George Mason University, Scalia Law School

ADVANCED FEDERAL COURTS

Spring 2024

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Note: Please email me at the listed email address.

Schedule:

1/27-28; 2/10-11; 4/6-7;

Alternate weekend: 3/16-17 (we will meet 3/16 to 3/17 anything unexpected keeps us from meeting a scheduled weekend)

Each day is 9AM to 5PM, with breaks throughout the day.

All classes are in person. Recording is prohibited.

Office hours by appointment.

First Day of Class:

For the first day of class, read the first three sections of the required reading listed below on the syllabus (1. Departmentalism and Judicial Review; 2. The Supreme Court; 3. Stare Decisis). For the second day of class, please read the next two sections (4. Standing; 5. Political Questions).

Course Overview:

This course covers the limits of the power of federal courts and why those limits matter.

This is not a lecture course. Class participation is a requirement. Although I will sometimes ask for volunteers to answer a question, I will also cold call. When questioned, you may look at your notes to find relevant details from the required reading, but you should know the basic holding and basic reasoning of each required case without needing to re-read the case.

You may not use laptops or tablets in class. You may bring notes to class (typed or handwritten). You may also bring paper copies of the readings to class, but that is not a requirement.

Learning Outcomes:

This course incorporates the general learning outcomes listed at https://www.law.gmu.edu/academics/degrees/jd/. In particular, by the end of the course, each student should better understand:

- The limits of the power of federal courts;
- Why those limits matter;
- How broadly precedents are often read;
- When, if ever, a precedent should be overruled;
- How the separation of powers protects liberty.

Casebook and Readings:

This class has no textbook. It does, however, require lengthy readings.

Begin by reading the United States Constitution, including its amendments.

Beyond that, at the end of this syllabus, I have listed the required reading for each day. Each reading has a hyperlink (except for the U.S. Constitution and U.S. Code, which you can Google). Please use the version of the case from the hyperlink so that we can all refer to the same page numbers.

Sometimes I have limited the reading to certain opinions from a case and sometimes certain sections of an opinion. But unless otherwise noted, read all opinions in the assigned case (majority, plurality, concurrences, dissents). Read the important parts of each opinion closely. You are not required to read the case syllabus or, for older cases, the summaries of the parties' arguments that precede the opinions.

Attendance:

Scalia Law School's attendance policy applies. Any student absent for more than 20% of the course is not eligible for credit, even if the absence is for good cause. In addition, because there are only four days of classes, unexcused absences will result in a significant grade decrease.

Assessment:

There will be an in-person exam. Your grade will be based on that exam. In addition, I will lower your final grade by a partial-grade level if, during class discussion, it is apparent you have not read an assigned reading. For example: B+ to B is a partial-grade-level reduction; A- to B+ is a partial-grade-level reduction. There is no cap on the number of partial-grade-level reductions.

Additional Policies and Resources:

Adhere to the Honor Code and the school's Academic Regulations.

Support and health resources, including mental health resources, are available at https://caps.gmu.edu, https://shs.gmu.edu, and https://ularlington.gmu.edu.

Required Reading:

1. **Departmentalism and Judicial Review**
    - U.S. Constitution
    - Federalist 78
    - Jay Letter on Advisory Opinions
    - Marbury v. Madison (1803)
    - Lincoln Speech Regarding *Dred Scott*
        - See Appendix to this syllabus
    - Lincoln First Inaugural
    - Cooper v. Aaron (1958)
    - Michael Paulsen, The Irrepressible Myth of Marbury
2. **The Supreme Court**
    - Court Packing; Term Limits; Shadow Docket
        - Report of Presidential Commission on the Supreme Court
            - Pages 67-83; 111-151; 203-215; 263-266; 271-273
        - Will Baude, Reflections of a Supreme Court Commissioner
        - Does v. Mills (2021)
            - Barrett statement
3. **Stare Decisis**
    - Kimble v. Marvel Entertainment (2015)
    - Gamble v. United States (2019)
        - Thomas concurrence
    - Ramos v. Louisiana (2020)
        - Majority/plurality: Introduction, I, II, IV, V

        - Sotomayor concurrence
        - Kavanaugh concurrence
        - Alito dissent

    - Pierre Leval, Judging Under the Constitution: Dicta About Dicta

4. Justiciability I: Standing

- General
    - Lujan v. Defenders of Wildlife (1992)
    - TransUnion v. Ramirez (2021)
- States
    - Massachusetts v. EPA (2007)
        - Majority: Introduction, I, II, III, IV
        - Roberts dissent
    - California v. Texas (2021)
        - Majority: Introduction, I, II(B)
        - Alito dissent: Introduction, I, II
    - United States v. Texas (2023)
        - Majority
        - Alito dissent III.A
- Nominal Damages
    - Uzuegbunam v. Preczewski (2021)
- Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?

5. Justiciability II: Political Questions

- Baker v. Carr (1962)
    - Majority
    - Frankfurter dissent
- Rucho v. Common Cause (2019)
    - Majority
    - Dissent: Introduction, II, III

6. Justiciability III: Sovereign Immunity

- Re-read Article III of the U.S. Constitution.

- Chisholm v. Georgia (1793)
- Re-read Amendment XI.
- Hans v. Louisiana (1890)
- Ex Parte Young (1908)
- Alden v. Maine (1999)
  - Majority
- PennEast Pipeline v. New Jersey (2021)
  - Gorsuch dissent
- Torres v. Texas Department of Public Safety (2022)
- Baude & Sachs, The Misunderstood Eleventh Amendment

7. Justiciability IV: Qualified Immunity

- Nixon v. Fitzgerald (1982)
- Harlow v. Fitzgerald (1982)
- Saucier v. Katz (2001)
- Pearson v. Callahan (2009)
  - Majority: III
- Baude, Is Qualified Immunity Unlawful?

8. Remedies I: Severability

- Lindenbaum v. United States (CA6 2021).
  - Introduction, I, III.A, IV
- Murphy v. NCAA (2018) (Thomas, J.)
  - Thomas concurrence
- Seila Law v. CFPB (2020) (Roberts, C.J. vs. Thomas, J.)
  - Majority/plurality: Introduction, I, IV
  - Thomas concurrence: Introduction, II
- Will Baude, Severability First Principles

9. Remedies II: Injunctions

- Ebay Inc. v. MercExchange, L.L.C. (2006)
- Winter v. NRDC (2009)
- Dine Citizens against Ruining Our Environment v. Jewell (CA10 2016).
  - Lucero separate opinion
- Bray, Multiple Chancellors: Reforming the National Injunction (2017)
- DHS v. NY (Jan. 27, 2020) (grant of stay)

10. Remedies III: Damages

- Read 42 U.S.C. § 1983.
- Bivens v. 6 Unknown Agents (1971)
- Egbert v. Boule (2022)
- Buchanan v. Barr (D.C. Cir. 2022)
  - Majority
  - Wilkins concurrence

11. Congress's Control Over the Courts I: Jurisdiction Stripping

- Re-read Article III of the U.S. Constitution.
- United States v. Klein (1871)
- Patchak v. Zinke (2018)
  - Thomas opinion
  - Breyer concurrence
  - Roberts dissent

12. Congress's Control Over the Courts II: AEDPA

- Brown v. Allen (1952)
  - Skim the following (1) Majority: beginning, IV; (2) Frankfurter separate opinion: II; (3) Jackson separate opinion
- Read 28 U.S.C. §§ 2254, 2255.
- Harrington v. Richter (2011)
  - Majority

- Edwards v. Vannoy (2021)

13. Congress's Control Over the Courts III: War Habeas

- Ex Parte Quirin (1942)
- Johnson v. Eisentrager (1950)
- Boumediene v. Bush (2008)

14. Congress's Control Over the Courts IV: Article I Tribunals

- *Crowell v. Benson*, 285 U.S. 22 (1932)
- *Oil States v. Greene's Energy Group*, 138 S. Ct. 1365 (2018)
- *Jarskey v. SEC*, 34 F.4th 446 (5th Cir. 2022)
- William Baude, *Adjudication Outside Article III*

15. Federal Common Lawmaking

- *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)
- *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)
- Steve Sachs, Finding Law

Readings Appendix:

Section of 1857 speech by Abraham Lincoln regarding *Dred Scott*

LINCOLN: And now as to the Dred Scott decision. That decision declares two propositions-first, that a negro cannot sue in the U.S. Courts; and secondly, that Congress cannot prohibit slavery in the Territories. It was made by a divided court-dividing differently on the different points. Judge [Stephen] Douglas does not discuss the merits of the decision; and, in that respect, I shall follow his example, believing I could no more improve on McLean and Curtis, than he could on Taney.
He denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?

Judicial decisions have two uses-first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no resistance to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country-But Judge Douglas considers this view awful. Hear him:

"The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever

resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government-a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence. I repeat, therefore, that if resistance to the decisions of the Supreme Court of the United States, in a matter like the points decided in the Dred Scott case, clearly within their jurisdiction as defined by the Constitution, shall be forced upon the country as a political issue, it will become a distinct and naked issue between the friends and the enemies of the Constitution-the friends and the enemies of the supremacy of the laws."

Why this same Supreme court once decided a national bank to be constitutional; but Gen. Jackson, as President of the United States, disregarded the decision, and vetoed a bill for a re-charter, partly on constitutional ground, declaring that each public functionary must support the Constitution, "as he understands it ." But hear the General's own words. Here they are, taken from his veto message:

"It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816 decided in its favor. Prior to the present Congress, therefore the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial and executive opinions against the bank have been probably to those in its favor as four to one. There is nothing in precedent, therefore, which if its authority were admitted, ought to weigh in favor of the act before me."

I drop the quotations merely to remark that all there ever was, in the way of precedent up to the Dred Scott decision, on the points therein decided, had been against that decision. But hear Gen. Jackson further-
"If the opinion of the Supreme court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."

Again and again have I heard Judge Douglas denounce that bank decision, and applaud Gen. Jackson for disregarding it. It would be interesting for him to look over his recent speech, and see how exactly his fierce philippics against us for resisting Supreme Court decisions, fall upon his own head. It will call to his mind a long and fierce political war in this country, upon an issue which, in his own language, and, of course, in his own changeless estimation, was "a distinct and naked issue between the friends and the enemies of the Constitution," and in which war he fought in the ranks of the enemies of the Constitution.

I have said, in substance, that the Dred Scott decision was, in part, based on assumed historical facts which were not really true; and I ought not to leave the subject without giving some reasons for saying this; I therefore give an instance or two, which I think fully sustain me. Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.

On the contrary, Judge Curtis, in his dissenting opinion, shows that in five of the then thirteen states, to wit, New Hampshire, Massachusetts, New York, New Jersey and North Carolina, free negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had. He shows this with so much particularity as to leave no doubt of its truth; and, as a sort of conclusion on that point, holds the following language:
"The Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of the State. In some of the States, as we have seen, colored persons were among those qualified by law to act on the subject. These colored persons were not only included in the body of `the people of the United States,- by whom the Constitution was ordained and established; but in at least five of the States they had the power to act, and, doubtless, did act, by their suffrages, upon the question of its adoption."

Again, Chief Justice Taney says: "It is difficult, at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted." And again, after quoting from the Declaration, he says: "The general words above quoted would seem to include the whole human family, and if they were used in a similar instrument at this day, would be so understood."

In these the Chief Justice does not directly assert, but plainly assumes, as a fact, that the public estimate of the black man is more favorable now than it was in the days of the Revolution. This assumption is a mistake. In some trifling particulars, the condition of that race has been ameliorated; but, as a whole, in this country, the change between then and now is decidedly the other way; and their ultimate destiny has never appeared so hopeless as in the last three or four years. In two of the five States-New Jersey and North Carolina-that then gave the free negro the right of voting, the right has since been taken away; and in a third-New York-it has been greatly abridged; while it has not been extended, so far as I know, to a single additional State, though the number of the States has more than doubled. In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power

from the Legislatures. In those days, by common consent, the spread of the black man's bondage to new countries was prohibited; but now, Congress decides that it will not continue the prohibition, and the Supreme Court decides that it could not if it would. In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it. All the powers of earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.

It is grossly incorrect to say or assume, that the public estimate of the negro is more favorable now than it was at the origin of the government.

. . .

Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, or ever afterwards, actually place all white people on an equality with one or another. And this is the staple argument of both the Chief Justice and the Senator, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal-equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, nor for that, but for future use. Its

authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.

Now let us hear Judge Douglas' view of the same subject, as I find it in the printed report of his late speech. Here it is:

"No man can vindicate the character, motives and conduct of the signers of the Declaration of Independence except upon the hypothesis that they referred to the white race alone, and not to the African, when they declared all men to have been created equal-that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain-that they were entitled to the same inalienable rights, and among them were enumerated life, liberty and the pursuit of happiness. The Declaration was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country."

My good friends, read that carefully over some leisure hour, and ponder well upon it-see what a mere wreck-mangled ruin-it makes of our once glorious Declaration.

"They were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain!" Why, according to this, not only negroes but white people outside of Great Britain and America are not spoken of in that instrument. The English, Irish and Scotch, along with white Americans, were included to be sure, but the French, Germans and other white people of the world are all gone to pot along with the Judge's inferior races. I had thought the Declaration promised something better than the condition of British subjects; but no, it only meant that we should be equal to them in their own oppressed and unequal condition. According to that, it gave no promise that having kicked off the King and Lords of Great Britain, we should not at once be saddled with a King and Lords of our own.

I had thought the Declaration contemplated the progressive improvement in the condition of all men everywhere; but no, it merely "was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country." Why, that object having been effected some eighty years ago, the Declaration is of no practical use now-mere rubbish-old wadding left to rot on the battle-field after the victory is won.

I understand you are preparing to celebrate the "Fourth," tomorrow week. What for? The doings of that day had no reference to the present; and quite half of you are not even descendants of those who were referred to at that day. But I suppose you will celebrate; and will even go so far as to read the Declaration. Suppose after you read it once in the old fashioned way, you read it once more with Judge Douglas' version. It

will then run thus: “We hold these truths to be self-evident that all British subjects who were on this continent eighty-one years ago, were created equal to all British subjects born and then residing in Great Britain.”

And now I appeal to all-to Democrats as well as others,-are you really willing that the Declaration shall be thus frittered away?-thus left no more at most, than an interesting memorial of the dead past? thus shorn of its vitality, and practical value; and left without the germ or even the suggestion of the individual rights of man in it?

From https://teachingamericanhistory.org/document/speech-on-the-dred-scott-decision/