



Jurisprudence and How Judges Rule on Cases

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Objective

- This session will focus on how courts sometimes use ethics in their rulings more than following the rule of law.
- We will discuss how courts have become a critical part of the public policymaking process and whether they should be exercising discretion to make decisions which have far-reaching consequences in terms of the distribution of benefits and burdens within society.
- Furthermore, this session will discuss Supreme Court Justices' jurisprudence and what guides them in ruling the way they do. We will review some landmark Supreme Court cases and how Supreme Court Justices can be guided by ethics more than the law.

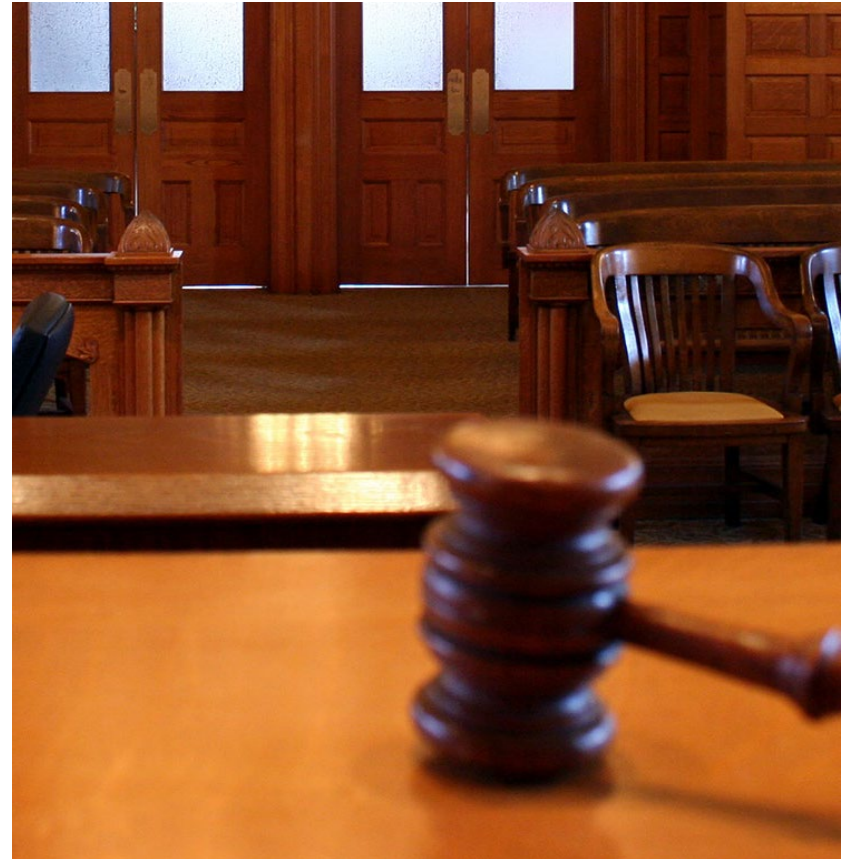
Jurisprudence


"the study, knowledge, or science of law; more broadly associated with the philosophy of law."



Jurisprudence


- What is law and why are laws written in the first place?
- Is a judge similar to a mathematician or a scientist applying autonomous and determinate rules and principles?
- Is a judge more like a legislator who simply decides a case in favor of the most politically preferable outcome?
- Must a judge base a decision only on the written rules and laws that have been enacted by the government?
- May a judge also be influenced by unwritten principles derived from theology, moral philosophy, and historical practice?



A hand is shown in the lower-left corner, holding a glowing, golden orb. The background is a soft, warm sunset or sunrise with a blurred horizon. The overall mood is serene and contemplative.

Theology, moral philosophy, and historical practice

- Theology: the study of the nature of God and religious belief.
- Moral philosophy: is the branch of philosophy that contemplates what is right and wrong. It explores the nature of morality and examines how people should live their lives in relation to others.
- Historical practice: is the practice of acting how precedent provides a basis for compromise and how the Court system typically works.



United States v. Schooner Amistad, 40 U.S. (15 Pet.) 518 (1841)

- Was a United States Supreme Court case resulting from the rebellion of Africans on board the Spanish schooner *La Amistad* in 1839. It was an unusual freedom suit that involved international issues and parties, as well as United States law.
- The historian Samuel Eliot Morison described it in 1969 as the most important court case involving slavery before being eclipsed by that of Dred Scott in 1857.

Amistad

On June 27, 1839, the Spanish ship *The Amistad* left the port of Havana, Cuba, with Captain Ransom Ferrer; two passengers, Jose Ruiz and Pedro Montez; and a total of 55 alleged slaves on board.

During the voyage, there was an uprising in which the slaves killed the captain and took possession of the ship.

On August 26, Lieutenant Thomas Gedney, of the American ship *Washington*, discovered *The Amistad* off the Long Island shore and brought all persons involved into the district court of Connecticut.

Ruiz and Montez claimed the slaves were their property and requested the relief of having their property released to them.

Amistad

- The alleged slaves argued that they were native-born, free Africans who had been unlawfully and forcibly kidnapped to be sold as slaves. The district court agreed and held that the alleged slaves should be delivered to the President of the United States to be transported back to Africa. The Circuit Court affirmed.

Amistad

- **Question**
- Are the alleged slaves the property of Ruiz and Montez?



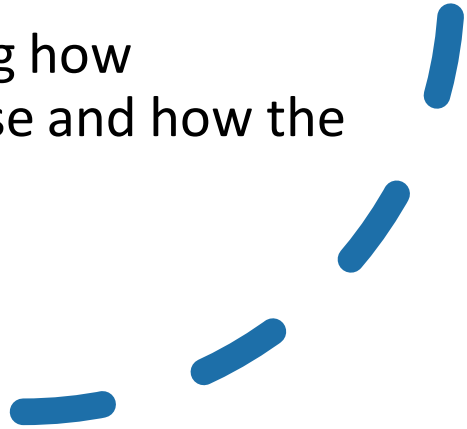
Amistad

- No. Supreme Court Justice Joseph Story delivered the opinion of the 7-1 majority. The Court held that the kidnapping and transportation of the alleged slaves was illegal because the laws of Spain forbid the slave trade and the importation of slaves into the dominions of Spain.
- Therefore, because the alleged slaves were not in fact slaves, they were kidnapped Africans who were unlawfully taken from their shores and detained on *The Amistad*.

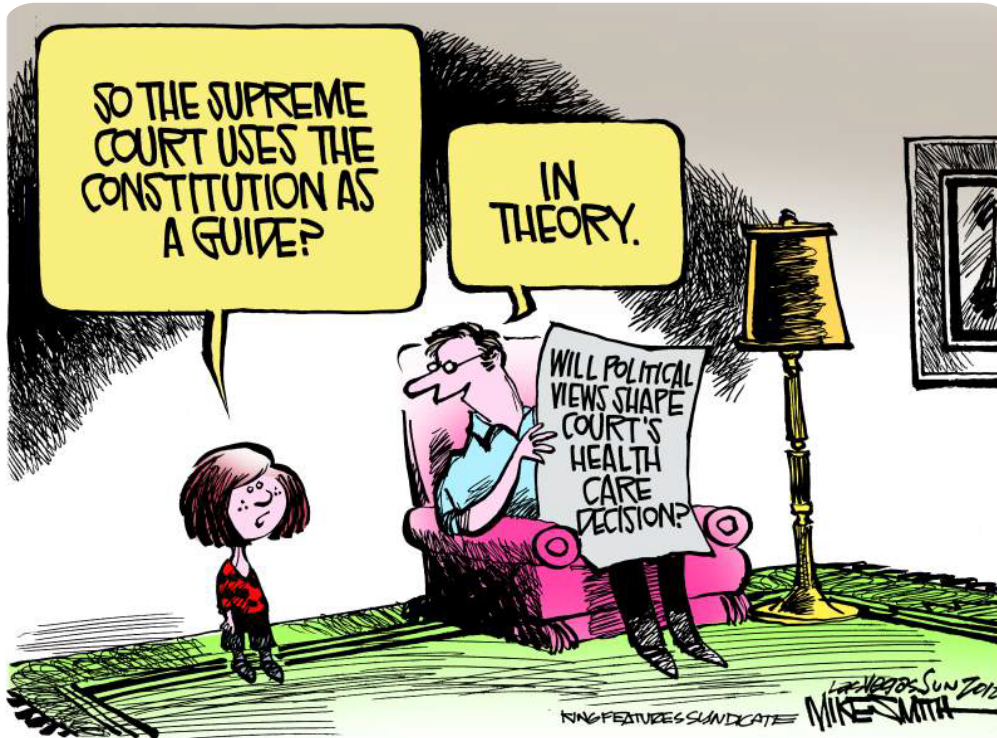
Amistad

- The United States is bound to respect the rights of the free Africans as much as the rights of the Spanish subjects, and therefore the Africans' rights to their own lives and liberty must supersede any obligations that Spain's treaty with the United States imposes to protect property rights.
- However, the Court also held that, when *The Amistad* arrived in American waters, it was under the control of the free Africans, who were clearly not importing themselves as slaves, so they need not be delivered to the President to be transported back to Africa.
- Instead, they should simply be declared free.

Questions about the Amistad Case

- Since there was no case law regarding the Amistad case, the Justices had to use other sources to come to their ruling.
 - Theology: the study of the nature of God and religious belief.
 - Moral philosophy: is the branch of philosophy that contemplates what is right and wrong. It explores the nature of morality and examines how people should live their lives in relation to others.
 - Historical practice: is the practice of acting how precedent provides a basis for compromise and how the Court system typically works.
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Judicial Activism



- *Black's Law Dictionary* defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."
- When there is no case law to guide a Judge, a Judge may use Judicial Activism.
- Even when there is case law to guide the Judge, a Judge may use Judicial Activism, if the case calls for it.

Judicial Activism



- Law professor and leading constitutional scholar, David A. Strauss, has offered his opinion that Judicial Activism can take at least three forms. These include:
- The act of overturning laws as unconstitutional
- Overruling judicial precedent
- Ruling contrary to a previously issued constitutional interpretation



Judicial Activism

A good example of the history of judicial activism is the 1954 case of *Brown v. Board of Education*.



Brown v. Board of Education

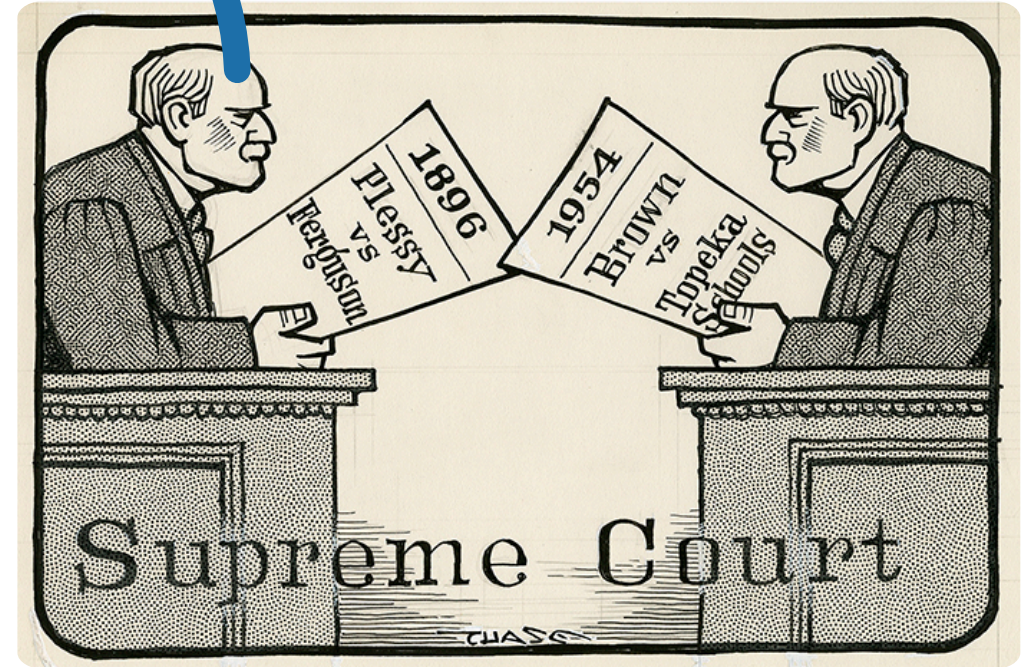
- The suit requested that the school district reverse its policy of racial segregation, in which the district operated separate schools for African American and Caucasian children. The plaintiffs in the case claimed that racial segregation resulted in inferior facilities, accommodations, and treatment of their children.

Brown v. Board of Education

- The District Court ruled in favor of the Board of Education, based on the prior ruling of *Plessy v. Ferguson*, a case that upheld state laws requiring segregated transportation on trains. When the parents appealed their case to the U.S. Supreme Court, the Court ruled that segregation of Whites and African Americans in school was indeed unconstitutional, as it was harmful to African American students.

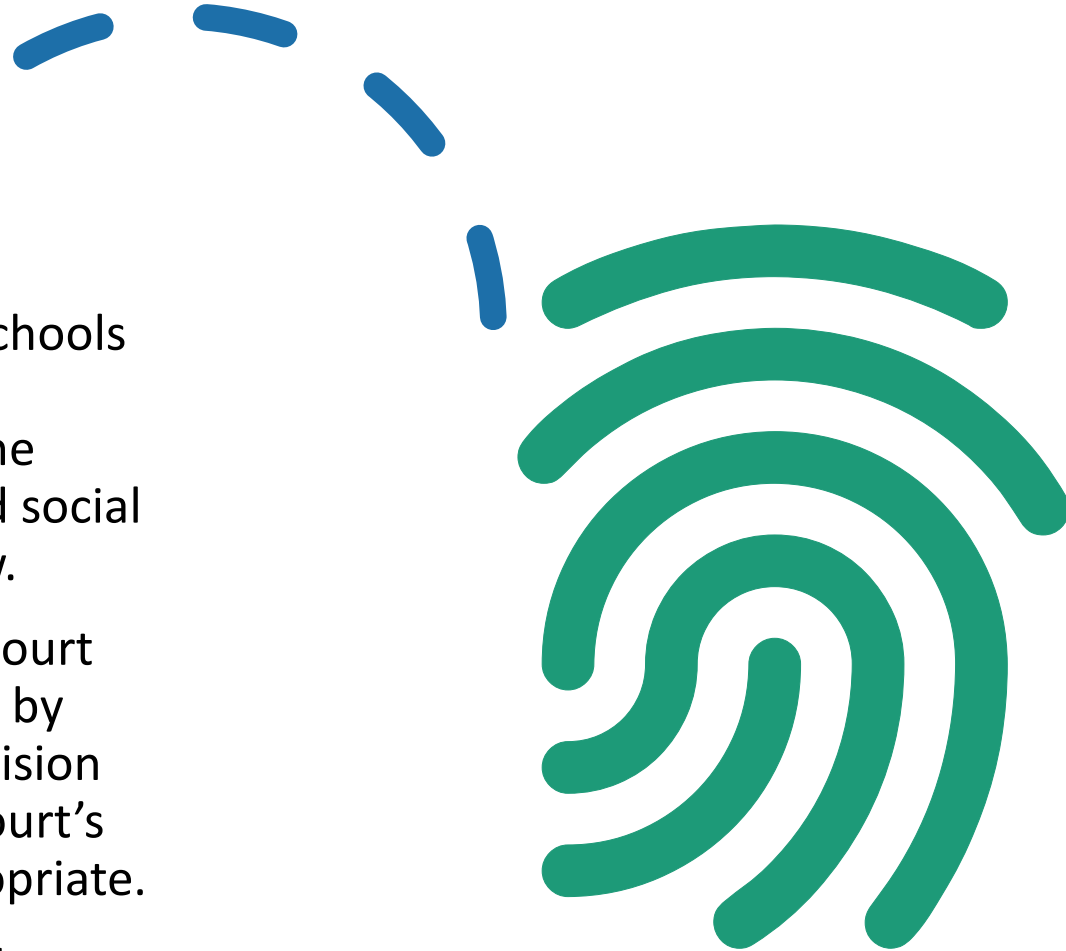
Brown v. Board of Education

- This ruling flew in the face of the legal doctrine of *stare decisis*, which requires judges to uphold prior rulings of higher courts. This is also referred to as “case precedent.” In this case, rather than relying on the ruling in *Plessy v. Ferguson*, which was a similar case, the Supreme Court overruled it.



Brown v. Board of Education

- This ruling on desegregation of public schools came with considerable resistance, as opponents of the ruling believed that the Court had relied on ethics, statistics and social theories, rather than on established law.
- This meant to them that the Supreme Court Justices had acted outside of its powers by creating new law. Supporters of the decision believed, on the other hand, that the court's exercising of judicial activism was appropriate.
- They argued that the court should use its power to adapt existing laws to address problems in current society.



Judicial Activism

- The judicial system in the United States is a system that provides courts with the power and authority to administer justice, though that justice must be within the bounds of the law.
- As some laws in the U.S. tend to be ambiguous or lacking in specific direction as applied to a particular case, the court system is also responsible for interpreting the laws, and ensuring they are applied correctly on both the state and federal levels.
- However, should Judges be able to interpret laws as they see fit?



Judicial Activism

- When a court does not confine its rulings to interpretations of the law that other reasonable judges would make, it may be seen as creating law from the bench, rather than applying existing laws. Similarly, Judicial Activism is sometimes seen in the form of making a ruling on an issue, creating public policy, that is not specifically brought to the court in a present case.



Do Judges Really Follow the Law?

- As previously stated, Judicial Activism is when a Judge uses a philosophy which motivates her/him to disregard the law and issue a decision based on her/his own political or personal beliefs.
- What are the negatives to Judicial Activism?
- What are the positives to Judicial Activism?

Do Courts Make Public Policy?

- The Supreme Court has the judicial power to interpret the law. This provides yet another method for the Supreme Court to make criminal justice policy.
- The Due Process Clause has proven very important in the Court's shaping of policy through this power. What exactly constitutes due process is extremely vague, and when the Court decides whether something is required by due process, they are in effect making policy.
- The evolution of police procedure during the Warren Court years is an enduring example of this policy-making power at work.



The evolution of police procedure during the Warren Court

- The Warren Court effectively ended racial segregation in U.S. public schools, expanded the constitutional rights of defendants, ensured equal representation in state legislatures, outlawed state-sponsored prayer in public schools, and paved the way for the legalization of abortion.





Do Courts Make Public Policy?

- In theory, Supreme Court justices should practice what constitutional scholars have called judicial modesty.
- Judicial modesty refers to the idea that justices should only strike down acts of the legislative branch when those laws are in direct conflict with a constitutional provision.
- There has been a historical trend of judicial self-restraint among at least some justices. These justices feel that policy is best left in the hands of the legislative and executive branches.
- Striking down a law merely because a majority of justices disagrees with the legislature is wrong under this doctrine.
- The way our system functions, there is nothing to stop the justices from doing this. Other justices take the position that the court should be active in cases of civil liberties and civil rights.
- When it comes to allowing political agendas enter into the judicial decision-making process, the justices must police themselves.

A photograph of several white marble columns in a courtroom, with a white circular graphic overlay on the right side containing text.

Do Courts Make Public Policy?

- Supreme Court justices, in theory, sit in order to interpret the law. This interpretation is, in reality, filtered through a political lens. No matter how well-meaning these justices may be, their perceptions of what is right in wrong in the law is impacted by their personal political beliefs.

Do Courts Make Public Policy?

- While there are always individual differences, a common way to divide the political leanings of the court is to use the terms **liberal** and **conservative** to describe both individual justices, the court in general, and particular decisions.
- Illustrations of **liberal decisions** are decisions favoring criminal defendants, people claiming discrimination, and those claiming violations of civil rights.
- Decisions that appear to favoring police, prosecutors, and other governmental entities are said to be **conservative**.



Do People
Make Public
Policy?



Gay Marriage

- On May 18, 1970, Jack Baker and Michael McConnell walked into a courthouse in Minneapolis, paid \$10, and applied for a marriage license. The county clerk, Gerald Nelson, refused to give it to them. Obviously, he told them, marriage was for people of the opposite sex and it was silly to think otherwise.



Gay Marriage

- When the clerk rejected Baker and McConnell's application, they sued in state court. Nothing in the Minnesota marriage statute, Baker noted, mentioned gender.
- And even if it did, he argued, limiting marriage to opposite-sex couples would constitute unconstitutional discrimination on the basis of sex, violating both the due process and equal protection clauses of the Fourteenth Amendment.
- He likened the situation to that of interracial marriage, which the Supreme Court had found unconstitutional in 1967, in *Loving v. Virginia*.

Gay Marriage

- When Baker appealed his case to the Supreme Court, the Supreme Court refused to hear the case, rejecting it with a single sentence: “The appeal is dismissed for want of a substantial federal question.” The idea that people of the same sex might have a constitutional right to get married, the dismissal suggested, was too absurd even to consider.



Gay Marriage

- In 2015, the Supreme Court declared that gays could marry nationwide. “Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions,” Justice Anthony Kennedy wrote in his sweeping decision in *Obergefell v. Hodges*. “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”
- The Constitution has barely changed since Baker appealed his case to the Supreme Court in 1970.
- How did the Supreme Court come up with a different ruling in 2015 from that of the Supreme Court in 1970?



Gay Marriage

- What changed, in other words, wasn't the Constitution—it was the country. And what changed the country was a movement.



Gay Marriage

- The decision wasn't solely or even primarily the work of the lawyers and plaintiffs who brought the case. It was the product of the decades of activism that made the idea of gay marriage seem plausible, desirable, and right.

A photograph of several classical marble columns with fluted shafts, standing on a polished floor. The columns are white with some yellowish staining, particularly on the lower parts. The image is partially obscured by a white, wavy-edged border on the right side.

Question

Was the Supreme Court decision based upon a violation of the Constitution or was it Judicial Activism?

What about when Judges refuse to employ Judicial Activism?

Supreme Court rules gay workers protected from job discrimination, in big win for LGBT rights

- The Supreme Court handed a big win to the LGBT community ruling in a 6-3 decision that an employer who fires a worker for being gay or transgender violates Title VII of the Civil Rights Act -- which already protected people from employer sex discrimination, as well as discrimination based on race, color, religion or national origin.



Supreme Court rules gay workers protected from job discrimination, in big win for LGBT rights

"Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee," said the court's opinion, written by Justice Neil Gorsuch.



Supreme Court rules
gay workers
protected from job
discrimination, in big
win for LGBT rights

Justice Samuel Alito said the majority went too far, calling the decision "legislation," in a dissent joined by Justice Clarence Thomas.

"There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive," Alito wrote.

Supreme Court rules gay workers protected from job discrimination, in big win for LGBT rights

Justice Brett Kavanaugh made a similar argument in a dissent of his own.

"Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court," he wrote.



Supreme Court rules gay workers protected from job discrimination, in big win for LGBT rights

- At the same time, Kavanaugh recognized the significance of the court's ruling for LGBT rights.
- "Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans," Kavanaugh wrote. "Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result."

Judicial Restraint

- “is a theory of **judicial** interpretation that encourages judges to limit the exercise of their own power. It asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional, though what counts as obviously unconstitutional is itself a matter of some debate.”

judicial restraint

a type of conservative legal decision that is made solely according to the law and by legal precedent



Judicial Restraint

- Judges who believe in judicial restraint place a great deal of weight on using the wording of the law and Constitution, rather than what they believe the legislators intended during their construction, to guide their interpretation. This is also known as “strict constructionism.”



Question

- Should Judges exercise Judicial Restraint or do they have more of a duty to abide by what a majority of the People want if that is what the majority wants?
- What about 2nd Amendment rights, where Gun Control and 2nd Amendment rights are about equally divided?
- What about a woman's right to choose?

Judicial Restraint Example

- In January 2015, star member of the swim team at Stanford University, Brock Turner, dragged a drunk woman behind a dumpster and violently raped her. Two other men, who happened by the scene, stopped the rape, chasing Turner away, and took the victim to medical care. Turner was charged with a number of felony crimes and tried in early 2016. Having been provided hard evidence, and eyewitness testimony, the jury convicted Turner of:
- Assault with intent to commit rape of an intoxicated woman
- Sexually penetrating an intoxicated person with a foreign object
- Sexually penetrating an unconscious person with a foreign object





Judicial Restraint Example

- The charges, which did not include the word “rape” by the letter of California law, were enough to make the public cry foul, even before the Judge handed down his sentence. Public outrage flared when Judge Aaron Persky sentenced this white student athlete from a prominent white family to just six months in jail.
- Even as Turner’s father railed against this sentence, which requires his son to register as a sex offender for the rest of his life, millions of people questioned how the Judge could render such a light sentence for this horrific crime. As it turns out, Judge Persky had, according to judicial restraint, followed the letter of California law.



Judicial Restraint Example

- When the prosecutor announced he had no plan to appeal the sentencing, the public reacted strongly again. According to law, the prosecution can only challenge a sentence that is somehow unlawful. The truth is, Judge Persky's decision followed the law, as well as the probation department's sentencing recommendation, and so did not abuse his discretion in rendering the extremely light sentence.



Question

- Was the sentence in the Brock Turner case fair and just?
- What would the argument be that the Judge was right in this case?
- What danger do we see if Judges do not follow the letter of law?



Supreme Court Justices' jurisprudence

- Richard Allen *Posner* is an American jurist and economist who stated, “the Supreme Court is a ‘political court’ and is different in degree than other courts for many reasons, including that it defines its own caseload, picks the most politically charged cases, and pretends to make decisions based on vague text and contested history, when in fact what the justices are doing is deciding cases based on their personal values.”



Justice Ginsburg

Justice Ginsburg

- Ginsburg characterizes her performance on the court as a cautious approach to adjudication.
- Liberal Justice.
- Liberalism – “political doctrine that takes protecting and enhancing the freedom of the individual to be the central problem of politics. Liberals typically believe that government is necessary to protect individuals from being harmed by others, but they also recognize that government itself can pose a threat to liberty.”

Justice Scalia



Justice Scalia

- Clear lines of separation among the legislative, executive, and judicial branches follow directly from the Constitution, with no branch allowed to exercise powers granted to another branch.
- Conservative Justice.
- Conservatism - reject the optimistic view that human beings can be morally improved through political and social change.

President Reagan

- “The role assigned to judges in our system was to interpret the Constitution and lesser laws, not to make them. It was to protect the integrity of the Constitution, not to add to it or subtract from it—certainly not to rewrite it. For as the framers knew, unless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.”

President Obama

- “I think we can say that the Constitution reflected an enormous blind spot in this culture that carries on until this day, and that the Framers had that same blind spot. I don’t think the two views are contradictory, to say that it was a remarkable political document that paved the way for where we are now, and to say that it also reflected the fundamental flaw of this country that continues to this day.”

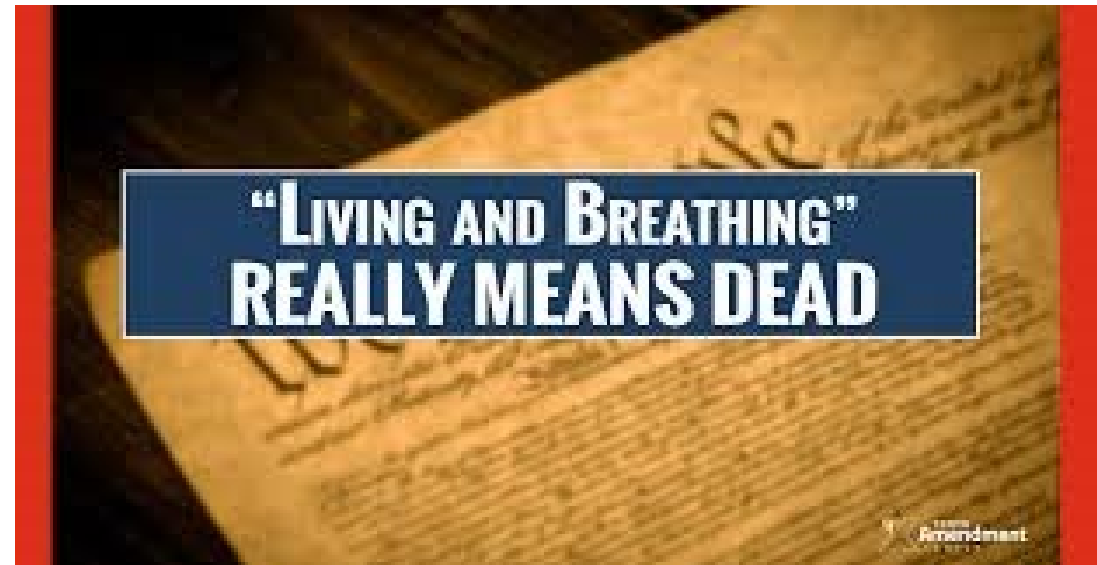
The United States Constitution Living or Dead?

The U.S. Constitution is a Dead Document: We've got to decide cases based on what the Constitution said and what it meant at the time it was written. Otherwise, the Supreme Court is making up the law; they're changing the Constitution.

The U.S. Constitution is a Living Document: The Constitution is a living document that must change with the times. The Founding Fathers did not know how the 21st Century would be when they wrote the Constitution.

Question

- Is the U.S. Constitution a living or dead document?
- What is the danger of saying it is a dead document?
- What is the danger of saying it is a living document?



Scalia vs. Ginsburg

- Essentially, that feud is about whether the Constitution is, as Scalia has put it, "dead" — that it means what the Founding Fathers said it meant at the time it was adopted. Or whether it is a "living" document, according to Ginsburg that the founders meant to adapt to the times.





Scalia vs. Ginsburg

- Scalia rejected Ginsburg's argument that the Constitution is "living," contending that to allow our founding document to adapt to the times would render it "subject to whimsical change by five of nine votes on the Supreme Court."
- Ginsburg countered that Scalia's "originalist" approach is not faithful to the idea of "We the people." The Constitution, she maintained, has to expand to cover more than the "white, property-owning men" who once were "We the People."

The Constitution is a dead document

- The Constitution is not a dynamic document. It was not meant to be interpreted in a way to achieve a desired policy-based outcome. The authors did not intend for it to be changed every time there was a swing in popular opinion. The legislative branch of government is filled with officials directly elected by the people serves that purpose.
- The genius of the United States Constitution is that it was constructed to withstand the test of time. There are ways to add amendments, but the process is extremely difficult for the reason that it was not intended for it to be easily changed.
- The Constitution withholds power from the government and gives it to the people. Altering it to give the government more power will be an ultimately irreversible act that can be detrimental to individual liberty.



The Constitution is a living document

- **The brevity of the document:** the Framers wanted to keep the Constitution accessible to Americans of all backgrounds. In other words, if the Framers didn't intend for the Constitution to be a living document, we wouldn't have a Constitution small enough to fit in our pocket.
- **The ambiguity of its language:** the Framers simply wanted to ensure that the Constitution had the flexibility to adapt to changing circumstances. When the Constitutional Convention's Committee of Detail met together to write the first draft of the Constitution, for example, framer Edmund Randolph advised his fellow Committee members "to insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."
- **Intent:** If the framers *really* wished for their intentions to control future interpretations of the Constitution's text, one would expect them to have kept a detailed recording of their deliberations in Philadelphia, just like Congress compiles a "legislative history" to guide future interpretation of the statutes they pass. The framers, however, declined to keep an official record of their deliberations in Philadelphia, and kept their proceedings secret from the public. This way, they ensured that future generations would not be trapped under the weight of their "original intent."

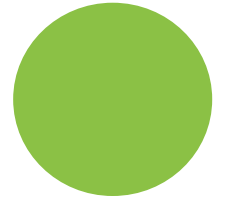
Jurisprudence

- Judges have a serious role. They interpret law, analyze law and sometimes even write law.
- Morals and values can sway any individual in what decision she/he makes.
- When Judges use their morals and values to render a ruling or decide upon a case, the question becomes are the Judge's morals and values in line with society's morals and values?



Contact me

- I am on LinkedIn and Facebook, so please feel free to send me a request to connect on LinkedIn or a friend request on Facebook. I use both for networking purposes and a way to stay in touch. (My email for LinkedIn is johnabermingham@aol.com). Additionally, my Facebook page is www.facebook.com/john.bermingham.7737
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Questions
