Company, 11 Mar. 2016. Web. 06 July 2017. <<https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/>>.

"Congress Reaffirms Indefinite Detention of Americans under NDAA." *RT International*. N.p., 22 May 2014. Web. 05 July 2017. <<http://rt.com/usa/160832-ndaa-gitmo-detention-approved/>>.

Cooper, Ryan. "This Is the First Election without the Full Voting Rights Act - and It's Already a Disaster." *The Week - All You Need to Know about Everything That Matters*. N.p., 07 Nov. 2016. Web. 06 July 2017.

<<http://theweek.com/articles/659599/first-election-without-full-voting-rights-act--already-disaster>>.

Corbis. "It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty - Here's How It Failed." *The Marshall Project*. N.p., 16 Nov. 2016. Web. 05 July 2017. <<https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed#.wy5Tbh8VU>>.

Denniston, Lyle. "Bringing Carolene Products up to Date?" *SCOTUSblog*. SCOTUSblog, 08 Sept. 2014. Web. 05 July 2017. <<http://www.scotusblog.com/2014/09/bringing-carolene-products-up-to-date/>>.

Dunbaremail, John. "The 'Citizens United' Decision and Why It Matters." *Center for Public Integrity*. N.p., 14 Mar. 2016. Web. 05 July 2017. <<https://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters>>.

Dunn, Stephen J. "Nothing Civil About Asset Forfeiture." *Forbes*. Forbes Magazine, 05 Nov. 2013. Web. 06 July 2017. <<http://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>>.

Editorial, A. Times. "Our Opinion: Pipeline Land Grab Sets Stage for Limit on Eminent Domain." *The Wilson Times*. N.p., 21 June 2017. Web. 05 July 2017. <<http://wilsontimes.com/stories/pipeline-land-grab-sets-stage-for-limit-on-eminant-domain,87145>>.

Editors, The. "Leave the Voting Rights Act Alone." *National Review*. N.p., 12 Aug. 2015. Web. 06 July 2017. <<http://www.nationalreview.com/article/422408/leave-voting-rights-act-alone-editors>>.

Epstein, Richard A. "Kelo v. City of New London Ten Years Later." *National Review*. N.p., 23 June 2015. Web. 05 July 2017. <<http://www.nationalreview.com/article/420144/ke-lo-v-city-new-london-ten-years-later-richard-epstein>>.

"Ex Parte Quirin." *The Oyez Project*. University of Chicago-Kent Law School, n.d. Web. 04 July 2017.

<<https://www.oyez.org/cases/1940-1955/317us1>>.

Farooq, Syed Umar. "Smoke, Mirrors, and Legal Precedent: The Problem with Shelby County v. Holder." *The Claremont Journal of Law and Public Policy*. N.p., 31 Oct. 2015. Web. 06 July 2017. <<https://5clpp.com/2015/10/31/smoke-mirrors-and-legal-precedent-the-problem-with-shelby-county-v-holder/>>.

Feldman, Noah. "Opinion | Why Korematsu Is Not a Precedent." *The New York Times*. The New York Times, 18 Nov. 2016. Web. 04 July 2017. <https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html?_r=1>.

"Footnote 4." *The Free Dictionary*. Farlex, n.d. Web. 05 July 2017. <<http://legal-dictionary.thefreedictionary.com/Footnote+4>>.

Friedman, Leon. "Overruling the Court." *The American Prospect*. N.p., 19 Dec. 2001. Web. 07 July 2017. <<http://prospect.org/article/overruling-court>>.

Greenhouse, Linda. "A Turf Battle's Unlikely Victim." *The New York Times*. The New York Times, 27 June 2000. Web. 04 July 2017. <<http://www.nytimes.com/2000/06/28/us/a-turf-battle-s-unlikely-victim.html>>.

"Gregg v. Georgia." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 05 July 2017. <<https://www.oyez.org/cases/1975/74-6257>>.

"Gregg v. Georgia." *Wikipedia*. Wikimedia Foundation, 05 June 2017. Web. 05 July 2017. <https://en.wikipedia.org/wiki/Gregg_v._Georgia>.

Grimes, Ben. "Furman v. Georgia Turns 42." *NCADP*. National Coalition to Abolish the Death Penalty, 26 June 2014. Web. 05 July 2017. <<http://www.ncadp.org/blog/entry/furman-v.-georgia-turns-42>>.

"Hamdi v. Rumsfeld." Oyez. University of Chicago-Kent Law School, n.d. Web. 05 July 2017.

<http://www.oyez.org/cases/2000-2009/2003/2003_03_6696>.

Hamilton, Alexander. "The Federalist #78." *Constitution Society*. N.p., n.d. Web. 03 July 2017.

Hamilton, Marci A. "The Religious Liberty Shell Game Needs to End Now Before the Civil Rights of Women and LGBTQ Recede into History." *Verdict Comments*. Justia, 24 Jan. 2017. Web. 05 July 2017.

<<https://verdict.justia.com/2017/01/24/religious-liberty-shell-game-needs-end-now-civil-rights-women-lgbtq-recede-history>>.

Hessler, Stephanie. "HESSLER: Presidential Power to Kill?" *The Washington Times*. The Washington Times, 16 Mar. 2012.

Web. 04 July 2017. <<http://www.washingtontimes.com/news/2012/mar/16/presidential-power-to-kill/>>.

Hiestand, Mike. "Student Press Law Center." *SPLC*. N.p., 10 Aug. 2009. Web. 07 July 2017.

<<http://www.splc.org/blog/splc/2009/08/retired-supreme-court-justice-warns-of-dangerous-state-of-civics-knowledge>>.

Honigsberg, Peter Jan. "The Real Origin of the Term 'Enemy Combatant'." *The Huffington Post*. TheHuffingtonPost.com, 09 Jan. 2014. Web. 04 July 2017. <http://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html>.

Jurecic, Quinta. "The Legality of Donald Trump's Proposal to Try US Citizens by Military Commission." *Lawfare*. N.p., 07 Nov. 2016. Web. 04 July 2017. <<https://www.lawfareblog.com/legality-donald-trumps-proposal-try-us-citizens-military-commission>>.

"Kelo v. City of New London." Oyez. Univer, n.d. Web. 05 July 2017. <<https://www.oyez.org/cases/2004/04-108>>.

Kennedy, Liz. "10 Ways Citizens United Endangers Democracy." *Demos*. N.p., 19 Jan. 2012. Web. 06 July 2017.

<<http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>>.

Killenbeck, Mark R. "Alabama's Religious Freedom: Natural Rights, Social Duties." *JURIST*. University of Pittsburgh, 22 June 2017. Web. 05 July 2017. <<http://www.jurist.org/forum/2017/06/Mark-Killenbeck-alabamas-religious-freedom.php>>.

Klein Murillo, Helen, and Alex Loomis. "A Summary of the Al Bahlul Decision." *Lawfare*. N.p., 24 Oct. 2016. Web. 04 July 2017. <<https://www.lawfareblog.com/summary-al-bahlul-decision>>.

Lawler, Peter Augustine. "On Super-Precedents." *National Review*. N.p., 22 Mar. 2017. Web. 07 July 2017. <<http://www.nationalreview.com/corner/446001/court-and-made-doctrine>>.

Leming, Robert S. "Ericdigests.org." *Teaching about Landmark Dissents in United States Supreme Court Cases*. ERIC Digest. ERIC Clearinghouse for Social Studies/Social Science Education Bloomington IN., 31 Dec. 1994. Web. 07 July 2017. <<https://www.ericdigests.org/1995-2/court.htm>>.

Lennard, Natasha. "Obama Signs NDAA 2014, Indefinite Detention Remains." *Salon*. N.p., 27 Dec. 2013. Web. 05 July 2017. <http://www.salon.com/2013/12/27/obama_signs_ndaa_2014_indefinite_detention_remains/>.

Liebelson, Dana. "The Supreme Court Guttled the Voting Rights Act. What Happened next in These 8 States Will Not Shock You." *Mother Jones*. N.p., 24 June 2017. Web. 06 July 2017. <<http://www.motherjones.com/politics/2014/04/republican-voting-rights-supreme-court-id/>>.

Lutz, Zak. "Limits of Religious Freedom." *Harvard Political Review*. Harvard, 27 May 2013. Web. 05 July 2017. <<http://harvardpolitics.com/covers/limits-of-religious-freedom/>>.

Mears, Bill, and Greg Botelho. "Supreme Court Makes Historic Voting Rights Law Harder to Enforce - CNNPolitics.com." *CNN*. Cable News Network, 26 June 2013. Web. 06 July 2017. <<http://www.cnn.com/2013/06/25/politics/scotus-voting-rights/index.html>>.

Mellor, Chip. "Civil Forfeiture Laws And The Continued Assault On Private Property." *Forbes*. Forbes Magazine, 08 June 2011. Web. 06 July 2017. <<https://www.forbes.com/2011/06/08/property-civil-forfeiture.html>>.

Millhiser, Ian, and Tara Culp-Ressler. "The Greatest Trick The Supreme Court Ever Pulled Was Convincing The World Roe v. Wade Still Exists." *ThinkProgress*. ThinkProgress, 04 Dec. 2013. Web. 03 July 2017. <<https://thinkprogress.org/the-greatest-trick-the-supreme-court-ever-pulled-was-convincing-the-world-roe-v-wade-still-exists-747d3d828ff9>>.

Morris, Errol. "Who Is Dangerous, and Who Dies?" *The New York Times*. The New York Times, 07 June 2017. Web. 05 July 2017. <https://www.nytimes.com/2017/06/07/opinion/errol-morris-interview-death-penalty.html?_r=0>.

New, Michael J. "Casey at 25: Pro-Life Progress Despite a Judicial Setback." *National Review*. N.p., 29 June 2017. Web. 04 July 2017. <<http://www.nationalreview.com/article/449104/planned-parenthood-vs-casey-25-years-later-abortion-has-declined>>.

"Obama Wins Back the Right to Indefinitely Detain under NDAA." *RT International*. N.p., 17 July 2013. Web. 05 July 2017. <<http://rt.com/usa/obama-ndaa-appeal-suit-229/>>.

Paulsen, Michael Stokes. "This Week in Judicial Supremacist Arrogance: City of Boerne v. Flores at Twenty." *National Review*. N.p., 26 June 2017. Web. 05 July 2017. <<http://www.nationalreview.com/bench-memos/448975/judicial-supremacy-arrogance-boerne-flores-free-exercise-section-five>>.

"Planned Parenthood of Southeastern Pennsylvania v. Casey." *The Oyez Project*. University of Chicago-Kent Law School, n.d. Web. 03 July 2017. <<https://www.oyez.org/cases/1991/91-744>>.

Pulliam, Mark. "The Quandary of Judicial Review." *National Review*. N.p., 08 Apr. 2015. Web. 05 July 2017. <<http://www.nationalreview.com/article/416590/quandary-judicial-review-mark-pulliam>>.

Pye, Jason. "Kelo v. New London: How the Supreme Court Gutted Constitutional Protections for Private Property." *Freedom Works*. N.p., 23 June 2015. Web. 05 July 2017. <<http://www.freedomworks.org/content/kelo-v-new-london-how-supreme-court-gutted-constitutional-protections-private-property>>.

Root, Damon W. "When Should the Supreme Court Overturn One of Its Own Precedents?" *Reason.com*. N.p., 13 Jan. 2016. Web. 07 July 2017. <<http://reason.com/blog/2016/01/13/stare-decisis-when-should-the-supreme-co>>.

"Shelby County v. Holder." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 6 July 2017. <<https://www.oyez.org/cases/2012/12-96>>.

Simpson, Steve. "Overturning Citizens United Would Be a Disaster for Free Speech." *TheHill*. N.p., 06 Sept. 2016. Web. 06 July 2017. <<http://thehill.com/blogs/pundits-blog/campaign/294665-overturning-citizens-united-would-be-a-disaster-for-free-speech>>.

Standler, Ronald B. "Overruled: Stare Decisis in the Supreme Court." (n.d.): n. pag. 19 July 2009. Web. 7 July 2017. <<http://www.rbs2.com/overrule.pdf>>.

Stillman, Sarah. "Taken." *The New Yorker*. N.p., 12 Aug. 2013. Web. 06 July 2017. <http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all>.

Suddath, Claire. "Beyond Roe v. Wade: Here's What Gorsuch Means for Abortion." *Bloomberg.com*. Bloomberg, 20 Mar. 2017. Web. 04 July 2017. <<https://www.bloomberg.com/news/features/2017-03-20/beyond-roe-v-wade-here-s-what-gorsuch-means-for-abortion>>.

Sutton, Jeffrey S. "City of Boerne v. Flores: A Victory for Federalism." *The Federalist Society*. N.p., 1 Dec. 1997. Web. 05 July 2017. <<http://www.fed-soc.org/publications/detail/city-of-boerne-v-flores-a-victory-for-federalism>>.

"United States v. Carolene Products Company." *Oyez*. University of Chicago-Kent Law School, n.d. Web. 05 July 2017. <<https://www.oyez.org/cases/1900-1940/304us144>>.

Waldman, Paul. "Roe v. Wade May Be Doomed." *Chicagotribune.com*. N.p., 08 Dec. 2016. Web. 04 July 2017.

<<http://www.chicagotribune.com/news/opinion/commentary/ct-roe-v-wade-abortion-supreme-court-20161207-story.html>>.

Walker, John SLS | Commentaries M. "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?" *China Guiding Cases Project*. Stanford Law School, 29 Feb. 2016. Web. 07 July 2017.

<<https://cgc.law.stanford.edu/commentaries/15-john-walker/>>.

"Why America Still Executes People." *The Economist*. The Economist Newspaper, 12 June 2017. Web. 05 July 2017.

<<https://www.economist.com/blogs/economist-explains/2017/06/economist-explains-10>>.

Winter, Meaghan. "Pro-Choice Advocates Fear That Roe v. Wade Could Be Lost. But It Already Happened." *Slate Magazine*. N.p., 27 Mar. 2016. Web. 03 July 2017.

<http://www.slate.com/articles/double_x/cover_story/2016/03/how_the_undue_burden_concept_eroded_roe_v_wade.html>.

Wittes, Benjamin, and Robert M. Chesney. "Protecting U.S. Citizens' Constitutional Rights During the War on Terror | Brookings Institution." *Brookings*. Brookings, 28 July 2016. Web. 04 July 2017.

<<https://www.brookings.edu/testimonies/protecting-u-s-citizens-constitutional-rights-during-the-war-on-terror/>>.

Wood, Jonathan, and Anastasia Boden. "On Independence Day, Celebrate Property Rights-the Foundation of the Pursuit of Happiness." *Townhall*. Townhall.com, 30 June 2017. Web. 05 July 2017.

<<https://townhall.com/columnists/jonathanwood/2017/06/30/on-independence-day-celebrate-property-rights-the-foundation-of-the-pursuit-of-happiness-n2348737>>.

Yoshino, Kenji. "Can the Supreme Court Change Its Mind?" *The New York Times*. The New York Times, 04 Dec. 2002. Web. 07 July 2017. <<http://www.nytimes.com/2002/12/05/opinion/can-the-supreme-court-change-its-mind.html>>