Case Briefs on Constitutional Law

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From the Author

I wrote the following briefs while taking the first-year course in constitutional law at Columbia Law School. The briefs are keyed to *Processes of Constitutional Decisionmaking*, 5th edition, by Brest et al. Most briefs consist of five sections: (1) an overview stating the nature of the case; (2) a summary of the facts, (3) the legal issue to be addressed; (4) the court's resolution of the issue, and (5) the reasoning used to reach the court's conclusion. Owing to differential coverage of material, some cases appear as abbreviated "squibs" rather than full-length briefs. In such instances, I have striven to capture the essence of the case without adverting to too much information not contained within the book.

—Y. H.
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Thanks

I'd like to thank the many software developers who contributed their time and effort to making OpenOffice. This project would not have been possible without the fruits of their labor.

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Constitutional Argument

McCulloch v. Maryland, Part I
17 U.S. 316 (1819)

Overview

A dispute arose as to whether Congress had the power to incorporate the second Bank of the United States.

Facts

The embarrassments that followed the dissolution of the first Bank of the United States spurred Congress to charter the second Bank of the United States. One of its branches was located in Maryland, which took issue with its presence. The Maryland legislature enacted a law levying a tax on out-of-state banks, and the only bank that fit the description was the Bank of the United States. McCulloch, the administrator of the Bank, refused to pay the tax. The dispute resulted in a lawsuit.

Issue

Did Congress have the power to incorporate the Bank?

Holding

Congress had power to incorporate the Bank.

Reasoning

Maryland argues that Congress had no power to incorporate the Bank on the grounds (1) that sovereignty lies with the states and (2) that the Necessary and Proper Clause does not permit Congress such great leeway in the administration of the nation's affairs. Both lines of reasoning lack merit. The Constitution was submitted to the people, not the states, for ratification. It was the people of the United States, and not the states themselves, who chose to adopt the Constitution as the supreme law of the land. Although necessity dictated that the ratification conventions be held in the individual states, such incidental circumstances give no support to the argument that consent to be governed by the Constitution actually came from the states.

Maryland contends in the alternative that Congress had no power to incorporate the Bank because such a power of incorporation does not appear among the enumerated powers of the federal government. This argument, however, makes the mistaken assumption that any power must first be enumerated before Congress can make use of it. The Necessary and Proper Clause was written specifically to avoid the difficulties and embarrassments that would result from such a stringent requirement. Incorporation is not a power in itself; it is only the means that Congress has chosen to administer the finances of the country.

Maryland finally argues that the Necessary and Proper Clause really means that Congress is prohibited from incorporating the Bank unless it were absolutely necessary. This reading of the Clause, however, contradicts the plain meaning of "necessary" and blatantly disregards the structure of the Constitution. "Necessary" is generally taken to mean "convenient" or "conducive"; that this meaning was intended is clear from the use of that word in conjunction with "proper." Had the Framers intended to impose strict limits on the meaning of the term, they would surely have used the phrase "absolutely necessary," as they did in the case of imposts and duties. Furthermore, the location of the Clause shows that the Framers intended it as a grant of, and not a limitation on, congressional power. Limitations on powers under the Clause would almost certainly have been set forth elsewhere in the Constitution.

The Judicial Power

Chisholm v. Georgia
2 U.S. (2 Dall.) 419 (1793)

Squib. Two British creditors sued the State of Georgia for debts the state had incurred. Although Georgia had not waived its sovereign immunity, the Supreme Court held that Georgia could nonetheless be liable. The decision set off a wave of protest across the states, which eventually led to the adoption of the Eleventh Amendment.

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803)

Overview

A dispute arose as to the disposition of certain judicial appointments made by John Adams.

Facts

By the end of the Adams administration, it had become clear that political power was moving from the hands of the hitherto-dominant Federalists to those of the Democratic Republicans. In an attempt to entrench Federalist influence in the judiciary, John Adams appointed the so-called Midnight Judges, among whom was Marbury. Although Adams had already signed and sealed the commission appointing Marbury as a justice of the peace in the District of Columbia, there was no time to deliver the letter before the Jefferson administration took office. When the duty to deliver the letter devolved upon James Madison, Madison flatly refused to make the deliveries. Following stonewalling by Madison, Marbury sued for his appointment.

Issue

(1) Does Marbury have a right to the commission? (2) If he has such a right, does the law afford him a remedy? (3) If he has a remedy, should that remedy be a writ of mandamus from the Supreme Court?

Holding

(1) Marbury has a right to the commission. (2) Marbury has a legal remedy. (3) That remedy is not a writ of mandamus from the Supreme Court.

Reasoning

(1) There can be no doubt that the appointment was finalized when the president signed and sealed the letter. Since the appointment is irrevocable, that moment marked the end of all executive power over the choice of Marbury for the position. From that moment on, the discretion to accept or reject the appointment lay solely with Marbury. The delivery of the commission is irrelevant. Such delivery is simply a ministerial duty to be carried out by the secretary of state. The commission might arrive sooner or later as circumstances dictate, but the conveyance of the document itself has no impact on the validity of the appointment.

(2) Although there are certain acts that fall outside the scope of judicial review, the delivery of the commission is not such an act. The president, in choosing the individuals to appoint, exercises discretion subject to review only in the political, rather than judicial, arena. Once that power has been exercised, however, the appointee has a right to his position. President Adams, having decided to appoint Marbury, had exercised the full extent of his power. The appointment imposed upon Madison a legal duty to deliver the commission. The failure to do so gives rise to a remedy.

(3) Marbury maintains his suit on the ground that the Judiciary Act of 1789 grants this Court the power to issue writs of mandamus to officers such as Madison. The Act, however, conflicts with Article III of the Constitution insofar as the former authorizes this Court to exercise

original jurisdiction in the current case whereas the latter authorizes it to exercise only appellate jurisdiction. When a law conflicts with the Constitution, it is the law that must be declared invalid. To allow a law to intrude upon the domain of the Constitution would negate the entire purpose of the Constitution, which is to be the supreme law of the land. Given that the Act is invalid on this ground, a writ of mandamus cannot issue.

Martin v. Hunter's Lessee
14 U.S. 304 (1816)

Squib. A dispute arose as to the preemption of Virginia statutes by federal treaties. In the subsequent decision, the Virginia Court of Appeals held that part of the Judiciary Act of 1789 was unconstitutional. The Supreme Court reversed. Justifying its authority to review the judicial opinions of states, the Court said that deference to the its decisions was a necessary check against the prejudices and biases of individual states, which might otherwise run rampant. Furthermore, the Court stressed the importance of its own function as the final arbiter in resolving differences in legal interpretation among the states.

Cohens v. Virginia
19 U.S. 264 (1821)

Squib. A dispute arose as to whether the Supreme Court had appellate jurisdiction over criminal cases. The Court held that it did. Explaining its decision, the Court said that many sovereign powers of the states had been curtailed when they entered the Union. Among the curtailed powers were those to make war, to regulate commerce, and so forth. To hold otherwise would be to submit the federal government to the will of the states, which might administer federal laws as they saw fit. The Constitution cannot possibly be construed to permit the states to undermine the integrity of the Union.

Antebellum Federalism

McCulloch v. Maryland, Part II
17 U.S. 316 (1819)

Note. The overview and facts have been stated in Part I.

Issue

May Maryland tax the second Bank of the United States?

Holding

Maryland may not tax the Bank.

Reasoning

The power to tax is the power to destroy. Left unchecked, taxation of federal institutions by the states might undermine the federal government entirely. Although Maryland correctly observes that the states have broad discretion in levying taxes within their respective territories, it is equally important that the Constitution has limited the states' power of taxation in crucial respects. The states, for instance, are forbidden from levying imposts or duties except what may be absolutely necessary. Such limitations are intended to assure the supremacy of the federal government. The federal government is supreme because it was formed by the people of the entire United States, not by the people of any single state. The decision whether to tax a federal institution such as the Bank therefore lies with the national legislature. Allowing Maryland to tax the Bank would allow the people of a single state to influence an institution that requires the consent of all. Such a state of affairs is unacceptable, as the people of any one state could not be imagined to entrust

even the most minor functions of their own state government to another state. It is also no argument to say that the states can be trusted to restrict taxation to certain institutions. Those advancing this argument have stated no basis on which one might distinguish taxable institutions from non-taxable ones. Maryland has exceeded its authority in attempting to tax the operations of the Bank itself, as opposed to property held by the Bank.

Gibbons v. Ogden
22 U.S. 1 (1824)

Overview

A dispute arose as to the regulation of the operation of steamboats by the State of New York.

Facts

New York had granted Robert Livingston and Robert Fulton the exclusive right to operate steamboats between New York and New Jersey. Livingston and Fulton then assigned this right to Ogden. When Gibbons established competing steamboat routes, Ogden sued for enforcement of his monopoly rights. Gibbons responded by stating that a federal statute authorized him to navigate the routes in question.

Issue

Should Gibbons be allowed to operate his steamboats notwithstanding the monopoly granted by New York?

Holding

Gibbons should be allowed to operate his steamboats.

Reasoning

Marshall, C.J. In attempting to create a monopoly on interstate navigation, New York has intruded upon powers reserved to Congress under the Commerce Clause. The Clause states that Congress has the power to regulate "commerce" without qualifying the grant of power with any restrictions. Ogden therefore takes an overly narrow view of the Clause in arguing that "commerce" should be interpreted to refer only in the traffic of goods as contrasted with navigation in general.

Unlike the power of taxation, the power to regulate interstate commerce in this case cannot be exercised concomitantly and harmoniously by the states and the federal government. In taxation, a state may take its share of the economic output without interfering with the federal government's ability to take from the remainder. In the current case, New York's attempted regulation of navigation has brought its state law into conflict with a federal statute. In such a case, the federal statute must prevail.

Johnson, J. The nature of the power to regulate commerce is such that its grant to Congress must be plenary, leaving no residual power to the states. It is important to note, however, that identity of means does not necessarily imply identity of power. Federal statutes may act on navigation with the end of regulating commerce while state statutes may act on the same navigation with a view toward preventing the spread of disease. No conflict exists as long as the states and the federal government use regulations for sufficiently distinct ends.

Wilson v. Black-Bird Creek Marsh Co.
27 U.S. (2 Pet.) 245 (1829)

Squib. Delaware incorporated the Black-Bird Creek Marsh Company for the purpose of damming a creek. Wilson, who operated a boat, challenged the constitutionality of the Company on the ground that Delaware, in having the creek dammed, had intruded upon the congressional authority to regulate interstate commerce. The Supreme Court held that the Company did not constitute an infringement of congressional power under the Commerce Clause. Given that Congress had enacted no statute designed to limit the states' power to dam creeks, Delaware's decisions did not amount to interference with the regulation of interstate commerce.

Mayor of New York v. Miln
36 U.S. 102 (1837)

Overview

Miln challenged the constitutionality of a New York law regulating the entry of persons into the state.

Facts

To combat the flood of poor immigrants arriving in New York, the New York legislature had enacted a statute imposing financial burdens and other responsibilities upon the captains of ships bringing passengers to New York. The captains of such ships were required, among other things, to post security for passengers who might become dependent on the state. Miln sued to recover a substantial fine incurred after a violation of the statute.

Issue

Is the New York law an unconstitutional attempt to regulate interstate commerce?

Holding

The law is not an unconstitutional attempt to regulate interstate commerce.

Reasoning

Barbour, J. The New York statute is plainly an exercise of police power that does not interfere with the congressional power to regulate interstate commerce. The statute does not concern itself with the interstate transportation of people. To the contrary, its provisions take effect only after the passengers of a ship have debarked in the state. It was passed for the benefit of the people of New York. The statute therefore resembles inspection and quarantine laws, which the courts have consistently regarded as legitimate exercises of the police power. The facts make it plain that New York has a pressing interest in controlling the arrival of immigrants in its cities, which are already swelling with the poor. More importantly, the statute addresses a right that falls within the category of those that have not been granted to Congress. Since the Constitution has not restrained the states' power to regulate the matter currently under consideration, New York should be accorded full discretion in this case.

Thompson, J. Since Congress has not acted to restrict state legislation on the issue under consideration, there is no need to decide the extent to which Congress and the states may concomitantly exercise the power to regulate commerce. Such a decision need not be made until a conflict arises.

Story, J., dissenting. The effects of the statute show that it indeed amounts to a regulation of interstate commerce. New York does not merely attempt to regulate the presence of persons within its own territory; it imposes a burden on ships leaving from foreign ports by requiring their captains to gather and provide information on the passengers. Indeed, it has already been conceded that the same statute, if enacted by Congress, would undoubtedly qualify as a regulation of interstate commerce. The argument in favor of the statute seems to be that its additional existence as an exercise of police power allows it to comport with the Constitution. If this argument were upheld, then states would be free to supplement federal regulations with their own laws. This, in turn, would bring about the unacceptable result of subjecting interstate commerce to regulation by dual sovereignties.

The Passenger Cases
48 U.S. 283 (1849)

Squib. The Supreme Court struck down legislation in New York and Massachusetts that required the operators of ships to pay landing fees for their passengers in order to fund the support of paupers. The Court, however, did not make any substantial move toward abolishing state regulation of immigration. Even as it struck down the particular means employed by the two states, it allowed the states to continue regulation of immigration through bonds and other instruments.

Cooley v. Board of Wardens
53 U.S. 299 (1852)

Overview

A dispute arose as to Pennsylvania laws governing the navigation of its waterways.

Facts

Pennsylvania had enacted a law requiring ships navigating its waterways to employ local pilots. The rationale of the law was to improve the safety of navigation. Failure to comply with the law resulted in a fine. When Cooley failed to hire a local pilot for one of ships and subsequently refused to pay the fine, the Board of Wardens sued.

Issue

Does the Pennsylvania law amount to an unconstitutional regulation of interstate commerce by a state?

Holding

The law does not amount to an unconstitutional regulation of commerce.

Reasoning

Curtis, J. Although the Commerce Clause authorizes Congress to regulate interstate commerce, one should not blindly construe the Clause to mean that the Constitution leaves no regulatory power to the states. In some cases, it is advisable that one uniform system should be established throughout the country. In such cases, the regulatory power devolves upon Congress. In other cases, however, local regulation would be more advisable. Since Congress has taken no action to regulate the particular aspects of navigation currently in question, the regulatory power should be allocated to the state.

McLean, J., dissenting. The Court's decision opens the door to rampant interference with interstate commerce by the states. There is nothing to stop every state along a river from regulating its portion of the river as it sees fit.

SLAVERY

Groves v. Slaughter
40 U.S. 449 (1841)

Squib. The Mississippi Constitution included a provision that arguably prohibited the importation of slaves from other states. Little doubt existed as to its purpose, which was to provide economic protection to local slave traders from out-of-state competition. From a constitutional standpoint, the difficult problem was distinguishing the economic protectionism of the Mississippi Constitution from other state laws that likewise prohibited the importation of slave, but on abolitionist grounds. If either was struck down as an unconstitutional state regulation of interstate commerce, then logic seemed to dictate that the same fate should befall the other. The majority opinion artfully avoided this nettlesome question.

McLean, J., concurring. Given that slavery is local in its effects, the states should be able to regulate their respective slave trades. The states have an interest in making sure that the slave population does not become a threat to the general public.

Taney, C.J. Justice McLean correctly concludes that the power to regulate slavery should rest with the states.

Baldwin, J. A state may abolish slavery entirely, but it may not maintain slavery within its own borders and simultaneously attempt to regulate the interstate slave trade. A state may regulate slavery within its own borders to any extent it desires, but it cannot purport to extend such regulations to trade with other states. The Privileges and Immunities Clause requires that states treat each other on equal footing.

Prigg v. Pennsylvania
41 U.S. 539 (1842)

Overview

A dispute arose as to a conflict between the Fugitive Slave Act of 1793 and a Pennsylvania statute.

Facts

Nathan Bemis had technically gained through inheritance the ownership of a slave, Margaret Morgan. By the time the inheritance took effect, however, Morgan had become, for all practical purposes, a free woman. Although Morgan had been a slave in Maryland, her owner had informally set her free shortly before his death. Morgan then married a free black man; the couple moved to the free state of Pennsylvania, where they started a family. Bemis, evidently intent on repossessing Morgan, engaged Prigg and several others to capture Morgan and her family in accordance with the Fugitive Slave Act. Although the initial capture was successful, there arose some question as to whether the local Pennsylvania court had jurisdiction over the question of Morgan's status. While the issue was still being resolved, Morgan and her children were sold as slaves. The sale engendered public outrage in Pennsylvania, which demanded that Prigg be tried for violating Pennsylvania law.

Issue

May Pennsylvania impose regulations of slavery in addition to those provided by the Fugitive Slave Act?

Holding

Pennsylvania may not impose such additional regulations.

Reasoning

Story, J. The Fugitive Slave Clause expressly requires each state to deliver fugitive slaves to their owners. The Clause therefore plainly authorizes Prigg to engage in the sort of self-help currently under question. Moreover, the Clause implicitly requires states to refrain from interfering with the capture of escaped slaves, such as through the Pennsylvania law. The power to regulate the handling of fugitive slaves rests with Congress alone; the states may not enact additional legislation to supplement what Congress has decided. The history of the Constitution supports this construction since it is scarcely conceivable that the slave states would have allowed free states the power to interfere with property rights in slaves through state-level legislation.

Taney, C.J., concurring. The states should be allowed to aid owners in recovering fugitive slaves. The Fugitive Slave Act merely prohibits states from passing any law interfering with the recapture of slaves. It says nothing about legislation to designed to actively aid slave owners. Indeed, it is the duty of the states to provide such aid.

McLean, J., dissenting. The issue here is not whether an owner may recover his slave from another; it is whether the owner may remove the slave from that state without a judicial determination of his rights over the slave. Pennsylvania, being a free state, acts on the assumption that every person of color is free. This assumption should receive deference; a purported slave owner should not be allowed to remove a purported slave from the state until the courts have determined that it is indeed proper to do so.

Dred Scott v. Sandford
60 U.S. (19 How.) 393 (1857)

Overview

A dispute arose as to whether Dred Scott had standing to sue for his freedom.

Facts

Dred Scott had been the slave of Emerson, an Army officer. In performing his duties, Emerson had traveled to various parts of the country, taking Scott with him wherever he went. For some time, Emerson was stationed north of the line drawn by the Missouri Compromise. Scott later sued on the theory that he had gained his freedom by setting foot in free territory.

Issue

May Scott sue for his freedom?

Holding

Scott may not sue because he is neither a citizen of Missouri nor a citizen of the United States.

Reasoning

Taney, C.J. The text and history of the Constitution point forcefully to the conclusion that persons descended from slaves should not be considered citizens. The Constitution itself authorized the slave trade until 1808. Prior to that year, the states and the British colonies that predated them had actively engaged in the slave trade. Society assumed that slaves were not persons but property. State laws reinforced this notion, chiefly by prohibiting marriage between white persons and persons of color. Slaves were excluded from the population for certain purposes, such as determining each state's obligation to raise militias. Although the Constitution occasionally refers to "people" in the general sense, history makes clear that this term could not have been intended to include slaves.

Recognizing Scott as a citizen of Missouri or a citizen of the United States would lead to dire results. The Constitution has plainly conferred the power of naturalization on the federal government. Naturalization, as stated therein, was intended to apply only to persons arriving from foreign countries. It would be absurd to think that the Framers, who so strictly constrained this power in its application to foreign immigrants, would intentionally have left to the states the power to confer citizenship upon the

much more numerous class of slaves. It is also no solution to recognize Scott as a citizen of Missouri only; if that were the case, then the Privileges and Immunities Clause would force every other state to recognize his rights of citizenship as well. The consequence would be effacement of the well-recognized difference between slaves and free persons.

Curtis, J., dissenting. To determine whether a person is a citizen of the United States or a particular state, one need only consider whether that person was born of free parents at the time of the adoption of the Constitution. Nothing in the Constitution suggests that the rights of citizenship, having been so conferred, can subsequently be taken away. The Court's fears of the consequences under the Privileges and Immunities Clause are also unfounded. There is nothing to suggest that a citizen must automatically be accorded every right of citizenship.

RECONSTRUCTION

Corfield v. Coryell
6 F. Cas. 546 (1823)

Squib. A dispute arose as to whether New Jersey could prohibit out-of-state persons from gathering clams and oysters from the state's waters. The court held that this right was not protected by the Privileges and Immunities Clause.

Washington, J. The Privileges and Immunities Clause guarantees to each person only those rights that are essential to citizenship. These rights include the right to habeas corpus, the right to dispose of property, the right not to be charged higher taxes than in-state residents, and so forth. The Clause, however, cannot be supposed to grant to out-of-state persons every right incident to being the resident of a particular state.

The Slaughterhouse Cases
83 U.S. 36 (1873)

Overview

A dispute arose as to the constitutionality of a state-controlled monopoly on slaughterhouses.

Facts

Louisiana had passed a statute requiring all butchers within the city of New Orleans to perform their slaughtering at a designated slaughterhouse. The statute effectively established a state monopoly on the operation of slaughterhouses. The statute was challenged on the theory that it amounted to an infringement of the privileges and immunities guaranteed by the Fourteenth Amendment.

Issue

Does the establishment of a state monopoly on slaughterhouses infringe the privileges and immunities guaranteed by the Fourteenth Amendment?

Holding

The state monopoly does not so violate the Fourteenth Amendment.

Reasoning

Miller, J. A state undoubtedly may exercise its police power to regulate noxious trades such as the operation of slaughterhouses. Such regulations cannot be said to conflict with the Fourteenth Amendment. In particular, the Amendment draws a distinction between the privileges and immunities arising from citizenship in a particular state and those that arise from citizenship in the United States. The Amendment protects only the latter. It cannot be thought that the Amendment was intended to remove all regulation of privileges and immunities to the federal domain. Rather, the federal priv-

ileges and immunities include only the right to peaceably assemble and petition for redress, to use navigable waterways, and so forth. All other rights are properly subject to regulation by the states. Any other holding would drastically alter the balance between state and federal power.

Field, J., dissenting. Although Louisiana may exercise its police powers, the establishment of the monopoly goes beyond any legitimate purpose to promote public health or morals. The state was within its power to command that slaughtering should take place downstream from New Orleans and that animals should be inspected prior to slaughter. These ends, however, do not necessitate the formation of a monopoly held by a private corporation. Nothing suggests that the health regulations would be better served by a monopoly than by multiple independent actors.

Bradley, J., dissenting. The Fourteenth Amendment, like the Magna Carta, is intended to protect certain essential rights. These rights include the right to pursue one's calling or profession. In restricting the ability of butchers to engage in their trade outside the terms of the state-granted monopoly, Louisiana has infringed the fundamental rights of its citizens.

Swayne, J., dissenting. Prior to the Civil War, amendments to the Constitution were intended mainly to protect rights from infringement by the federal government. The Fourteenth Amendment makes it clear that such rights are to be protected from infringement by the states as well. The Court has taken an overly narrow view of the Amendment.

Bradwell v. Illinois
83 U.S. 130 (1873)

Squib Myra Bradwell sued the State of Illinois for refusing to grant her a license to practice law solely on account of her being female. Bradwell argued that a woman's right to practice law was one of the privileges and immunities guaranteed by the Fourteenth Amendment. The Court, however, disagreed.

Miller, J. The decision whether to admit an individual to a state's bar in no way rests on the question of citizenship. Even if citizenship were allowed to be a criterion, the application of that criterion should rest with the respective states.

Bradley J., joined by Swayne and Field JJ, concurring. Although the Fourteenth Amendment guarantees certain privileges and immunities, these privileges and immunities cannot be said to include the right of women to practice law. History shows that men and women have always occupied separate spheres and that women have been properly allocated domestic duties. This natural balance has been reflected in the law, which prevents a married woman from making a contract without her husband's consent. The settled order should not be upset.

Minor v. Happersett
88 U.S. 162 (1874)

Overview

A dispute arose as to whether a state could deny women the right to vote.

Facts

Virginia Minor attempted to register to vote in Missouri. After the state turned her away, she sued on the ground that it had violated the Fourteenth Amendment.

Issue

Is the right to vote one of the privileges and immunities guaranteed by the Fourteenth Amendment?

Holding

The right to vote is not one of those privileges and immunities.

Reasoning

Waite, C.J. Historical evidence within and outside the Constitution strongly suggest that the right to vote is not coextensive with citizenship. When the Constitution was adopted, most states had limited, either expressly or impli-

citly, suffrage to male citizens. If the Framers had intended to change this state of affairs, they almost certainly would have done so using a clause in the Constitution. The lack of such a clause indicates that they intended to leave voting rights as they had existed. Furthermore, understanding the right to vote as a component of citizenship would lead to an absurd consequences. Under this view, the Privileges and Immunities Clause of Article IV would necessarily mean that each state is bound to allow a citizen of any other state to vote. The Fourteenth and Fifteenth Amendments explicitly prohibit disenfranchisement on the basis of race or previous condition of servitude, but they glaringly omit any mention of disenfranchisement based on sex. When the states were admitted to the Union, no objection was ever made on grounds that they denied women the right to vote; such was the case even in the readmission of the Southern states following the Civil War.

Strauder v. West Virginia
100 U.S. 303 (1880)

Overview

A dispute arose as to whether a state could discriminate on the basis of race in selecting jurors.

Facts

Strauder had been convicted of murder by a West Virginia court. At the time, a West Virginia statute prohibited blacks from serving on juries. Strauder sought to remove the case to federal court and to challenge the composition of the jury, but his efforts were unsuccessful.

Issue

Does a law prohibiting blacks from serving on juries violate the Fourteenth Amendment?

Holding

Such a law violates Fourteenth Amendment.

Reasoning

Strong, J. The Fourteenth Amendment was ratified specifically for the purpose of protecting the recently emancipated slaves against discrimination by the states. The West Virginia statute infringes upon Strauder's right to a fair trial, as a jury consisting entirely of whites could not possibly be a jury of his peers. The prejudices of certain classes in society against others are well known. It could hardly be doubted that a rule prohibiting whites from serving on juries would be regarded as unfair.

Justice Field, joined by Justice Clifford, dissenting. Equal protection under the Fourteenth Amendment does not require a black person to be entitled to a mixed jury. No one contends that women or other groups should be entitled to jurors from their respective groups. There is no reason to think that white jurors would not be equally fair to all defendants. Furthermore, the Fourteenth Amendment guarantees only civil rights as opposed to political rights. Jury duty is a political right and ought to be regulated as the states see fit.

The Civil Rights Cases
109 U.S. 3 (1883)

Overview

A dispute arose as to the constitutionality of the Civil Rights Act of 1875.

Facts

A number of cases had arisen to challenge the Act, which required public establishments to refrain from exercising racial discrimination.

Issue

Is the Civil Rights Act of 1875 unconstitutional in giving Congress the power to enact affirmative legislation in order to prohibit the forms of discrimination disallowed by the Fourteenth Amendment?

Holding

The Civil Rights Act of 1875 is unconstitutional because it gives Congress such powers.

Reasoning

Bradley, J. The Fourteenth Amendment gives Congress only the power to enact legislation to correct state laws and practices that might infringe upon rights guaranteed by the Fourteenth Amendment. It does not, however, give Congress the right to legislate affirmatively on such issues. Congress is not authorized to act until a state has definitively enacted a law or other policy that perpetuates the forms of discrimination prohibited by the Fourteenth Amendment. The Civil Rights Act therefore finds finds no support under this Amendment.

Supporters of the Act contend alternatively that it actually derives its authority from the Thirteenth Amendment. This argument also lacks merit. The Thirteenth Amendment, insofar as it grants Congress the power to make affirmative legislation, grants that power only in relation to the abolition of slavery. Supporters of the Act are essentially arguing that unequal treatment in public facilities amount to slavery. This argument is implausible.

Harlan, J., dissenting. The majority has eviscerated the intent of the Fourteenth Amendment using clever language. It could not possibly be that Congress intended the rights of former slaves to be subjected to the whim of states governments, which might restrict those rights as they see fit. The Thirteenth Amendment was intended to eliminate all "badges" of slavery, not just the institution itself. Racial discrimination at the hands of inns and other public facilities are such a badge. Moreover, an essential part of the privileges and immunities secured by the Fourteenth Amendment is freedom from discrimination. Even if one adopts the majority's view that a state violation of such rights must occur before Congress can take action, the current situation makes it clear that such a violation has occurred.

Plessy v. Ferguson
163 U.S. 537 (1896)

Overview

A dispute arose as to the constitutionality of separate but equal facilities for white persons and for persons of color.

Facts

Louisiana had enacted a statute requiring railroad conductors to segregate passengers based on race. The law was phrased in such a way that a railroad was potentially liable for mistaken assignments. Plessy, who was one-eighth black but who looked like a white person, challenged the statute on the ground that it violated the Thirteenth and Fourteenth Amendments.

Issue

Does the statute violate the Thirteenth or Fourteenth Amendment?

Holding

The statute violates neither Amendment.

Reasoning

Brown, J. The statute plainly has no relation to the Thirteenth Amendment, which addresses involuntary servitude as opposed to segregation. Although the Fourteenth Amendment is intended to make the races equal before the law, that equality extends only to political, as opposed to social, rights. There is no reason to consider the assignment of colored persons and white persons to separate railroad cars an unconstitutional practice in itself. If segregation is seen as a mark of inferiority upon black persons, then such is the case only because black persons have collectively chosen to interpret segregation in that way. Plessy argues that social integration might be better served through intermingling of blacks and whites, but such intermingling cannot be achieved through a legislative mandate. The races must approach each other on their own terms. It also cannot be argued that upholding the statute would lead to segregation based on hair color, country of ori-

gin, or other arbitrary criteria. Adherence to reasonableness will ensure that segregation is not so capriciously applied.

Harlan, J., dissenting. It is beyond doubt that the true intent of the statute in question was not to ensure equal accommodations; rather, it was to ensure that black persons could not occupy facilities reserved for use by white persons. The current situation places a badge of inferiority on the entire black population. That such is the case becomes plain when one considers that Chinese persons, who are in many respects even more restricted in their rights, nonetheless face lighter sanctions for violating segregation than do black persons. The Court suggests that "reasonableness" will prevent segregation from being applied along arbitrary criteria, but it offers no further explanation of its conclusion. The ruling will certainly engender racial animosity.

Giles v. Harris
189 U.S. 475 (1903)

Squib. Giles challenged an Alabama statute forbidding blacks to vote.

Holmes, J. Even if the statute were unconstitutional, there is nothing the Court could do to enforce black voting. Unless the Court is prepared to supervise directly all voting in Alabama, a court order will do nothing to change the current situation.

The Lochner Era

Substantive Due Process

Calder v. Bull
3 U.S. 386 (1798)

Overview

Calder sued to invalidate a will of whom Bull was the beneficiary.

Facts

Calder successfully sued to invalidate a will of whom Bull was the beneficiary. Calder thus became the decedent's heir at law. The Connecticut legislature subsequently passed a resolution setting aside the outcome of the trial and granting a new hearing. The will was approved at the new hearing, thereby restoring the inheritance to Bull. Calder then claimed that the legislature's act amounted to an ex post facto law.

Issue

Did the Connecticut legislature have authority to pass a resolution on the matter of the will?

Holding

The Connecticut legislature had such authority.

Reasoning

Chase, J. A legislature cannot do what the people have implicitly left beyond its powers even if there is no express constitutional prohibition of those actions. The Connecticut legislature did not exceed the boundaries of its power, as Calder had no vested interest in the inheritance in the first place.

Iredell, J. Even if an act of legislature is thought to conflict with natural justice, the courts are powerless to do anything to overturn that act. All a court can say is that it does not agree with the legislature's reasoning.

Lochner v. New York
198 U.S. 45 (1905)

Overview

A dispute arose as to the constitutionality of a maximum-hours law enacted by the State of New York.

Facts

New York had enacted a law prohibiting bakeries from requiring their employees to work more than sixty hours per week or more than ten hours per day. Lochner was convicted of failing to comply with these limits in operating his bakery.

Issue

Is the New York statute a legitimate exercise of police power, or does it constitute an unreasonable interference with the private right of contract?

Holding

The statute unreasonably interferes with the private right of contract.

Reasoning

Peckham, J. Although the states may generally use their police power to regulate activities that affect public health, public morals, or public safety, this power cannot be used as a pretext to enact laws that otherwise have no bearing on the public good. If this limitation did not exist, then the legislature could justify almost any law as an exercise of police power. Here, there is no reason to believe that bakers are less capable of protecting their own interests than their employers or that they otherwise need protection from the state. The statute, if justifiable at all, must be justified for reasons of public health. Public health, however, also fails to support the statute. There is no reason to suspect that the quality of the bread depends on the fact that the baker works no more than sixty hours per week. Regulations to that effect already exist in the form of building codes, which require separate washrooms and other facilities. That the act of baking might have some inchoate impact on health is also insufficient to justify the statute. Scarcely any profession does not affect the health in some way. If this contention is allowed, then no profession would be free from regulation.

Harlan, J., dissenting. A statute should not be invalidated unless it plainly contradicts constitutional bounds or equally fundamental limits on state power. Here, there is a colorable argument that the statute in question really is designed to promote the public health. Reasonable and intelligent men could disagree as to whether bakers need the protection set forth in the statute. At least one scholar has observed that bakers work under conditions generally detrimental to health. The courts should therefore defer to the legislature on this issue.

Holmes, J., dissenting. The question is one for the state legislatures. The courts should not be so quick to invalidate the statute because of perceived social norms.

Muller v. Oregon
298 U.S. 412 (1908)

Squib. The Supreme Court upheld a statute limiting the workday of women in laundries and factories to ten hours per day. The Court found that women had always been considered dependent upon men. Although the rights of women had been greatly expanded in the recent past, the inherent limitations of women, physically and otherwise, still placed them in such a position as to necessitate special protection by the state. The Court observed that the protection of women's health is especially important since women's role as mothers are essential to the survival of the human race.

Adkins v. Children's Hospital
261 U.S. 525 (1923)

Squib. The Supreme Court invalidated a law establishing a minimum wage for women but not for men as a violation of the due process guaranteed by the Fifth Amendment. The

Court found that legislation had reduced the legal differences of men and women almost to the vanishing point. Although physical differences between men and women still existed, such differences did not justify the restrictions on contract imposed by the minimum-wage law.

The Commerce Clause

Champion v. Ames
188 U.S. 321 (1903)

Overview

A dispute arose as to the constitutionality of a federal law prohibiting the sale of lottery tickets.

Facts

Congress had enacted a law prohibiting the interstate transport of lottery tickets by any means. Champion was indicted under the law for shipping Paraguayan lottery tickets from Texas to California. Champion challenged the indictment on ground that the law exceeded the congressional power to regulate interstate commerce.

Issue

Does the interstate transportation of lottery tickets fall within the congressional power to regulate interstate commerce?

Holding

The interstate transportation of lottery tickets falls under the congressional power to regulate interstate commerce.

Reasoning

Harlan, J. Congress has the power to prohibit the interstate transportation of lottery tickets; that power stems from the commerce power set forth in the Constitution. Champion argues (1) that lottery tickets do not fall within the definition of "commerce" because they have no value and (2) that the congressional power to regulate interstate commerce does not include the power of prohibition, such as that used against the shipping of lottery tickets. In response to the first argument, it may be said that lottery tickets do qualify as commercial goods because they have value in the form of the prize promised to the winner. In response to the second argument, it is necessary to consider the nature of the goods being regulated. Lotteries have generally been regarded as a societal pest. Unlike conventional forms of gambling, it tends to affect all sectors of society. The Court has already held that a state may not contract away its duty to protect public morals by establishing a state-run lottery. Indeed, many states have banned lotteries for being immoral games. Congress, in fact, is probably supplementing such state legislation by prohibiting the interstate transportation of lottery tickets.

Fuller, C.J., dissenting. Lottery tickets cannot be said to fall within the scope of interstate commerce. They are no different from insurance policies because they are merely contracts between two parties. The Court has held that insurance policies are not articles of interstate commerce, and it should make the same finding for lottery tickets. An article does not come within the power of the Commerce Clause simply because it is being transported from state to state. The majority's decision infringes on states' power.

Hammer v. Dagenhart
247 U.S. 251 (1918)

Overview

A dispute arose as to the constitutionality of a federal statute prohibiting interstate trade in the products of child labor.

Facts

Congress had enacted a statute stating that the products of any factory, mine, or other manufacturing concern could not be transported between different states if that establishment had employed child labor within the thirty days prior to the shipment of the products. Hammer

sued to prevent the enforcement of the law in North Carolina.

Issue

Does the statute exceed the congressional power to regulate interstate commerce?

Holding

The statute exceeds the congressional power to regulate interstate commerce.

Reasoning

Day, J. The Court has upheld statutes forbidding the transportation of lottery tickets, prostitutes, and tainted food across state lines. In all these cases, the interstate traffic of such goods was essential to the evil being done. Such is not the case here. Here, the goods to be shipped are themselves harmless. In fact, even goods that were produced with child labor may be shipped as long as the manufacturer waits more than thirty days after their production. Although it has been argued that permitting the interstate traffic in such might place some states at a competitive disadvantage because of the strictness of their child-labor laws, Congress has no power to equalize such differences under the guise of regulating interstate commerce. The regulation of production within a state is solely the business of that state.

Holmes, J., dissenting. A Congressional statute cannot be invalidated solely because of its indirect effects on state activities. The Commerce Clause gives Congress the unqualified power to regulate interstate commerce. Congressional regulation cannot be curtailed simply because some states might find such regulation inconvenient.

The General Welfare Clause

The Child Labor Tax Case
259 U.S. 20 (1922)

Squib. Congress had enacted the Child Labor Tax Act, which imposed a 10% tax on the net income of any manufacturer using child labor. The Supreme Court invalidated the Act on the ground that it violated the Tenth Amendment. The Court found that Congress, despite having the power to tax, could not use that power as a pretext for invading subjects that lay within the sphere of state regulation. The purpose of an ordinary tax was to raise revenue; although such a tax may have some effects on intrastate activities, such effects would be purely incidental. By contrast, the purpose of the Act was not to raise revenue but to coerce compliance with a congressional mandate.

United States v. Butler
297 U.S. 1 (1936)

Squib. Congress had passed the Agricultural Adjustment Act, which paid farmers to reduce the amount of crops they grew. A dispute arose as to whether the Act was permitted under the General Welfare Clause.

Roberts, J. The Act attempts to accomplish through constitutional means an unconstitutional end. Even if one construes the General Welfare Clause broadly, that Clause still cannot be read to mean that Congress has the power to regulate agriculture. It is no argument to say that the Act obtains the voluntary compliance of farmers; such "voluntary" compliance is in fact coerced through the loss of benefits for those farmers who would rather not comply.

Stone, J., joined by Brandeis and Cardozo, JJ., dissenting. The Court takes the self-contradictory position that Congress has the power to spend but does not have the power to impose conditions on that spending.

Nebbia v. New York
291 U.S. 502 (1934)

Squib. Nebbia had been convicted of selling milk below the minimum wholesale price mandated by the New York Milk Control Board. The Supreme Court upheld the law on the ground that it had a reasonable relation to the goal of preventing ruthless competition from driving milk prices to ruinously low levels. Although the production of milk was not "affected with the public interest" in the same way as public utilities, the Court found that nothing prevented a state legislature from enacting regulations for the public good. In his dissent, Justice McReynolds said that the Court was interfering with one's ability to conduct his own affairs on terms of his choosing.

Home Building & Loan Association v. Blaisdell
290 U.S. 398 (1934)

Overview

A dispute arose as to the constitutionality of a moratorium on foreclosures.

Facts

The Great Depression had led to widespread defaults on mortgages. The Minnesota legislature tried to stanch the resulting wave of foreclosures by enacting a law that extended the period during which a defaulting homeowner could recover possession of a foreclosed home. Blaisdell, whose home had been foreclosed, sought refuge under the statute. The Home Building & Loan Association, which had foreclosed the home, argued that the statute violated the Contracts Clause of the Constitution.

Issue

Does the Minnesota statute violate the Contracts Clause?

Holding

The statute does not violate the Contracts Clause.

Reasoning

Hughes, C.J. Emergencies do not grant to the federal government or to the states powers they do not already possess. Rather, existing constitutional grants of power should be interpreted in light of the circumstances. The Contracts Clause was added to the Constitution in the period following the Revolutionary War. At that time, the states had imposed so many limitations on the collection of debts that the entire system of credit threatened to collapse. The Contracts Clause was apparently added to the Constitution to prevent interference with the collection of such private debts. The history of the Clause, however, does not suggest that it should be read as a categorical prohibition on state action in relation to the enforcement of contracts.

Here, the Minnesota legislature has sought to ameliorate the effects of a severe economic downturn by temporarily altering the means by which contracts may be enforced. Similar legislation has been upheld in the past. The constitutionality of the statute in question cannot be challenged on ground that the Framers would have interpreted the Constitution differently. The Constitution was intended to adapt to the times.

Sutherland, J., dissenting. The history of the Commerce Clause reveals that it was intended to prevent the government from interfering with the collection of private debts during precisely the sort of crisis now existing. At that time, the rampant cancellation of debts through legislation threatened to destroy the reputation

of the American people in the eyes of their creditors. The circumstances that gave rise to the Clause cannot now be invoked to prevent it from taking effect.

Cardozo, J., concurring. The Contracts Clause was drafted in a time when contracts were thought to affect only private parties as opposed to the state. The development of society has shown that this assumption is no longer true. The statute was designed to protect the stability of society. The Framers would agree with its constitutionality.

Carter v. Carter Coal Co.
298 U.S. 238 (1936)

Squib. The Court invalidated a part of the Bituminous Coal Conservation Act of 1936, which required coal companies to engage in collective bargaining with miners. The Court drew a distinction between "manufacture" and "commerce," emphasizing that Congress had the power to regulate only the latter. Mining, by contrast, was only a "manufacturing" activity because it bought into exist the object of commerce. Although the Court conceded that manufacturing inevitably had some impact on interstate commerce, that impact was not sufficiently "direct" to make it regulable by Congress.

Schechter Poultry Corp. v. United States
295 U.S. 495 (1935)

Squib. The Supreme Court struck down a New York law regulating the poultry industry because it found that poultry ceased to be an object of interstate commerce once it arrived in the destination state.

West Coast Hotel Co. v. Parrish
300 U.S. 379 (1937)

Overview

A dispute arose as to the constitutionality of a minimum-wage law for women.

Facts

The State of Washington had enacted a law specifying a minimum wage for women. The constitutionality of the law was challenged.

Issue

Is the minimum-wage law for women unconstitutional?

Holding

The minimum-wage law for women is not unconstitutional.

Reasoning

Hughes, C.J. Although the Constitution guarantees liberty, that liberty is not absolute; rather, it is constrained by countervailing concerns for the public health, public morals, and public safety. It is beyond dispute that the protection of women from unscrupulous employers is a legitimate state interest. In the current case, women have been exploited through the payment of woefully inadequate wages. Furthermore, women themselves can scarcely change their current position since they lack bargaining power against their employers. The burden of providing adequate living conditions to those women unable to afford such conditions themselves invariably devolves upon the state. The citizenry should not be expected to thus subsidize private greed.

United States v. Carolene Products Co.
304 U.S. 144 (1938)

Overview

Carolene Products challenged a law prohibiting the sale of filled milk.

Facts

Congress had passed the Filled Milk Act, which prohibited interstate commerce in "filled milk," milk in which the original milk fat had been replaced by vegetable oil. The Act was passed after a legislative inquiry showed that filled milk was injurious to the public health because it lacked certain nutrients present in natural milk. Carolene Products produced Milnut, a filled-milk product. Carolene sued on the theory that the Act violated the Fifth Amendment guarantee of due process by depriving Carolene of the right to sell filled milk.

Issue

Does the Act violate the Fifth Amendment?

Holding

The Act does not violate Fifth Amendment.

Reasoning

Mr. Justice Stone delivered the opinion of the Court. In general, the legislature is to be given deference in its decisions. To that end, the courts should presume the constitutionality of a statute unless the circumstances plainly suggest otherwise. The constitutionality of a statute may be challenged in two ways. First, the courts may investigate facts that might undermine the presumption of constitutionality. Second, the statute can be argued not to apply to a particular situation because that situation is so peculiar as to fall outside the purpose of the statute. In either case, the challenge must be founded on a set of facts that are at least discoverable in principle. Here, Carolene has challenged not specific facts but the general wisdom of the statute. That is a question for Congress, not the courts.

Justice Butler, concurring in the result. Carolene should be allowed to show that Milnut is not injurious to the health or a fraud upon the public. Denying it this chance would violate due process.

Williamson v. Lee Optical Co.
348 U.S. 483 (1955)

Overview

A dispute arose as to the constitutionality of an Oklahoma statute regulating the fitting of prescription lenses.

Facts

Oklahoma had passed a law making it illegal for any person to replace, duplicate, or fit lenses for glasses without the written permission of an optometrist or ophthalmologist. Lee Optical challenged the statute for violating the Fourteenth Amendment. The District Court invalidated several of the statute's provisions.

Issue

Does the statute violate the (1) Due Process Clause or the (2) Equal Protection Clause of the Fourteenth Amendment?

Holding

The statute violates neither the (1) Due Process Clause nor the (2) Equal Protection Clause of the Fourteenth Amendment.

Reasoning

Douglas, J. The Oklahoma legislature was competent to determine when such permission should be required for the fitting of prescription lenses. Although it is true that new lenses may be produced and existing lenses duplicated without guidance from an eye-care professional, the legislature may have a legitimate interest in promoting eye checkups. The court below erred in holding that it was unconstitutional to limit the marketing of eyeglass frames. Although the Lee Optical contends that such frames are merely ordinary merchandise, regu-

lation is proper because they are invariably used in conjunction with prescription lenses. It is therefore proper for Oklahoma to impose limitations on the marketing of such frames. The court below also erred in holding that it was unconstitutional to prohibit optometrists from occupying space in retail establishments. Oklahoma has a legitimate interest in preventing the eye-care profession from being tainted by commercialism.

NLRB v. Jones & Laughlin Steel Corp.
301 U.S. 1 (1937)

Squib. The Supreme Court upheld the National Labor Relations Act (NLRA) in the face of a challenge by the Jones & Laughlin Steel Corporation, which wanted to prevent its employees from bargaining collectively.

Hughes, C.J. The multi-state operations of Jones & Laughlin are so closely connected to interstate commerce that Congress should not be denied the power to regulate its activities. Although there are circumstances in which the effects of a business are too remote from interstate commerce to warrant congressional regulation, such is not the case here. Here, the results of a labor dispute between Jones & Laughlin and its employees would have immediate and catastrophic consequences.

United States v. Darby Lumber Co.
312 U.S. 100 (1941)

Overview

A dispute arose as to the constitutionality of a federal minimum-wage law.

Facts

Congress had enacted the Fair Labor Standards Act of 1938, which required employers to observe minimum-wage and maximum-hours requirements. A Georgia lumber manufacturer was indicted for violating the Act.

Issue

Is the Act a valid regulation of interstate commerce?

Holding

The Act is a valid regulation of interstate commerce.

Reasoning

Stone, J. Congress has plenary power to regulate interstate commerce. This power extends even to the regulation of goods produced entirely within a single state. Congress passed the Act with the manifest purpose of preventing goods manufactured under substandard labor conditions from competing with those manufactured in compliance with the Act. Although the employees of the lumber manufacturer do not themselves engage in interstate commerce, the goods they produce are so tied to interstate commerce as to fall under congressional regulation.

Wickard v. Filburn
317 U.S. 111 (1942)

Squib. The Agricultural Adjustment Act of 1938 placed limits on the amount of wheat each farmer can grow. A farmer was penalized for produce above that limit 239 bushels, or over six tons, of wheat. Although the farmer avowed that the wheat was intended for his private use, the Supreme Court found that it nonetheless fell within the scope of congressional regulation.

Jackson, J. Congressional regulation of interstate commerce extends not only to those articles that participate directly in such commerce but also to articles that may indirectly affect such commerce. The home-consumed wheat here "competes" with wheat on the market in the sense that the former reduces the consumer's demand for the latter. This impact on commerce at large makes the wheat regulable.

Individual Rights

Desegregation

Sweatt v. Painter
339 U.S. 629 (1950)

Squib. The Supreme Court found that a hastily established law school for black students was probably not equal to the University of Texas Law School. Aside from the difference in the quality of facilities and student activities, the Court found that the black school was also lacking in essential but intangible factors, such as the quality of the faculty, alumni networks, and overall prestige.

McLaurin v. Oklahoma State Regents
339 U.S. 637 (1950)

Squib. The Supreme Court struck down a graduate school's attempt to make its single black student sit in a separate section of the classroom, library, and cafeteria. The Court found that such segregation interfered with the exchange of ideas between the affected student and the rest of the student body.

Brown v. Board of Education of Topeka
347 U.S. 483 (1954)

Overview

A dispute arose as to the constitutionality of segregation in public schools.

Facts

Residents of several states challenged the constitutionality of segregated public schools. They sued on the ground that segregation deprived students of equal protection as guaranteed by the Fourteenth Amendment.

Issue

Does segregation of schools violate equal protection under the Fourteenth Amendment?

Holding

Segregation of schools does violate equal protection under the Fourteenth Amendment.

Reasoning

Warren, C.J. "Separate but equal" does not exist because segregation itself creates inequality. Segregation tends to impose feelings of inferiority in black children. Such feelings in turn influence their motivation to learn and ultimately the effectiveness of the education that is essential to good citizenship. It is unnecessary to consider whether the quality of the respective facilities in schools for white and non-white students are materially identical.

Bolling v. Sharpe
347 U.S. 497 (1954)

Squib. The Supreme Court struck down the segregation of schools in the District of Columbia, to which the Fourteenth Amendment technically did not apply. The Court found segregation to be so repugnant that it would have been unthinkable for schools within the District of Columbia to remain segregated after the Brown decision.

Brown II

Squib. The Supreme Court determined that the schools were to be integrated with "all deliberate speed." School districts were to bear the burden of desegregation while federal district courts oversaw their efforts. The courts were to apply principles of equity to allow for flexibility, but they were also to ensure that the schools

made good-faith efforts at desegregation. Any school that desired additional time for desegregation carried the burden of showing that such time was necessary.

Cooper v. Aaron
358 U.S. 1 (1958)

Squib. Following massive Southern resistance to desegregation, the Supreme Court ordered the city of Little Rock, Arkansas, to proceed with desegregation despite intense opposition from within the state.

Green v. New Kent County School Board
391 U.S. 430 (1968)

Squib. The Supreme Court held that the New Kent County School Board, whose school district contained only two schools, could not settle on a "freedom of choice" plan for desegregation because that plan tended to perpetuate segregation.

Brennan, J. Although of freedom-of-choice plan is not unconstitutional in itself, it plainly fails to constitute an adequate step toward desegregation here. Under the plan, 85% of the black children in the school district still attend the all-black school. It is also worth noting that the school district made no effort toward desegregation until a decade after the Brown decision.

Swann v. Charlotte-Mecklenburg Board of Education
402 U.S. 1 (1971)

Squib. The Supreme Court authorized federal district courts to use broad equitable remedies to desegregate schools. The Court upheld a district-court plan that required the Charlotte-Mecklenburg School District to implement busing and to maintain a certain ratio between black and white students in its schools. The Court also held (1) that not every school had to reflect the racial composition of the district as a whole, (2) that the existence of one-race schools was not automatically unconstitutional, (3) that the district court could order race-based assignment of students once a constitutional violation had been found, and (4) that busing was a valid judicial remedy.

Keyes v. School District No. 1, Denver, Colorado
413 U.S. 189 (1973)

Squib. The Supreme Court ordered a Colorado school district to desegregate. Unlike Southern school districts, the Colorado district had never been segregated by law. The plaintiffs, however, argued that the district had segregated itself through race-conscious manipulation of student assignments. The district contained both suburban and inner-city schools. Although the Court found intentional segregation only in the former, it nonetheless ordered desegregation of the inner-city schools as well.

Brennan, J. Although the plaintiffs bear the burden of proving that segregation exists, they need not prove that segregation exists in every school. Rather, establishing segregation in a substantial number of schools allows the presumption that the remaining schools have been intentionally segregated as well. Since the district here has been shown to have implemented intentional segregation, it must bear the burden of showing that particular schools in question are not intentionally segregated.

Rehnquist, J., dissenting. The Court's decision amounts to a drastic and unjustified expansion of the Brown decision. The Brown decision required only that school districts refrain from active segregation; it did not create an affirmative duty to integrate.

Powell, J., concurring in part and dissenting in part. The distinction between "de jure" and "de facto" segregation should be phased out. These terms were coined in a time when segregation by law was widespread. Now, segregation persists not because of laws but because of entrenched residential patterns and similar factors. Where segregation still exists,

the courts should presume that the local school district has not taken adequate efforts to desegregate. Where the school districts have failed to integrate, the courts should have the authority to order remedies such as redrawing district lines, busing, and transfer programs.

Milliken v. Bradley
418 U.S. 717 (1974)

Squib. After finding de jure segregation in a Detroit school district, a district court handed down a desegregation plan that included not only the segregated district but 53 surrounding districts. The Supreme Court struck down the plan as unconstitutionally broad.

Burger, C.J. Before a court can order an inter-district remedy, it must first find that any inter-district segregation is the product of the segregative actions of a particular district or of deliberate attempts to draw boundaries in such a way as to separate the races. Having failed to show inter-district segregation, the court ordered a remedy that was too broad.

White, J., joined by Douglas, Brennan, and Marshall, JJ., dissenting. The state should have authority to redraw district boundaries if necessary. The Court has upheld the redrawing of political districts for the purpose of equalizing representation.

Marshall, J., dissenting. The state has indirectly facilitated segregation by drawing district lines in such a way as to keep blacks and whites in separate schools. Districts so defined tend to keep blacks in predominantly black schools and to fuel white flight. The state should bear at least some responsibility for these effects.

Congressional Action

Heart of Atlanta Motel v. United States
379 U.S. 241 (1964)

Squib. The Supreme Court found that the Heart of Atlanta Motel had violated Title II of the Civil Rights Act of 1964, which prohibited racial discrimination in segregation in places of public accommodation. The Court justified the authority of Congress to pass this act using the Commerce Clause. It found that the generally lack of accommodations receptive to black customers had reached epidemic proportions and that congressional action was appropriate.

Katzenbach v. McClung
379 U.S. 294 (1964)

Squib. The Supreme Court struck down as unconstitutional the racially discriminatory practices of a restaurant in Alabama. The Court justified its ruling using the Commerce Clause.

Clark, J. The record shows that racial discrimination tends to depress spending at restaurants by black customers. Such depression, in turn, affects interstate commerce by altering the amount food sold across state lines. While a single restaurant may have a negligible impact on the economy at large, this fact alone does not justify the segregation here. As the Court observed in Wickard v. Filburn, the conduct of a single actor may nonetheless be restrained if it bears any connection to interstate commerce.

South Carolina v. Katzenbach
383 U.S. 301 (1966)

Overview

A dispute arose as to the constitutionality of the Voting Rights Act.

Facts

Congress had passed the Voting Rights Act in response to persistent Southern efforts to prevent blacks from voting. Southern states had been restricting the black vote through a number of instruments, such as "grandfather clauses" and other tests. Although the Court had struck down many of these schemes, literacy tests became an entrenched way of discriminating against blacks at the polls. The Act provided in relevant part (1) that no literacy tests could be used, (2) that federal authorities would review all new voting regulations, and (3) that the Attorney General had the power to qualify individuals to vote on a case-by-case basis. South Carolina challenged the Act as an improper exercise of congressional power.

Issue

Does the Fifteenth Amendment authorize Congress to pass the Act?

Holding

The Fifteenth Amendment authorizes Congress to pass the Act.

Reasoning

Warren, C.J. South Carolina challenges the Act on the theory that the Fifteenth Amendment allows Congress only the power to nullify state statutes that interfere with the right to vote. This position blatantly contradicts the plain language of the Amendment, which states that "Congress shall have power to enforce this article by appropriate legislation." The Amendment, moreover, has always been understood to be self-executing. The Act was appropriate in light of the entrenched nature of voting discrimination. Congress fairly concluded from the facts that case-by-case litigation, which had been the dominant strategy for challenging such discrimination, failed to provide an adequate solution to the problem. Such litigation had been time-consuming to boot; even when it succeeded, states often switched to non-prohibited methods of discrimination or flouted court orders outright. It is also no argument to say that literacy tests are not forbidden by the Constitution. Because such tests have been applied in a discriminatory way, Congress has the power to forbid their use.

Black, J., concurring and dissenting. Although the Act is mostly constitutional, it may not demand the states to seek federal approval before enacting laws that have potential impact of voting. That provision distorts the balance of power between the states and the federal government.

Katzenbach v. Morgan

384 U.S. 641 (1966)

Squib. One provision of the Voting Rights Act specified that no state could deny its residents the right to vote on the ground of not knowing English. New York had enacted precisely such a law, whose effect was to make a number of Puerto Rican residents unable to vote because they did not know enough English. New York challenged the voting rights act on the theory that Congress had exceeded its powers in passing the relevant provision.

Brennan, J. New York argues that Congress has power to override a state law only when the courts have made an express determination that the law contravenes the Fourteenth Amendment. This theory lacks merit, as it would confine congressional action too strictly. Rather, section 5 of the Amendment authorizes Congress to pass whatever laws it deems necessary to further the ends of that Amendment. Congressional action is to be upheld as long as the courts can discern a rational basis for that action. Here, Congress could reasonably have concluded that the English-language requirement worked more harm than good. Although historical evidence suggests that the requirement was enacted for the goal of encouraging immigrants to learn English, the evidence also suggests that discrimination may have been a motivation as well. Furthermore, Congress was within its discretion to conclude that a thorough knowledge of English was unnecessary for the effective exercise of the vote since Spanish-language materials can be equally effective in informing the citizenry of political issues. It is also no argument to say that the Act discriminates against non-American-flag schools as com-

pared to American-flag schools. The Act is designed to expand the franchise, not to restrict it to particular classes of people.

Harlan, J., joined by Stewart, J., dissenting. The Court has ignored the question of whether the discrimination purportedly resulting from the New York law actually amounts to a constitutional violation. Rather, the Court seems to state that Congress has the power to define the substantive scope of the Fourteenth Amendment and to declare that state laws contravene that Amendment. This power should rest with the judiciary. In any case, the Court has failed to show convincingly that Spanish-language materials would offer the same coverage of election news as English-language materials.

Jones v. Alfred H. Mayer Co.
392 U.S. 409 (1968)

Squib. The Supreme Court upheld a Reconstruction-era statute prohibiting private discrimination in real estate. In so holding, the Court took a significantly expanded view of what Congress could do under the Thirteenth Amendment.

Stewart, J. The Enabling Clause of the Thirteenth Amendment gave Congress the power to eliminate all the badges and incidents of slavery. This power includes the ability to invalidate laws, such as the Black Codes, that tend to perpetuate the effects of slavery.

Equal Protection

Discriminatory Intent

Griggs v. Duke Power Co.
401 U.S. 424 (1971)

Squib. The Supreme Court struck down an employer's requirement that each job applicant should have a high-school diploma and pass a general intelligence test. The Court found that these requirements, despite being neutral on their face, had discriminatory effects.

Burger, C.J. Title VII of the Civil Rights Act is intended to prevent not only overt discrimination but also discrimination implemented through facially neutral criteria. The record shows that neither the high-school diploma requirement nor the intelligence test tend to predict the performance of any candidate. Even if the employer acted with good intentions in setting up these requirements, the requirements cannot stand if they operate as built-in headwinds against minority groups.

Washington v. Davis
426 U.S. 229 (1976)

Overview

A dispute arose as to whether discriminatory effect alone is sufficient to support a finding of unconstitutionality.

Facts

The District of Columbia required prospective police officers to take a written test before they could qualify for employment by the police department. Several black candidates, after being rejected for failing the test, sued on the theory that the test violated equal protection as guaranteed by the Fifth Amendment. They did not sue under Title VII because that Title did not yet cover municipal employees.

Issue

Does the disparate impact of the test on black candidates support a finding of unconstitutionality?

Holding

The disparate impact does not in itself support a finding of unconstitutionality.

Reasoning

White, J. Although disparate impact alone may permit the conclusion that Title VII has

been violated, this low standard should not be applied in finding constitutional violations. In the context of school desegregation, the Court has found that the existence of predominantly white or black schools does not in itself give rise to an inference of segregation across the entire school district. The Court reached the same conclusion with respect to racially skewed juries. Although disparate impact may serve as evidence of underlying discrimination, a plaintiff must make a basic showing of discriminatory intent before a constitutional violation can be found. Here, the District of Columbia has a legitimate interest in ensuring that its employees meet certain standards of written and oral communication. It should not be forced to settle for lower standards simply because black candidates are more likely to be disqualified than white candidates.

Stevens, J., concurring. The line between discriminatory effect and discriminatory intent is not nearly as bright as the Court makes it seem.

Personnel Administrator of Massachusetts v. Feeney
442 U.S. 256 (1979)

Squib. The Supreme Court upheld a Massachusetts statute giving preference to veterans in certain forms of employment. The plaintiff had challenged the statute on the ground that it discriminated against women and that the legislature had intended such discrimination since it was obvious that women were largely barred from military service. The Court, however, found that intent to discriminate could be found only when a regulation had been adopted "because of," as opposed to "in spite of," its disparate impact.

Village of Arlington Heights v. Metropolitan Housing Development Corp.
429 U.S. 252 (1977)

Squib. The Supreme Court upheld a zoning plan that reserved a certain area of land to be used for single-family homes as opposed to multi-family homes. The Metropolitan Housing Development Corporation (MHDC) had challenged the zoning decision on the theory that it discriminated against poor tenants. The Court, however, found that the MHDC had not shown anything beyond discriminatory effect and therefore was not entitled to a finding of unconstitutionality. The Court set forth six standards for determining when discriminatory effect may indicate discriminatory intent: (1) the impact of the action, including a pattern of racially disparate impact unexplainable on grounds other than intnetional discrimination; (2) the historical background of the decision; (3) the specific sequence of events leading to the decision; (4) departures from normal procedure; (5) whether the decision-maker departs from the usual consideration of the facts; and (6) the legislative or administrative history of the decision.

Suspect Classifications

Race

Korematsu v. United States
323 U.S. 214 (1944)

Overview

A dispute arose as to the constitutionality of Japanese internment during World War II.

Facts

Following the attack on Pearl Harbor, President Roosevelt authorized the military to remove persons of Japanese descent from certain areas

of the West Coast. The decision was justified on the ground of military necessity. Korematsu challenged the constitutionality of the internment order.

Issue

Does the internment of persons of Japanese descent violate the Constitution?

Holding

The internment does not violate the Constitution.

Reasoning

Black, J. Although a racial classification is immediately suspect and must undergo rigid scrutiny, it may nonetheless pass constitutional muster. Here, the internment order was not executed solely because of racial prejudice; rather, it was designed to serve the legitimate military purpose of protecting the country from attack by Japan. The military had well-founded concerns about possible subversion from Japanese elements within the United States. Following the outbreak of the War, thousands of Japanese residents either refused to renounce allegiance to the Japanese Emperor or repatriated to Japan. While such individuals of questionable loyalty may have comprised only a small fraction of the total Japanese-descended population, the military was within its discretion to decide that separating the loyal from the disloyal would have been impractical in the face of wartime realities.

Frankfurter, J., concurring. The Constitution authorizes Congress to make war, and wartime decisions should be enough deference to ensure that war can be waged successfully. Such decisions should not be evaluated in the same light as decisions made during peacetime. As long as a military order does not go beyond the constitutional war powers, it should not be questioned.

Roberts, J., dissenting. A citizen has been singled out for punishment solely on the basis of race. That such treatment is unconstitutional cannot be doubted.

Murphy, J., dissenting. No one questions that the military may use reasonable means to ensure the safety of the country in times of war. The internment order, however, works such heavy-handed discrimination that it plainly falls outside constitutional bounds. The military's appears to have founded its decision on conclusory judgments framing all Japanese-descended persons as disloyal. No evidence of sabotage or other subversion has ever been produced, and the lack of martial law in the affected regions suggests that the situation was not as dire as the military has portrayed. Furthermore, it is altogether unjustifiable that persons of German and Italian descent should be afforded individual hearings to determine their loyalties while those of Japanese descent are effectively subjected to group punishment. The internment policy works precisely the kind of discrimination that the United States has been fighting in the War.

Jackson, J., dissenting. Although military necessity may trump constitutional doctrine in times of war, this does not mean that the Court should give the constitutional stamp of approval to every military decision. It is true that the Court is bound to accept military decisions, even if those decisions are justified only by self-serving testimony. The exigencies of war do not normally permit the courts to engage in any real review of military decisions. The Court, however, has done much more damage by giving post hoc approval to the internment order. The Court has transformed internment from a one-time necessity to a legal precedent that may be invoked by anyone who can think up a suitable national emergency.

Loving v. Virginia
388 U.S. 1 (1967)

Overview

A dispute arose as to the constitutionality of a Virginia anti-miscegenation statute.

Facts

Richard Loving, a white man, had married Mildred Jeter, a black woman, in the District of

Columbia. Following their marriage, they returned to Virginia to start a family. Loving was then indicted for violating a Virginia anti-miscegenation statute.

Issue

Does the Virginia statute violate the Fourteenth Amendment?

Holding

The Virginia statute violates the Fourteenth Amendment.

Reasoning

Mr. Chief Justice Warren delivered the opinion of the Court. Virginia argues that the statute comports with the Fourteenth Amendment because it mandates equal punishment for white and non-white participants in an interracial marriage. This theory of "equal application," however, has been overturned. The question is not how the law is applied; the question is whether the law attempts to create a distinction solely on the basis of race. The Virginia statute plainly serves no purpose aside from racial discrimination. That it applies only to interracial marriages involving whites shows that the legislature passed it with the intent to protect white supremacy.

Palmore v. Sidoti
466 U.S. 429 (1984)

Squib. The Supreme Court reversed a state court's decision to grant custody of a white child to the father because the mother had entered a relationship with a black man. The state court had found that the mother had chosen for her child a lifestyle unacceptable to the father and to society and that the child might be exposed to pressures for having parents of different races. The Court, however, found that the Constitution may not be used to give effect to private prejudices.

Sex

Frontiero v. Richardson
411 U.S. 677 (1973)

Overview

Frontiero challenged a statute establishing different requirements for men and women in claiming government benefits for their spouses.

Facts

Frontiero, a woman, was a lieutenant in the Air Force. At that time, the government had enacted several measures designed to boost enlistment, one of which was the granting of housing and medical benefits to dependents of soldiers. The relevant statute provided that all men could automatically claim their wives as dependents without regard to any actual need for financial support. By contrast, women were required to prove that their husbands relied on them for more than half their support. Frontiero challenged the statute on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment.

Issue

Does the statute violate the Equal Protection Clause of the Fourteenth Amendment?

Holding

The statute violates the Equal Protection Clause of the Fourteenth Amendment.

Reasoning

Brennan, J. The legislature has apparently said little of the reasons for the distinction now challenged. The trial court applied the rational-basis test and concluded that the legislature could have had in mind legitimate concerns about costs when enacting this policy. Given that the vast majority of the members of the Armed Forces are male, perhaps the legislature thought it could save money by restricting to women any inquiries as to dependency.

The rational-basis test, however, is inappropriate in this situation. The statute appears to draw the distinction solely on the basis of sex; it has therefore used sex as an inherently suspect classification. Here, heightened scrutiny should be applied. The government has conceded that the distinction is not intended to serve any purposes beyond mere administrative convenience. While efficient administration is desirable, it should not take precedence over more-important constitutional values. The statute draws an arbitrary distinction between men and women who are similarly situated. It runs afoul of Title VII of the Civil Rights Act and similar provisions.

Powell, J., joined by Burger, C.J., and Blackmun, J., concurring. The result is correct, but the Court need not have expanded the law so drastically as to identify sex as a suspect classification. Given that Congress is already acting on the issue, it would be improper for the Court to overstep its bounds and preempt a legislative decision.

Craig v. Boren
429 U.S. 190 (1976)

Squib. The Supreme Court struck down an Oklahoma statute that allowed women, but not men, between the ages of 18 and 21 years to purchase "near beer." The Court established that distinctions based on sex required intermediate scrutiny. Under intermediate scrutiny, the regulation in question was presumptively unconstitutional unless the state could show that it "substantially related" to "important governmental objectives." This language paralleled the definition of strict scrutiny, which required the challenged regulation to be "necessary" to promote a "compelling state interest."

United States v. Virginia (The VMI Case)
518 U.S. 515 (1996)

Overview

A dispute arose as to the admission of women to the Virginia Military Institute.

Facts

Since its founding, the Virginia Military Institute (VMI) had been a male-only institute of higher learning. VMI differed from conventional colleges in educating its students through the "adversative" method, which incorporated military-style physical regimen into the students' lives. A female high-school student complained that the exclusion of women from VMI violated the Equal Protection Clause of the Fourteenth Amendment.

Issue

Does the restriction of VMI attendance to men violate the Fourteenth Amendment?

Holding

The restriction violates the Fourteenth Amendment.

Reasoning

Justice Ginsburg delivered the opinion of the Court. A state must justify the use of sex-based criteria by giving "exceedingly persuasive" reasons for the use of such criteria in achieving important governmental objectives. Virginia argues (1) that VMI contributes to the diversity of educational options within the state, (2) that admitting women would be detrimental to the adversative model of education, and (3) that the state has proposed a reasonable alternative to admitting women. All three arguments lack merit.

Virginia's argument for diversity amounts to little more than a post hoc rationalization of the male-only admissions policy at VMI. The state has produced no evidence to suggest that VMI was originally founded with the intention of increasing the diversity of educational options.

To the contrary, higher education was already restricted to men at the time of its founding. Indeed, the diversity argument itself rests on a flawed premise, as any such diversity would benefit only the men, and not the women, in Virginia.

Virginia next tries to justify the men-only policy by arguing that most women would not find the adversative model suitable to their education needs. In making this argument, however, the state has resorted to precisely the sort of sweeping generalization that the Court has found unconstitutional. Although it is probably true that most women would not choose to attend VMI, the real question here is whether it is constitutional to deny admission to those women who do have a desire to attend the school. The record shows that some women are capable of meeting the demands of a VMI education. Notwithstanding the practical challenges of admitting women, the basic mission of VMI is not inherently incompatible with women.

Finally, Virginia argues that the proposed Virginia Women's Leadership Institute (VWIL) would be a suitable alternative to VMI. The record shows, however, that VWIL offers none of the features that are central to a VMI education. Indeed, this alternative is reminiscent of the hastily proposed all-black law school in Sweatt v. Painter.

Chief Justice Rehnquist, concurring in judgment. Although the Court reaches the correct conclusion, it has confused its analysis with references to "exceedingly persuasive justifications." This term was originally used to illustrate the challenges of applying intermediate scrutiny, not to act as a standard in itself. The Court should have considered only those actions that VMI took after cases made it clear that sex discrimination had become unconstitutional. Furthermore, VMI should not be required to remedy the situation by admitting women; rather, it suffices for Virginia to establish a separate, women-only school.

Justice Scalia, dissenting. Since the maintenance of single-sex colleges dates back to the beginning of the nation and the Constitution says nothing about their legality, the Court should not have forced VMI to admit women. The Court's duty extends only to making sure that existing constitutional standards are not violated; it does not extend to creating new constitutional limits. The Court has created such a limit by making sure that single-sex education is functionally dead. In doing so, it disregards factual findings showing that single-sex education tends to improve the performance of students. It also makes the sweeping conclusion that the admission of women would not interfere with VMI's educational methods despite evidence to the contrary. Finally, the Court has eviscerated any meaningful distinction between intermediate scrutiny and strict scrutiny.

Disability

City of Cleburne v. Cleburne Living Center, Inc.
473 U.S. 432 (1985)

Overview

A dispute arose as to whether mental retardation is a suspect classification.

Facts

Cleburne Living Center (CLC) intended to establish a home for the mentally retarded in the City of Cleburne. While the home complied with the zoning restrictions that normally applied to a structure of its type, the City nonetheless determined that CLC would need to obtain a special permit. When CLC applied for the permit, the City denied it.

Issue

(1) What should be the standard of review for classifications based on mental retardation? (2) Does the City's requirement of a permit violate the Equal Protection Clause of the Fourteenth Amendment?

Holding

(1) The standard of review should be the rational-basis test. (2) The City's requirement of a

permit violates the Equal Protection Clause of the Fourteenth Amendment.

Reasoning

White, J. delivered the opinion of the Court. The Court should apply rational-basis review to distinctions founded on mental retardation. The record shows that the degree of mental retardation varies widely from patient to patient. Given the great variation, the Court would not be competent to dictate how this purported class should be treated; that task should be left to the legislature. The record also shows that the legislature has taken pains to protect the mentally retarded through statutes. This solicitude shows that the mentally retarded are not a class that is politically powerless.

The City, however, nonetheless fails to pass muster under rational-basis review. It has stated no convincing reason that demanding a special permit in the current case would further any state interest. The City argues that the residents of the home might be harassed by nearby children or pose a threat to nearby residents, but these arguments seem to rest on vague fears rather than clear evidence. The City's purported concerns about the safety of the home also fail to clarify how special restrictions should apply here but not to other homes of similar structure. In all, the City's decision appears to have arisen from antipathy toward mentally retarded individuals.

Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part. The Court has actually applied heightened scrutiny under the banner of rational-basis review. In failing to differentiate this heightened standard from the "traditional" rational-basis review used in cases such as Williamson v. Lee Optical Co., the Court has muddled the doctrinal foundations of the different levels of review. The Court has also glossed over the fact that mentally retarded persons have been subject to abuses comparable to the worst excesses of the Jim Crow laws. The Court also claims that heightened scrutiny is inappropriate in cases where (1) individual differences between members of a discriminated-against class or (2) some legislative action has been taken to protect that class. This reasoning suggests that the Court's power of review would be strictly confined. Finally, the Court should have struck down the permit requirement outright rather than limiting its application only in the current case.

Affirmative Action

Regents of the University of California v. Bakke
438 U.S. 265 (1978)

Squib. The Supreme Court struck down an affirmative-action program implemented by the University of California at Davis Medical School. The program set aside 16 out of the 100 seats in each incoming class for certain minority students. Minorities could qualify for these seats even if they had GPAs that would ordinarily have disqualified them from admission. Bakke, a rejected white applicant, sued after discovering that several minority applicants had been admitted despite having significantly lower grades than he did.

Justice Powell stated that equal protection "cannot mean one thing when applied to one individual and something else when applied to a person of another color." Powell rejected in particular the idea that individuals could be grouped into classes, which would then be used as the basis for affirmative action. Powell argued that such classifications would inevitably lead to intractable line-drawing problems as to what constituted a discriminated-against class. Powell also observed that UC Davis had no authority to remedy "societal discrimination," as such a heavy-handed approach would tend to compensate victimized groups at the expense of innocent individuals within the majority. Finally, Powell took issue with the quota imposed by the program; while it was acceptable to treat race as a "plus" in admissions, it was going too far to exclude whites categorically from competing for a certain fraction of the seats.

Justice Brennan dissented, arguing that the history of discrimination justified the use of

race-conscious admissions criteria. He found race-neutral alternatives to be inadequate given the numerical superiority of whites at every socioeconomic level. An affirmative action favoring poor applicants, for instance, would simply favor poor white applicants as opposed to poor black ones.

Justice Marshall dissented, stating that it was ironic for the Court to strike down a class-based remedy for class-based discrimination.

Justice Blackmun dissented, stating that the Court was creating undue difficulties for the affirmative-action program when it allowed schools to give preference on the basis of athletic ability, "legacy" status, and other criteria.

Fullilove v. Klutznick
448 U.S. 448 (1980)

Squib. The Supreme Court upheld the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977. The MBE required that a certain portion of government contracts were to be granted to minority-owned businesses. Chief Justice Burger wrote that Congress had power to pass the provision under the Fourteenth Amendment because past discrimination had placed minority-owned businesses at a disadvantage in competing for government contracts. Justice Powell concurred on the ground that Congress need not engage in fresh fact-finding for every piece of legislation if its experiences supported the view that such legislation was necessary. Justice Marshall concurred on other grounds. Justice Rehnquist dissented on the ground that the government may not afford a person different treatment solely on account of race. Justice Stevens dissented, arguing that the policy presented intractable questions of racial classification.

Wygant v. Jackson Board of Education
476 U.S. 267 (1986)

Squib. The Supreme Court struck down a school board's policy of laying off non-minority teachers first so as to preserve the racial diversity of the faculty. Justice Powell, writing for the plurality, stated that preserving the diversity of the faculty was a "compelling state interest." The layoff policy, however, was not a legitimate means to achieve that end because it imposed excessive burdens on innocent parties. Justice White concurred on the ground that the policy was invalid because it tied layoffs to the percentage of minority students in the district. Justice Marshall dissented, arguing that such protection of minority teachers was necessary; otherwise, the usual last-in-first-out layoff policy would almost certainly lay off such teachers first. Justice Stevens dissented, arguing that prior discrimination against minority teachers was not necessary to justify the program.

City of Richmond v. J.A. Croson Co.
488 U.S. 469 (1989)

Overview

A dispute arose as to the constitutionality of an affirmative-action program for awarding government contracts.

Facts

The City of Richmond had adopted a plan requiring awardees of government contracts to subcontract at least 30% of the work to minority business enterprises (MBEs). An MBE was defined to be any business at least 51% of which was owned by minority individuals. The stated purpose of the plan was to remedy the effects of past discrimination, which had depressed minority participation in such businesses to effectively negligible levels despite that blacks accounted for more than 50% of the population. The plan allowed waivers where a contractor showed that no qualified MBEs existed to take the requisite subcontracts. After J.A. Croson Company was denied such a waiver, it challenged the constitutionality of the plan.

Issue

Is the Richmond plan a proper exercise of legislative power under the Fourteenth Amendment?

Holding

The Richmond plan is not a proper exercise of power under the Fourteenth Amendment.

Reasoning

Justice O'Connor announced the judgment of the court . . . . The states may not exercise the same level of discretion as the federal government in formulating affirmative-action plans. The Fourteenth Amendment expressly reserves to Congress the power to legislate in accordance with the goals of the Amendment. Indeed, the Amendment was ratified with the very purpose that it should act as a check against abuses by state governments. Allowing the states the discretion that Richmond has exercised would undermine the balance of state and federal powers.

Richmond has failed to produce sufficient evidence that its plan addresses well-defined instances of discrimination. Rather, it relies solely on federal findings of discrimination and tends to make generalizations about discriminated-against classes. This sort of reasoning runs afoul of the principle that equal protection cannot mean one thing when applied to one person and something else when applied to another. Richmond argues that the low presence of minorities in businesses necessarily means that discrimination is taking place. This conclusion, however, rests on the faulty assumption that minority persons would indeed choose to go into business at the same rate as non-minority persons. Richmond has failed to establish that the apparent dearth of minorities resulted from some discriminatory purpose. Absent a stronger factual basis, Richmond has simply applied an arbitrary racial classification.

Stevens, J., concurring in part and concurring in the judgment. Richmond has failed to make a convincing case that granting preference to MBEs would further a public interest. Richmond also exceeded its bounds in engaging in legislative fact-finding on the issue of discrimination. Such fact-finding should be reserved to the courts. Finally, affirmative-action programs should be based on a detailed analysis of the characteristics of the discriminated-against class. Here, Richmond has failed to engage in such analysis, opting instead to implement a heavy-handed policy categorically favoring certain classes. As a result, some MBEs which have never been victimized by discrimination may receive windfalls. At the same time, non-MBEs which never engaged in discrimination may be unfairly burdened by the plan.

Kennedy, J., concurring in part and concurring in the judgment. The Court's decision reaches the somewhat puzzling conclusion that a federal affirmative-action program might become unconstitutional if implemented by a state. The states should have not only the power, but also the duty, to actively remedy the effects of discrimination, especially if those effects resulted from the state's own doing. Still, it is not entirely clear that the Court should strike down any plan that uses racial classification. Rather, the strict scrutiny suggested by Justice O'Connor is a good standard of review.

Scalia, J., concurring in the judgment. The Court correctly concludes that the states may not attempt to remedy discrimination with race-based classifications. Such classifications tend to perpetuate the basis of discrimination, and the Fourteenth Amendment was ratified with the purpose of combating prejudices at the state level. Here, Richmond has assumed the existence of "societal" discrimination rather than attempting to identify individual discrimination. The practice of lumping people into groups and then according preferences to one or the other will inevitably prove detrimental to racial relations.

Marshall, J., with whom Justice Brennan and Justice Blackmun join, dissenting. The Court blatantly disregards the factual findings of Richmond and launches a broad attack against all race-conscious remedies for discrimination. It is ironic that the Court would strike down the former Confederate capital's own efforts to combat discrimination. It is too late to deny that Richmond has had a history of racial

discrimination. While statistical evidence alone may not always establish underlying discrimination, the gross disparity between the fraction of blacks in the Richmond population and the tiny number of MBEs among Richmond businesses strongly suggests that discrimination is at work. The Court should not reject the factual determinations of local authorities, who best understand local issues.

The Richmond plan cannot be said to be too broad. It has a sunset provision, and it provides for waivers in cases where no MBEs can be found to take subcontracts. The Court makes a misplaced demand for racially neutral alternatives. Richmond had already experimented with such alternatives and found them inadequate. The 30% set-aside cannot be considered too drastic; indeed, it was modeled on the federal quota upheld in Fullilove.

The Court also should not have insisted on applying strict scrutiny to race-based remedies. There is a world of difference between using race to create invidious discrimination and using race to remedy that discrimination. The Court's ruling makes the erroneous suggestion that the Fourteenth Amendment somehow requires federal anti-discrimination measures to preempt similar measures taken by the states. There is nothing to suggest that the states should be prohibited from fighting discrimination alongside the federal government.

Metro Broadcasting v. FCC
497 U.S. 547 (1990)

Squib. The Supreme Court upheld an FCC policy giving preferences to minorities in the granting of broadcasting licenses. Justice Brennan found that "benign" race-conscious measures were to be upheld as long as they furthered some important governmental objective. Justice O'Connor dissented, arguing that federal racial policies should not be subject to a lower standard of scrutiny than similar state policies. Justice Kennedy, dissenting, argued that race-conscious measures would tend to stigmatize minorities.

Adarand Constructors v. Peña
515 U.S. 200 (1995)

Squib. Congress had enacted the Small Business Act, which provided certain advantages to minority-owned businesses in the awarding of government contracts. After submitting the low bid but losing the contract to another bidder because of the Act, Adarand Constructors challenged the constitutionality of the Act.

O'Connor, J. The Court's rulings through Croson established (1) that any race-based criterion is subject to strict scrutiny, (2) that the Equal Protection Clause must mean the same thing when applied to every individual regardless of race, and (3) that equal protection is the same under the Fifth Amendment as under the Fourteenth Amendment. To the extent that Metro Broadcasting held that certain "benign" racial classifications could be exempted from strict scrutiny, it is overruled. It cannot be said that strict scrutiny is "strict in theory but fatal in fact." Indeed, the very point of strict scrutiny is to distinguish acceptable race-based criteria from unacceptable ones.

Scalia, J., concurring in part and concurring in the judgment. The government is never justified in attempting to remedy discrimination by applying even more race-conscious criteria.

Thomas, J., concurring in part and concurring in the judgment. Strict scrutiny should apply to all race-conscious criteria regardless of whether such criteria might be characterized as "benign." Race-based classifications are inherently discriminatory.

Stevens, J., with whom Ginsburg, J., joins, dissenting. The Court refuses to recognize the difference between using race-based criteria to discriminate against minorities and the use of such criteria to affirmatively remedy the effects of discrimination. By subjecting all race-based affirmative-action programs to strict scrutiny, the Court has made it easier for Congress to remedy discrimination against women than to remedy discrimination against racial minorities.

Grutter v. Bollinger
539 U.S. 306 (2003)

Overview

A dispute arose as to the constitutionality of an affirmative-action that considered race as one of many factors in admission.

Facts

The University of Michigan Law School had implemented affirmative action in its admissions policy. The purpose of the affirmative-action was to guarantee a "critical mass" of minority students so as to foster effective classroom discussion. To this end, admissions officers considered race as one factor in admission. Although the admission office monitored the number of admitted minority students, admissions officers also testified that "critical mass" did not translate to a particular number of minority students. Barbara Grutter, who was rejected from the school, challenged the policy on the ground that it violated equal protection under the Fourteenth Amendment.

Issue

Does the Law School's admissions policy violate equal protection under the Fourteenth Amendment?

Holding

The policy does not violate equal protection under the Fourteenth Amendment.

Reasoning

Justice O'Connor delivered the opinion of the Court. The maintenance of a diverse student body is a compelling state interest, and the Law School's admissions policy furthers that interest in a way that passes muster under strict scrutiny. Universities, as forums for free speech and thought, have consistently been accorded special consideration in constitutional law. The Law School is entitled to determine that a diverse student body would further its goals; its judgment deserves a presumption of good faith absent evidence to the contrary. The Law School and amici have produced abundant evidence to show that exposure to a racially diverse environment is crucial to a student's success. This factor is especially important here since law schools are responsible for training a significant portion of the country's leaders.

The Law School has taken care not to use race in the heavy-handed way disapproved in Bakke. It does not attempt to set aside a certain number of seats for minority students, nor does it otherwise attempt to insulate minority applicants from competition with the rest of the applicant pool. Rather, the Law School uses race as one of many "plus" factors in a holistic evaluation of students. That the Law School awards "plus" factors on the basis of criteria other than race shows that the schools is not focusing unduly on racial classifications. Although the Law School has shown some concern about the number of minority applicants ultimately admitted, there is no evidence to show that the monitoring of minority admissions in any way affects the weight of race as a "plus" factor. Finally, the Court should not require the Law School to exhaust race-neutral alternatives before implementing the current plan. Implementing such an alternative, such as a lottery system, may force the school to make an unacceptable reduction in the quality of its student body.

Justice Ginsburg, with whom Justice Breyer joins, concurring. The Court makes an overly optimistic estimate in saying that affirmative action will become unnecessary in twenty-five years.

Chief Justice Rehnquist, with whom Justice Scalia, Justice Kennedy, and Justice Thomas join, dissenting. The Law School seems to be carrying out racial balancing in disguise. In particular, it has offered no evidence to reconcile its claim of achieving "critical mass" with admissions data. The significant differences between the numbers of students admitted from each minority suggests that the "critical mass" is different for each race. This result is puzzling since one would expect precisely the opposite. A far more sensible explanation is that the Law School is consciously manipulating the proportion of minorities in each admitted class. Indeed, the data

show that the number of admitted students from each race tracks the proportion of applicants from those races.

Justice Kennedy, dissenting. The Court has confused the legitimate goal of racial diversity with illegitimate methods of attaining that goal. In doing so, it has accepted wholesale the Law School's inadequate evidence as to the constitutionality of its affirmative-action policy. The record shows that racial considerations carry the most weight toward the bottom of the applicant pool. The Law School's monitoring of minority admissions only reinforces the impression that race increasingly conflicts with individualized review as seats become filled. The Law School has not provided enough evidence to show that it is guarding against the possibility that race will be used improperly. Indeed, some faculty members have shown cynical views about which individuals should qualify as minorities.

Justice Scalia, with whom Justice Thomas joins, concurring in part and dissenting in part. The Law School's avowed interest in achieving "racial understanding" and related goals should not receive constitutional recognition. If such goals are recognized, then nothing would lie outside the scope of affirmative action. The Court's decision suggests that Michigan's civil-service system might also benefit from according certain preferences to minority applicants. In any case, the Court's decision tends to prolong, not settle, the constitutional questions surrounding affirmative action.

Justice Thomas, with whom Justice Scalia joins . . . , concurring in part and dissenting in part. The Court has placed the Law School's desire to maintain its elite status above the constitutional questions as to its affirmative-action program. It is hard to discern how the Law School's interest in the "educational benefits that flow from student body diversity" is not simply a polite way of stating a desire for racial balancing. Indeed, the Court has ignored entirely the issue that maintaining a public law school of any sort, much less an elite one, hardly qualifies as a compelling state interest. There are states that have no law school at all. While one might argue that the Law School might relate to the state's interest in training qualified lawyers, its elite status belies this claim since most of its graduates tend to move out of state anyway. Comparing this case to the VMI Case, it is difficult to understand how the Court can rationalize its refusal to force the Law School to explore race-neutral admissions policies. In the VMI Case, the remedy was more drastic and the standard of review was lower, yet the Court had no problem with forcing VMI to admit women. The Court today expresses its support for a program that tends to brand minorities with a stamp of inferiority by insinuating that minority individuals cannot succeed without special preferences.

Gratz v. Bollinger
539 U.S. 244 (2003)

Squib. The undergraduate program at the University of Michigan used a 150-point scale in evaluating applicants. Applicants receiving 100 points or more were guaranteed admission, with the prospects for admission decreasing as the score dropped below that threshold. The admissions office awarded 20 points on the bonus of race; other considerations, such as the admissions essay or personal achievements, might result in 3--5 points. Certain applications could also be flagged for review by the Admissions Review Committee (ARC), which could use its discretion to accept students near the borderline of admissibility. The Supreme Court held that racial diversity was a legitimate goal but that the University had sought to achieve that goal through improper means.

Rehnquist, C.J. The point system provides a categorical advantage to applicants of certain races. This approach contravenes the principle that college should use individualized review when evaluating applicants. That a particular applicant might receive addition review from the ARC is little comfort; the University has provided no indication of how many applications actually receive such review, and in any case the review takes place only after the racial advantage has taken effect.

O'Connor, J., concurring. The sheer number of points assigned to race suggests an attempt at outright racial balancing. The existence of

the ARC seems to be more of an afterthought than a genuine attempt to carry out individualized review.

Thomas, J., concurring. The University's admissions policy does not give adequate consideration to non-racial factors.

Souter, J., dissenting. The Court effectively punishes the University for transparency in its admissions policy. The policy in question differs significantly from the quota struck down in Bakke. The University has not unconditionally reserved a specific number of seats to minority applicants. Rather, it considers race as only one of many factors in the admissions decision. It is difficult to understand how using a point system to valuate each factor makes the system suspect; it seems to do explicitly what the University's law school does implicitly through "holistic" review. While the 20-point bonus for race might come across as excessive, bare suspicion of the point value cannot render the system unconstitutional. Indeed, closer examination reveals that a non-minority applicant can easily gain more than 20 points through a combination of non-racial factors. The ARC also provides a bulwark against the heavy-handed use of racial classifications.

Ginsburg, J., dissenting, joined by Souter, J. The long history of racial discrimination is powerful evidence for the necessity of the University's affirmative-action policy. In holding that racial classifications cannot be used even for the purpose of overcoming the lingering effects of racial discrimination, the Court turns a blind eye to reality. Today's decision will likely cause colleges to resort to subtler means of implementing affirmative action.

Parents Involved in Community Schools v. Seattle School District No. 1

551 U.S. 701 (2007)

Overview

A dispute arose as to the constitutionality of assigning children to schools on the basis of race.

Facts

Seattle School District No. 1 had never been segregated by law, but it nonetheless took efforts to combat what it considered de facto segregation. The Seattle district used race as a tiebreaker in assigning children to a school whenever the balance between white and nonwhite students at that school deviated from the district-wide ratio by more than 10%. Jefferson County Public Schools in Louisville was formerly deemed to be segregated, but a court had declared that it had achieved "unitary" status. The Louisville district restricted the transfer of students to a school once the proportion of black students at that school fell below 15% or rose above 50%.

Issue

Do the race-conscious plans of the school districts pass muster under strict scrutiny?

Holding

The plans do not pass muster under strict scrutiny.

Reasoning

Chief Justice Roberts announced the judgment of the Court . . . . The Court has recognized only two interests that warrant the use of race-conscious criteria: (1) remedying the effects of past discrimination and (2) maintaining a diverse student body for the purpose of enhancing education. Neither district can justify its plan under the first interest; since the Seattle district was never found to be segregated and the Louisville district has achieved "unitary" status, there is no legally recognized effect of discrimination to be addressed. Both districts also fall short under the second interest because their plans skew heavily toward racial balancing for its own sake.

The Seattle district determines the "appropriate" balance of black and white students using no principled basis; rather, it relies only on the current demographics of its area. The Louisville district, by contrast, sets a fixed range for the proportion of black students at each school. Neither district has produced evidence to show

any connection between its desired racial composition and educational benefits. The districts appear to be "working backward" to justify racial balancing on the basis of imagined benefits.

Although the districts argue vigorously that their racial policies are necessary to achieving diversity, the very fact that few students are affected by the plans suggest that they are ineffective and unnecessary. Far from aiding racial integration, the plans are likely to perpetuate racial distinctions and to stoke racial animosity.

Justice Kennedy, concurring in part and concurring in the judgment. Diversity of the student body may be a compelling interest under the appropriate circumstances. Here, however, the school districts have failed to explain how their policies are narrowly tailored to serve that interest. The Louisville district describes its program in only vague and general terms; it fails to explain how race-conscious rules will be applied or whether any oversight exists to prevent abuse of the system. The Seattle district provides somewhat more information, but it still fails to justify its decision to place students into "white" and "non-white" categories. This two-class system disregards the fact that not all non-white persons belong to the same race. The districts should consider race-conscious approaches that would not necessarily involve overt classifications based on race. Each district, for example, might achieve integration to a significant extent through the strategic drawing of district boundaries or the strategic selection of school sites.

The dissent appears to ignore the distinction between de jure and de facto segregation. The central purpose of the distinction is to separate those cases in which racial classifications are deemed a necessary evil from those in which it is not. A finding of de jure segregation amounts to a declaration that patterns of discrimination have become so entrenched that the government should be given significant leeway in combating their effects. De facto segregation, by contrast, is merely "societal discrimination"; the Court has held that such discrimination does not warrant racial classifications. The dissent's approach would promote the imposition of racial labels on students and tend to aggravate, rather than resolve, racial issues.

Justice Stevens, dissenting. The Court has misinterpreted Brown. In comparing the race-based policies of the school districts here with the segregation in Brown, the Court ignores that segregation burdened only blacks.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting. In striking down the school districts' plans for promoting integration, the Court ignores both legal precedent and social realities. Since the Brown decision, the Court has on numerous occasions ordered schools to implement desegregation plans involving race-conscious criteria, such as busing and race-based restrictions. The Court has also allowed school districts to exercise significant discretion in their means of promoting integration. So far, the Court has set forth only minimum requirements for efforts at integration; it has not placed limits on what schools are constitutionally allowed to do.

The Court overplays the distinction between de jure and de facto segregation in its holding. Its decision suggests that a plan which was constitutional the day before a school district achieves "unitary" status would instantly become unconstitutional the day after it achieves that status. The Fourteenth Amendment cannot possibly have such an inconsistent meaning. As a matter of fact, the Court also inflates the claim that neither the Seattle district nor the Louisville district were ever segregated. While it is true that no court currently recognizes either as segregated, this does not mean that their integrated status has gone unchallenged. To the contrary, Louisville implemented its plan pursuant to a court order, and Seattle undertook its efforts following lawsuits alleging that the school board had enacted discriminatory policies.

The Court incorrectly applies strict scrutiny because it fails to distinguish between the use of race to end segregation and the use of race to promote it. The Seattle and Louisville districts have a compelling interest in promoting racial diversity. Research has shown that the integration of schools tends to close the performance

gap between black students and their white counterparts. The plans in question may be characterized as "narrowly tailored" to their purposes; the evidence shows that other plans are substantially less likely to achieve the goal of integration. Indeed, the current plans emphasize race to a much lesser extent than previous plans. The Court is taking a position that would implicitly invalidate many of the efforts at desegregation that have taken place during the past decades.

Substantive Due Process Revisited

Reproductive Freedom

Meyer v. Nebraska
262 U.S. 390 (1923)

Squib. The Supreme Court struck down a Nebraska statute prohibiting the teaching of foreign languages to children who had not yet reached the eighth grade. The statute had been passed during a time of anti-German sentiment following World War I. The Court found that the statute infringed the liberty guaranteed by the Fourteenth Amendment. The statute limited a teacher's right to instruct children without providing a reasonable relation to a state interest.

Pierce v. Society of Sisters
268 U.S. 510 (1925)

Squib. The Supreme Court struck down an Oregon statute forbidding children from attending parochial and private schools. The Court found that the fundamental theory of liberty included the right of parents to educate their children as they saw fit. The state had no business in interfering with children's development by mandating a certain form of education.

Skinner v. Oklahoma
316 U.S. 535 (1942)

Squib. The Supreme Court invalidated an Oklahoma statute requiring the sterilization of repeat offenders who committed certain crimes. The Court took issue with the arbitrary classification of crimes that could result in mandatory sterilization. The Court noted that the power of sterilization had far-reaching consequences and that it could easily become an instrument of abuse in the wrong hands.

Griswold v. Connecticut
381 U.S. 479 (1965)

Overview

A dispute arose as to the constitutionality of the use of contraceptives by married couples.

Facts

Connecticut had enacted a criminal statute prohibiting the use of contraceptives. Griswold, who operated a clinic supplying contraceptives to married couples, challenged the statute on the ground that it violated the Fourteenth Amendment.

Issue

Does the statute violate the Fourteenth Amendment?

Holding

The statute violates the Fourteenth Amendment.

Reasoning

Douglas, J. The Court has upheld many rights that are not enumerated in the Constitution. Such rights have included the right to be educate one's children as he chooses and the right to free association. These rights have special importance because they are intimately related to those rights that are enumerated. In the current case, Connecticut seeks to control the distribution of contraceptives not by regulating their sale but by interfering directly with the

marital relationship. Such a heavy-handed intrusion of privacy is not a legitimate way of promoting the state interest at stake.

Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring. The Ninth Amendment justifies the Court's ruling. That Amendment was drafted specifically in response to fears that the other amendments might be though to provide an exhaustive list of all rights falling under constitutional protection. The right to marriage is a fundamental right deeply rooted in the traditions of this country. A state may not encroach upon such a right without showing some compelling interest that would be advanced as a result. Connecticut argues that the statute may help to prevent extramarital relations, but a ban on contraceptives is plainly too broad a remedy. The state has already addressed the problem through statutes prohibiting fornication.

Harlan, J., dissenting [in Poe v. Ullman]. The Fourteenth Amendment embraces not only the enumerated rights but also a set of unenumerated, fundamental rights. These fundamental rights derive from the balance that the country has struck between the need to protect individual liberties and the need to maintain an organized society. The right to marriage is such an unenumerated right, and the state here proposes to regulate that relationship using all the apparatuses of the government. Although the state may regulate who may enter into marriage, it may not dictate the details of that relationship once it is recognized. The Connecticut statute fails to survive strict scrutiny.

White, J., concurring. Marriage is an unenumerated right protected by the Fourteenth Amendment, and a state may not infringe that right without providing a compelling state interest. Here, Connecticut has stated no such interest; rather, it justifies the law only on the basis that it would prevent promiscuous relationships. While the state may have an interest in discouraging such relationships, prohibiting the use of contraceptives is an ineffective and overly broad way to serve that purpose.

Black, J., joined by Stewart, J., dissenting. The Constitution provides no "right to privacy," and the Court should not read such a provision into it. In doing so, the Court has significantly altered the meaning of the Constitution. The Court's appeals to consensus provide scant justification for its decision since the judiciary is ill-equipped to measure public opinion.

Stewart, J., joined by Black, J., dissenting. The statute may be unwise or even asinine, but the Court's duty is not to evaluate its desirability. The Court's only duty is to determine whether it comports with the Constitution. Since the Constitution sets forth no general right to privacy, the statute should be upheld.

Eisenstadt v. Baird
405 U.S. 438 (1972)

Squib. The Supreme Court struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. The Court found that the distinction between married and unmarried persons amounted to a violation of equal protection under the Fourteenth Amendment. Justice Brennan, writing for the majority, stated that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion . . . ." Chief Justice Burger dissented, distinguishing the case from Griswold on the ground that it banned, not regulated, the distribution of contraceptives.

Roe v. Wade
410 U.S. 113 (1973)

Overview

Roe challenged the constitutionality of a Texas criminal statute prohibiting abortions except in the circumstances where an abortion was necessary to preserve the life of the mother.

Facts

Texas, like many other states, enacted a statute making abortion a crime except in situations where failure to perform an abortion could endanger the mother's life. The Texas statute reflected the anti-abortion sentiment that had been building since the inception of American

law. Regulation of abortion was historically lax. In Ancient Greece and Ancient Rome, anti-abortion laws existed but were rarely enforced. The English common law somewhat tightened the restrictions by distinguishing abortion performed before "quickening" of the fetus from that performed afterward. In general, only the latter was considered a crime. In the nineteenth century, American states began to punish pre-quickening abortions, though with lighter sentences than for post-quickening abortions. It was not until the twentieth century that categorical bans on abortion took hold. Recent developments, however, have loosened the restrictive views toward abortion. Roe sued on the theory that abortion is right, like the right to privacy, that is protected by substantive due process.

Issue

Does the Texas statute violate substantive due process?

Holding

The Texas statute violates substantive due process only to the extent that it reaches beyond "compelling" state interests in regulating abortion. The state interest in such regulation increases with the development of the fetus. In the first trimester of pregnancy, states do not have any compelling interest in regulating abortion. After the first trimester of pregnancy, states may regulate abortion to the extent required to protect the mother's health. After the fetus becomes viable, states may regulate additionally regulate abortion to the extent required to protect the potential life of the fetus.

Reasoning

Blackmun, J. The Court need not decide the point at which new life is formed following pregnancy. Given the vigorous disagreement within the scientific and religious communities as to the answer to this issue, the judiciary is not competent to speculate on the outcome. All that is necessary is that the Court recognize that a fetus has the potential for life and that this potential may become protectable. Both sides state valid arguments but overreach in their conclusions. Roe correctly contends that substantive due process extends protection to the decision whether to have an abortion. To the extent that Roe is correct, Texas is incorrect. The emotional impact of having an unwanted child as well as the social consequences of single motherhood can take a toll on a mother. Women should therefore have significant discretion in choosing whether to abort a fetus. At the same time, Roe incorrectly concludes that this right should constitute unlimited discretion to the woman. Texas observes correctly that states may have a "compelling" interest in regulating abortion. This interest begins below the "compelling" threshold and grows throughout pregnancy. Data have shown that the risks of abortion to the mother during the first trimester of pregnancy are lower than those of childbirth. During this period, the state has no argument that it has a compelling interest in protecting the health of the mother. Following the completion of the first semester, the risks of abortion rise to a sufficient extent such that the state now has a compelling interest in protecting the health of the mother. When the fetus becomes viable, the potential life of the fetus also becomes a compelling interest that a state may choose to protect. The right to abortion should therefore be adjusted in accordance with the changing circumstances of the pregnancy.

Douglas, J., concurring [in Doe v. Bolton]. A woman should be free to choose whether to have a child. An unwanted child may impose enormous burdens on the mother, so forcing a woman to bear a child amounts to a violation of the unenumerated rights protected by substantive due process. The Georgia statute gives too much favor for states' interests. In particular, it makes the unjustified conclusion that the value of the embryo at the moment of conception is equal to the value of the fetus immediately before birth.

Stewart, J., concurring. The case law establishes beyond doubt that substantive due process protects unenumerated rights such as the right to privacy and the right to personal autonomy. Previous cases have held that rights far less important than the decision whether to bear a child may not be infringed by the government. These lesser rights have included the

right to allow one's child to attend private school and the right to have students learn a foreign language. In light of these cases, it cannot be disputed that a woman's right to abort a pregnancy is protected by the constitution. Although states may regulate abortion to the extent necessary to protect the health of the mother and fetus, the Texas statute has reached far beyond these objectives.

Rehnquist, J., dissenting. The Court justifies its decision on the puzzling ground that abortion somehow implicates the right of privacy. It is unclear exactly what is "private" about an abortion. It is performed with the aid of a doctor, so by its nature it is not private. Even if such "privacy" is held to be freedom from government interference in private transactions, it is still not categorically immune from regulation. Such laws have traditionally been upheld on the rational-basis standard. Under this standard, the "right" to abortion is not as "fundamental" as the Court would have one believe. That thirty-six states have enacted statutes restricting abortions in some way demonstrates the division of opinion on the issue. The Court's decision amounts to judicial legislation.

White, J., joined by Rehnquist, J., dissenting [in Doe v. Bolton]. The abortions at issue are those in which the mother, for reasons of convenience or whim rather than health, chooses to terminate a pregnancy. While the Court may be justified in its ruling from a purely legal standpoint, it has exercised its power in a ham-handed way. There is simply no reason for the Court to override states' interests in protecting the potential life of the fetus.

Doe v. Bolton
410 U.S. 179 (1973)

Squib. The Supreme Court struck down a Georgia statute restricting abortions. First, the Court found that Georgia could not require abortions to be performed in hospitals as opposed to clinics or other smaller establishments. Second, the Court struck down requirements for special accreditation of hospitals performing abortions. Third, the Court found that the requirement of a concurring medical opinion unduly restricted the freedom of the patient. Finally, the Court struck down the statute's limitation of the availability of abortions to residents of the state.

Planned Parenthood of Southeastern Pennsylvania v. Casey
505 U.S. 833 (1992)

Overview

A dispute arose as to whether key aspects of Roe v. Wade should be reaffirmed.

Facts

Pennsylvania enacted a statute requiring women to comply with certain requirements before undergoing abortions. Among these requirements were that a woman be provided with certain information prior to the abortion, that she wait for at least twenty-four hours after such information is provided, that a minor should obtain the consent of at least one parent to the abortion, and that a married woman report to her husband her intention to have an abortion. The statute provided for certain exceptions to these requirements, such as medical emergency and fear of domestic violence. A dispute arose to whether these requirements were constitutional.

Issue

Are the requirements imposed by the Pennsylvania statute constitutional?

Holding

The requirements are constitutional to the extent that they do not impose an "undue burden" on women seeking abortions.

Reasoning

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court . . . . The Court should not overrule precedent except when changed realities force it to do so. In particular, the Court should sup-

port any overruling with more than the mere feeling that a previous case was decided wrongly. Excessive overruling tends not only to damage the reputation of the Court but to harm individuals who have relied on its decisions in framing their own lives. In the context of abortion, it cannot be doubted that countless women have decided to engage or not to engage in sexual activity on the assumption that abortion will be available, even if it is anticipated as a last resort, to be used only when other methods of contraception have failed.

Only two significant instances of overruling comparable to the one now contemplated now have occurred in the entire history of American law. The first was the overruling of Lochner v. New York and the related line of cases, in which the Court had held that laissez-faire economics fell under the protection of substantive due process. The Court reversed its earlier ruling in the face of universal recognition that laissez-faire policy was woefully inadequate to ensure decent living conditions for all people. The second overruling occurred when Brown v. Board of Education superseded Plessy v. Ferguson. Again, realities had become so changed that it was no longer to accept the earlier conclusion that segregated facilities could be equal. By contrast, the current case presents no such profound shift in the recognition of factual reality. Given the absence of such any compelling basis for overruling precedent, the Court should decline to overrule Roe v. Wade.

At the same time, the holding of Roe should be re-evaluated under the "undue burden" standard. This standard holds that a state may not place substantial obstacles in a woman's path to abortion but may enact regulations designed to promote birth. Under this analysis, the trimester framework of the original holding is flawed because it tends to establish overly broad restrictions against regulation. There is no reason that states should be barred from encouraging women not to undergo abortion, even during the first trimester, when the woman's discretion is accorded effectively complete deference. The informed-consent requirement and the twenty-four-hour waiting period are also constitutional because they advance the legitimate state interest in promoting well-reasoned decisions regarding abortion. Similar consent requirements exist for transplant surgeries, and there is no reason to think that such a requirement would be inadvisable here. The only problem is that women who live far away from abortion clinics may be inconvenienced by the need to make separate trips to their clinics. This need, in turn, might make it difficult to maintain the privacy of the abortion. Still, it is doubtful that such inconveniences amount to an undue burden. The requirement that a minor obtain the consent of at least one parent is also designed to help a minor benefit from her parents' advice. Such an end promotes a legitimate state interest.

The requirement that a married woman notify her husband, however, must be struck down for imposing an undue burden. The trial court made copious factual findings supporting the proposition that such reporting often exposes women to violence, intimidation, and other forms of psychological pressure from husbands who do not want the abortion to occur. Such husbands might take out their anger on their wives directly. Alternatively, they might try to coerce women through less direct means, such as by abusing their children, withholding money, or threatening to reveal the abortion to family and friends. The constant threat of such intimidation has the capacity to dissuade women from considering abortion entirely, as if the state had outlawed abortion outright.

Justice Stevens, concurring in part and dissenting in part. The required provision of information an the waiting period are unconstitutional to the extent that they skew a woman's decision-making. By allowing states to require women to consider alternatives to abortion, the Court effectively interferes with the woman's choice at the moment she makes it. There is also no evidence to suggest that the waiting period indeed enhances decision-making. Rather, it seems to be an attempt to force a woman to reconsider abortion after having made up her mind.

Justice Blackmun, concurring in part, concurring in the judgment in part, and dissenting in part. Restrictive abortion laws invade both women's right to bodily integrity

and their right to equal treatment. By forcing women to carry pregnancies to term, the state effectively presses women into child-rearing without compensation. The justification of this state of affairs as an "incident" of womanhood has already invoked scrutiny under the Equal Protection Clause.

Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part. The Court makes a full-scale retreat from the holding of Roe v. Wade, but it attempts to disguise this retreat by citing general principles of stare decisis. In doing so, the Court fails to make a convincing argument against upholding every part of the Pennsylvania statute in question. The Court has eliminated the trimester framework of Roe. Given that this framework formed an essential part of that decision, it is unclear what part of the Roe holding remains to be upheld. The Court justifies its ruling on the ground that self-reversal is inadvisable, but it puzzlingly supports this rationale with Lochner and Plessy, two cases in which the Court did the opposite of what it did today. These cases would suggest that the Court should follow its own example and overrule Roe rather than try to sustain it on questionable grounds. Finally, it is not clear that the "reliance" argument rests on any factual basis. In any case, it is not at all convincing that the right to abortion is so "fundamental" as to require strict scrutiny. Rather, rational-basis review should suffice. Pennsylvania has demonstrated that it has a rational basis for every part of the statute.

Justice Scalia, with whom the Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part. The right to abortion undoubtedly carries great implications for women, but it is not a right protected by the Constitution. The Court attempts to justify its decision with flowery rhetoric invoking concepts like "personal autonomy," but it advances no principled basis for upholding the right to abortion. "Personal autonomy" and similar concerns apply equally well to acts already held to be illegal, such as suicide. Furthermore, the Court replaces the trimester framework with the "undue burden" standard, which gives effectively unrestricted discretion judges in determining whether some particular set of circumstances amount to an unconstitutional restriction on abortion. In all, the Court's meddling in abortion has elevated the issue from the states to the national level and rendered compromise much more difficult, if not impossible, to achieve. The Court should leave the issue to Congress.

Stenberg v. Carhart
530 U.S. 914 (2000)

Squib. The Supreme Court struck down a Nebraska statute banning "partial-birth abortions." After a pregnancy reaches the second trimester, abortion of the fetus typically requires a procedure known as dilation and evacuation (D&E). In D&E, the doctor removes at least some fetal tissue from the womb using surgical instruments. This process often results in the dismemberment of the fetus. Two variations of D&E exist. The first variation, known as "intact D&E," is akin to a head-first delivery. The fetus presents head-first, and the doctor collapses the head before mechanically extracting the otherwise intact fetus. The second variation is known as "dilation and extraction" (D&X), or "partial-birth abortion." In a partial-birth abortion, the fetus presents feet-first. The fetus is then delivered like a normal newborn until the head enters the cervix. With the lower parts of the fetus already outside the mother, the doctor then uses a pair of scissors to collapse the head and complete the extraction.

Justice Breyer, writing for the majority. The statute is flawed because it fails to provide a health exception. Although Nebraska tries to justify the unconditional ban as an effort to show respect for potential life, the argument lacks merit for two reasons. First, no fetuses are actually saved as a result of the law; the law governs only the method by which an abortion is performed, not whether that abortion occurs in the first place. Second, the health of the mother should not be subordinated to the vague concerns of the state. Nebraska has also failed to make a convincing argument as to the safety

of the procedure. Although there is debate as to whether D&X is indeed preferable to other methods, such debate counsels that D&X should be available at the doctor's discretion. Medical necessity should not be judged using an absolute standard. By restricting a procedure that is arguably safer than D&E, Nebraska has imposed precisely the sort of undue burden prohibited by Casey.

Justice O'Connor, concurring. Nebraska should have provided a health exception.

Justice Stevens and Justice Ginsburg, concurring. D&X is not significantly more gruesome than D&E. The Court should not force a doctor to choose one procedure when the other may, in his or her judgment, be the better choice. The statute amounts to little more than a veiled attempt to chip away at abortion rights.

Justice Kennedy, dissenting. Nebraska has a legitimate interest in ensuring that the medical profession does not tarnish its reputation by performing unseemly procedures. Partial-birth abortion presents a special risk to the profession since it commandeers the ordinary process of birth, at least until the doctor kills the fetus. Witnesses to the procedure have reported that the fetus moves as if alive and reacts to the piercing of its skull. The issue is not whether the Court can see a difference between partial-birth abortion and other forms of abortion; the issue is whether Nebraska can. The questionable safety advantages of partial-birth abortion do not justify the procedure. The increase in safety is at best marginal.

Justice Thomas, dissenting. The majority takes a particular form of abortion to be "necessary" whenever it offers benefits as compared to other forms of abortion. This holding eviscerates the notion of necessity; for almost any procedure, one could probably find some doctor who deems it safer than the alternatives. The Court's ruling effectively allows a woman to demand whatever form of abortion she desires.

Gonzales v. Carhart
550 U.S. 124 (2007)

Overview

A dispute arose as to the constitutionality of the Partial-Birth Abortion Act.

Facts

Following the Supreme Court's decision in Stenberg v. Carhart, Congress passed the Partial-Birth Abortion Act. The Act prohibited doctors from carrying out abortions using the methods known as "intact dilation and evacuation" (D&E) and "dilation and extraction" (D&X). The Act also established anatomical landmarks to define when a partial-birth abortion had occurred and imposed a scienter requirement.

Issue

Does the Act place an undue burden on women seeking abortion?

Holding

The Act does not place an undue burden on women seeking abortion.

Reasoning

Justice Kennedy delivered the opinion of the Court. The Act does not impose an undue burden on women seeking abortion because it prohibits only a narrowly defined procedure. It defines partial-birth abortion through anatomical landmarks and states that the fetus must be killed through an act distinct from the delivery itself. The Act also sets forth a scienter requirement, so that doctors who accidentally deliver a fetus past one of the landmarks does not thereby face liability. Indeed, the evidence shows that the accidental performance of a partial-birth abortion is a rare occurrence. The demands of the procedure are such that a partial-birth abortion is unlikely to occur unless the doctor clearly intends it. The Act prohibits only the act it defines therein; it does not affect a doctor's ability to perform ordinary D&E abortions.

As the Court held in Casey, the government has a legitimate interest in showing respect for potential life. Congress has chosen to promote that interest here by prohibiting what it views as an especially disturbing form of abortion. Congress was within its discretion to conclude that partial-birth abortion bore an alarming resemblance to live birth and tended to blur the ethical boundaries of the medical profession. The government has also expressed valid concerns that doctors may fail to adequately explain the procedure to women seeking abortion.

Given the debate as to the medical advantages, if any, of partial-birth abortion, Congress had the authority to conclude that the procedure should be banned. There is no clear evidence that partial-birth abortion is any safer than the alternatives. The existence of medical doubt does not mean that Congress should give doctors unfettered discretion to choose which procedure to apply. A patient is always free to bring an as-applied challenge to the statute if some special case should arise.

Justice Thomas, with whom Justice Scalia joins, concurring. The Court had no constitutional basis for its decisions in Roe and Casey.

Justice Thomas, with whom Justice Scalia joins, concurring. The Court shows alarming disregard for the principles established in Roe and Casey. The congressional fact-finding supporting the Act is unreliable. Congress relied on testimony not from specialists with experience in abortion but on doctors with minimal experience in the relevant procedures. Numerous medical organizations sent letters expressing the view that partial-birth abortion offered genuine medical advantages. Indeed, the record is so shaky that many of the government's own experts could not recommend the ban.

Congress also tries to justify the lack of a health exception on the meritless ground that doing so shows respect for potential life. In accepting this argument, the Court has forgotten that the Act does not save a single fetus; it only "saves" fetuses from being destroyed in a particular way. Given that the fetus will be destroyed regardless of the procedure, it is absurd to withdraw from the doctor the discretion to choose the procedure that will most likely protect the mother's health. The Court also fails to make any convincing argument that partial-birth abortion really is more gruesome than D&E; in the latter procedure, the fetus is dismembered during extraction. Finally, Congress's invocation of the concern that some women might regret the decision to have abortions reveals its assumption that women are incapable of making informed decisions.

It is also hard to understand how the Court believes that as-applied challenges will accord any benefit to women who need partial-birth abortions as a matter of medical necessity. By the time any such necessity becomes apparent, it may be too late to wait for the courts to rule on the issue. In any case, the Court should not have rejected the facial challenge to the lack of a health exception. Congress argues that the exception is unnecessary because it would not apply in most cases, but the very purpose of an exception is to protect the women who fall into the few special cases.

Education

San Antonio Independent School District v. Rodriguez

411 U.S. 1 (1973)

Overview

A dispute arose as to the constitutionality of a system of school funding that produced schools of disparate quality.

Facts

Texas created a two-tiered system of school funding wherein schools received both local tax revenue and state funding. The state funding was intended to equalize economic disparities between school districts. Even with state funding, the Edgewood Independent School District nonetheless lagged behind nearby districts in funding. Edgewood received only $333 per student from combined local and state sources. By contrast, a nearby school district received $594

per student. Rodriguez sued on the theory that the funding scheme violated equal protection as guaranteed by the Fourteenth Amendment.

Issue

(1) Is strict scrutiny the appropriate standard for examining this question? (2) Regardless of the standard of review, should Texas exercise its current level of discretion in designing the funding scheme for its schools?

Holding

(1) Strict scrutiny is not the appropriate standard. Instead, rational-basis review should be applied. (2) Texas should be allowed to exercise its current level of discretion in choosing school-funding schemes.

Reasoning

Rodriguez has failed to demonstrate either that education is a right protected by substantive due process or that the current funding scheme discriminates against any identifiable class of people. While Rodriguez correctly argues that education is an indispensable aspect of American society, such importance alone does not establish that education should be protected by substantive due process. In this case, education lacks a sufficient nexus with enumerated constitutional rights. While education is undoubtedly a precondition to the effective exercise of rights such as those to vote and to free speech, the Constitution does not require Texas to provide a top-flight education to everyone. To the contrary, the record shows that Texas is doing an adequate job of ensuring that its citizens receive the basic level of education necessary to the exercise of constitutional rights. Furthermore, Rodriguez has failed to show that residents of "poor" school districts comprise an identifiable class. To the contrary, the record suggests that poor students are substantially likely to be scattered throughout "rich" school district as well as "poor" ones.

Texas has a sufficient interest in funding its school districts that the Court's intervention here would be inappropriate. The current system allows local authorities to have a say in how schools should be operated. Texas may rationally choose the current system over one that produced more-equal funding but which also reserves more authority to the state. That the boundaries of the school districts are drawn arbitrarily is no counterargument. Any division of land into political regions necessarily entails the drawing of arbitrary boundaries.

White, J., joined by Douglas and Brennan, JJ., dissenting. The premise of the system seems to be that the state guarantees a certain minimum level of funding while localities have the choice of augmenting that funding through local property taxes. The Court has overlooked the fact that the choice to have augmented funding simply does not exist in poor districts. Since this disparity seems to rest on no rational basis, it should be regarded as a violation of Fourteenth Amendment equal protection.

Marshall, J., joined by Douglas, J., dissenting. The Court takes pains to explain how the Texas system attempts to reduce disparities in the quality of education. The constitutionality of the funding scheme, however, does not depend on whether it attempts to close some gap. It depends on whether the state has discriminated on a basis that fails to align with a sufficiently compelling state interest. The Court has consistently recognized that some rights, despite not being enumerated in the Constitution, nonetheless warrant strict scrutiny of questionable policies. Since education is intimately related to enumerated rights such as those to free speech and to vote, the funding scheme should be subject to strict scrutiny. Strict scrutiny, in turn, reveals that Texas has imposed burdens on certain student simply because they happen to live in a district with lower tax revenue. This burden, in fact, is even less justifiable than those the Court held unconstitutional in the past. In past cases, the burden turned on personal wealth; here, the burden turns on the aggregate wealth of a school district, which no single person can control. Although the state interest in local control of schools is strong, Texas should have explored less invasive alternatives to achieving this end.

Plyler v. Doe
457 U.S. 202 (1982)

Overview

A dispute arose as to discrimination against illegal immigrants in education.

Facts

Texas had passed a law restricting the availability of public education to children of illegal immigrants. The law allowed the state to withhold funding that might be used to educate such children. The law also allowed school districts to deny enrollment to children of illegal immigrants.

Issue

Does the Texas law violate the Fourteenth Amendment?

Holding

The Texas law violates the Fourteenth Amendment.

Reasoning

Brennan, J. While the state may force those who enter the country to bear the consequences of those actions, the state should not punish illegal immigrants by directing its policies against their children. The children are innocent parties; they cannot control the decisions of their parents, and they should not bear the costs of their parents' wrongdoing. Although education is not expressly guaranteed by the Constitution, the courts have long held that it is an essential precondition to participating in the civic life of the country. The lack of education will inflict upon children a lifetime handicap. The importance of education therefore amounts to a deprivation of equal protection as provided in the Fourteenth Amendment.

While a state may take into account the illegal status of the children in formulating policy, it must nonetheless justify any discrimination against them on the ground that such discrimination furthers a substantial goal of the state. Texas has fallen far short of this standard. First, it argues that prohibiting education of illegal children would tend to reduce the flow of illegal immigrants into the country. While Texas concededly has an interest in reducing illegal immigration, preventing the education of children is an exceptionally wrongheaded way to serve this end. There is no evidence that illegal immigrants enter the country for the purpose of obtaining a free education; rather, they enter the country to obtain jobs. Curtailing the employment of illegal immigrants would be a much more effective way of stemming their influx. Second, Texas argues that the use of resources to educate children of illegal immigrants tends to diminish the quality of education available to legal residents. The state, however, has advanced no convincing factual basis for this claim. Finally, Texas argues that educating the children of illegal immigrants would be a wasted investment because those children may not choose to remain within the state and contribute to the local economy. Setting aside that most of these children will probably remain in-state, Texas has not shown that its legal students are any more likely to remain in--state.

Burger, C.J., with whom White, Rehnquist, and O'Connor, JJ., join, dissenting. Texas enacted its law in accordance with federal immigration law. The Court has apparently invented a result-oriented standard of review. It purports to protect children from discrimination on the basis of factors they cannot control, but it ignores that the government may legitimately distinguish between classes on such bases as mental or physical illness. Such distinctions are not unconstitutional unless they facilitate invidious discrimination. The Court also fails to make a convincing argument as to the unique importance of education. Such importance does not automatically elevate a governmental service to the level of a "fundamental" right. Given that the Court has not shown that Texas is using a suspect classification to abridge a fundamental right, rational-basis review should be the standard of review. Under that standard, Texas has stated an adequate case for limiting the expenditure of resources on persons who have no right to be in the country.

Washington v. Glucksberg
521 U.S. 702 (1997)

Overview

A dispute arose as to the constitutionality of assisted suicide.

Facts

The State of Washington had enacted a law making it a felony to assist the suicide of another person. Another state law, however, provided that withholding life-sustaining treatment at the patient's direction did not constitute a crime.

Issue

Does the Fourteenth Amendment guarantee a right to suicide?

Holding

The Fourteenth Amendment does not guarantee a right to suicide.

Reasoning

Rehnquist, C.J., delivered the opinion of the Court. In evaluating whether a particular right falls under the protection of substantive due process, the Court must determine whether that right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." The Court must also discern the nature of the liberty interest served by the right. History shows that Anglo-American law has been staunchly opposed to suicide since the thirteenth century. Although respondents appeal to the precedents of Casey and similar cases, those cases do not address the question of actively assisting suicide. Given that the evidence weighs heavily against finding any right to suicide, the state need only demonstrate a rational basis for its laws. The state here has stated more than an adequate basis for its prohibition of assisted suicide. It has produced evidence suggesting that patients who desire suicide retract their requests once underlying conditions, such as physical pain or depression, have been treated. The state has also raised a valid concern that assisted suicide might be applied disproportionately to the elderly, the poor, or other stigmatized groups. Finally, the state has produced a Dutch study indicating that assisted suicide may lead down a slippery slope to euthanasia.

Souter, J., concurring in the judgment. The possibility of going down a slippery slope toward euthanasia is sufficiently real that it alone could justify the Court's decision. The realities of health care often include mounting bills, incorrect terminal diagnoses, and other factors that might push a patient or the family thereof to choose assisted suicide despite the availability of alternatives. Furthermore, it is not at all certain that the judgment of physicians alone will suffice to prevent a slide toward abuse of assisted suicide. Physicians may be unwilling to turn down a request for assisted suicide, or they might be tempted to choose suicide because of a hospital's financial pressures. While society may one day advance to the point where assisted suicide would be an advisable choice, the facts show too much danger to allow assisted suicide today.

Vacco v. Quill
521 U.S. 793 (1997)

Squib. The Supreme Court upheld a New York statute prohibiting assisted suicide. The Court upheld in particular the difference between refusing life-sustaining treatment and seeking assisted suicide.

Rehnquist, C.J. There is a fundamental difference between withdrawing life-sustaining treatment and assisting suicide. In the former, a pre-existing condition kills the patient. In the latter, the physician kills the patient through an affirmative act. The law firmly recognizes this distinction, and it is all the more important to sustain the distinction given the factors, fin-

ancial or otherwise, that might pressure one to choose assisted suicide.

O'Connor, J., concurring. The Court need not address whether a terminally ill patient has a right to control the circumstances of his or her death. The law already allows any such patient to obtain palliative care, even if that care may hasten death. Given the availability of such care, the state has a legitimate interest in preventing assisted suicide where consent to that suicide may not be truly voluntary.

Ginsburg, J., concurring in the judgments. Justice O'Connor is right.

Breyer, J., concurring in the judgments. The Court has perhaps framed the issue too narrowly by addressing it solely as "assisted suicide." Rather, the issue should be framed more broadly as a "right to die with dignity." Even so, the Court need not rule on this right in the current case because the law already allows a patient to avoid pain through other means.

Bowers v. Hardwick
478 U.S. 186 (1986)

Overview

A dispute arose as to the existence of any right to engage in consensual homosexual sodomy in the privacy of one's home.

Facts

A police officer had entered the house where Hardwick lived to arrest him for drinking in public. After looking through the house for Hardwick, the officer found Hardwick engaging in oral sex with another man. Hardwick was arrested for violating a Georgia anti-sodomy statute, though the district attorney declined to present the case to a grand jury absent additional evidence.

Issue

Does the Fourteenth Amendment protect the right to engage in consensual homosexual sodomy within the privacy of one's home?

Holding

The Fourteenth Amendment protects no such right.

Reasoning

Justice White delivered the opinion of the Court. The right to engage in consensual homosexual sodomy within the privacy of one's home receives no support from history. To the contrary, the laws have consistently opposed the practice. Even in the present, the act is outlawed in a substantial number of states and in the District of Columbia. Hardwick attempts to draw a parallel between the current case and those involving abortion or contraception. Those cases, however, all turned on issues of personal autonomy not implicated here. Hardwick also may not rest his case on the ground that the state may not regulate private behavior. The consumption of illegal drugs in private is nonetheless a crime, as is the possession of stolen property. In any case, the Court should not abuse its discretion by imposing the judgments of its justices on the public when there is no constitutional support for their views.

Burger, C.J., concurring. History clearly supports the view that homosexual sodomy should remain outlawed. To rule in favor of Hardwick would overturn centuries of moral teachings.

Powell, J., concurring. The stiff sentences that Georgia imposes for homosexual sodomy may qualify as cruel and unusual punishment. Since Hardwick has not raised this Eighth Amendment issue, however, the Court has no occasion to rule on it.

Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting. The Court seems to found its decision on blind adherence to history rather than a reasoned analysis of the interests involved. The current case concerns not so much the right to engage in homosexual sodomy as the right to choose the kind of intimate relationships that one has with others. The Court has repeatedly ruled that the right to privacy contains (1) the right to make certain decisions without interference from the government and (2) the right to be physically

free from invasion in certain locations, such as the home. The Georgia statute tramples on both of these key aspects, yet the state has advanced no support for its law except religious justifications and prevailing moral views. The mere prevalence of such views, however, cannot justify the invasive nature of the law.

Stevens, J., joined by Brennan and Marshall, JJ., dissenting. Widespread disapproval of a particular form of conduct cannot save that form of conduct from a constitutional attack. Such was the case with miscegenation. The current case implicates an individual's right to engage in intimacy as he or she chooses. When such intimacy takes place in the privacy of a bedroom, the state has no authority to interfere. Georgia has failed to advance any justification for curtailing individual autonomy in such cases.

Romer v. Evans
517 U.S. 620 (1996)

Overview

A dispute arose as to whether sexual orientation is a protected status.

Facts

Colorado passed Amendment 2 to its constitution, which prohibited any person from being accorded special protection on the basis of sexual orientation.

Issue

Does the Colorado law violate equal protection?

Holding

The Colorado law violates equal protection.

Reasoning

Justice Kennedy delivered the opinion of the Court. The law tolerates no classes among citizens. Colorado argues that the law does not discriminate against homosexuals but merely prevents them from receiving special protection. This argument, however, defeats itself because the state has already worked discrimination by singling out homosexuals for different treatment. The law, far from eliminating discrimination, actually aggravates it by denying to homosexuals protections that other citizens may take for granted. Colorado has failed to state a rational basis for Amendment 2. It has provided no legitimate state interest that may be advanced by the amendment; rather, the state has cited only private prejudices against homosexuality.

Justice Scalia, with whom the Chief Justice and Justice Thomas join, dissenting. The Court argues that Amendment 2 discriminates against homosexuals merely because it imposes upon them some additional burden as a prerequisite to obtaining preferential treatment under the law. Such a burden has never been considered unconstitutional. Homosexuals would still receive the same protection as other citizens under existing laws; the only thing they have lost is the entitlement to special treatment on the basis of sexual orientation alone. Indeed, the Court has apparently ignored that states have been able to criminalize homosexuality without constitutionality. If such is the case, then it should be true a fortiori that the states may decline to engage in preferential treatment of homosexuals. The Court effectively foists upon the public its own elitist judgment as to what the general view of homosexuality should be.

Lawrence v. Texas
539 U.S. 558 (2003)

Overview

A dispute arose as to the constitutionality of a law prohibiting consensual homosexual sodomy in the privacy of one's home.

Facts

A police officer had gone to the home of Lawrence to investigate a reported disturbance involving weapons. When the officer arrived, he found Lawrence having anal sex with another man. Lawrence and his partner were convicted of violating a Texas criminal statute prohibiting "deviate sexual intercourse," which in-

cluded anal sex among members of the same sex.

Issue

Does the Texas law violate the Fourteenth Amendment?

Holding

The Texas law violates the Fourteenth Amendment.

Reasoning

Justice Kennedy delivered the opinion of the Court. The Court has upheld the right to privacy in cases involving contraception, abortion, and other issues. In all of these cases, the Court protected not the right to specific forms of conduct but the right to personal autonomy that is expressed through outward action. In holding that private, consensual sodomy was illegal, Bowers v. Hardwick construed the right to privacy too narrowly. In justifying its decision in that case, the Court took an inaccurate view of history. The Court misinterpreted the evidence when it suggested that Anglo-American law evidenced a longstanding disapproval of sodomy. It is not at all clear that anti-sodomy statutes were prevalent until recent decades; to the extent that such statutes did exist in earlier times, legislatures had apparently passed them with the intention of supplementing statutes prohibiting rape or general prohibitions on extramarital sex. There was no evidence to suggest that such laws targeted homosexuals in particular. The Court also overstated its case with regard to any moral consensus on sodomy. Although some authorities have vocally denounced the conduct as immoral, the evidence also shows that even states with anti-sodomy laws have rarely enforced those laws. Indeed, the current case is the first time that Texas has invoked the law in decades. In any case, precedent and tradition alone do not control the Court's ruling. Bowers should be overruled because it denies to homosexuals equal protection under the Fourteenth Amendment by imposing on them the threat of criminal sanctions for behavior in which the state has no legitimate interest.

Justice O'Connor, concurring in the judgment. The law should be struck down on the narrow ground that it infringes equal protection. Texas has impermissibly chosen to burden a class of persons, in this case homosexuals, for no reason except moral disapprobation of that group. It is settled law that the bare desire to burden a class does not constitute a rational basis for state legislation. Texas may not argue that the law applies only to homosexual conduct as opposed to homosexuality in itself; the targeting of homosexual behavior invites discrimination against the underlying group.

Justice Scalia, with whom the Chief Justice and Justice Thomas join, dissenting. The Court refuses to address the central question of whether homosexual sodomy is a "fundamental right" protected under the Fourteenth Amendment. Rather, it overrules the decision in Bowers on unsupportable grounds. The Court first concludes that Bowers should be overruled because it has been weakened through doctrinal erosion and public criticism. Oddly enough, the Court offers no convincing explanation as to how Bowers differs from Roe. Roe, too, faced widespread controversy, yet the Court decided in Casey that such controversy was precisely the justification to uphold that decision. The Court seemingly distinguishes the current case from Casey on the ground that no reliance has developed following Bowers, but the evidence belies this claim. American society has always relied on the moral disapprobation of homosexual sodomy. Texas has a rational basis for the statute; other laws, which prohibit acts such as polygamy and incest, have not been questioned, and the Court has offered no distinction between those laws and the one now in question. Finally, the law cannot be understood to deny equal protection to homosexuals. Under the law, men and women receive identical punishment. That the law tends to burden homosexuals by prohibiting only homosexual activity is no counterargument. Laws prohibiting public nudity might be thought to burden nudists, but no one raises constitutional doubts in that case. In all, the Court has imposed its own pro-homosexual views on the public when the issue should have been left to more-democratic processes.

Justice Thomas, dissenting. The Constitution does not provide a general right of privacy.

Lofton v. Secretary of Department of Children & Family Services
358 F.3d 804 (11th Cir. 2004)

Squib. The Eleventh Circuit upheld ban on adoptions by "practicing homosexuals." The court distinguished the case from Lawrence on the grounds (1) that the act in question involved children in addition to consenting adults and (2) that the ban affected the affirmative act of adoption rather than the negative right to be free from interference in one's private life. Applying rational-basis review, the court found that Florida had a legitimate interest in promoting the raising of children in traditional family structures as opposed to merely placing children in homes as quickly as possible. In particular, the court questioned evidence suggesting homosexual couples could raise children as effectively as heterosexual couples. Finally, the court did not find any anti-gay animus underlying the ban.

The dissent argued that the ban denied homosexual couples the benefit of individual review. It noted that persons with far more troubling backgrounds, such as terrorists and rapists, were not categorically banned from adoptions while homosexuals were. The dissent characterized the legislation as the result of a statewide anti-gay campaign.

Modern Federalism

Limits on the Reconstruction Power

City of Boerne v. Flores
521 U.S. 507 (1997)

Overview

A dispute arose as to whether Congress had the authority to pass the Religious Freedom Restoration Act of 1993 (RFRA).

Facts

The Court had held in a previous decision that a general prohibition with the incidental effect of limiting the practice of religion did not automatically violate the Free Exercise Clause. Congress passed the RFRA in response to the holding. The RFRA stated (1) that any general rule burdening the exercise of religion was suspect and (2) that the government bears the burden of proving that any such rule is narrowly tailored to advance a compelling government interest.

Issue

Has Congress exceeded its authority under section 5 of the Fourteenth Amendment?

Holding

Congress has exceeded its authority under section 5 of the Fourteenth Amendment.

Reasoning

Kennedy, J. Although the Fourteenth Amendment gives Congress broad discretion to legislate in accordance with the demands of that Amendment, Congress does not have the power to define the substantive scope of the Amendment. Historical evidence shows that section 5 of the Amendment was intended as a remedial measure; indeed, the drafters rejected alternate versions that would have given more power to Congress.

In enacting the RFRA, Congress went beyond providing a remedy. The RFRA amounts to

sweeping, preventive legislation whose reach is out of proportion with interest it seeks to protect. The RFRA does not purport to target specific laws imposing religious discrimination, nor does it contain any provisions that might limit its applicability. The RFRA tends to upset the balance of power between the federal and state governments as well as the separation of powers.

Stevens, J., concurring. The RFRA allows organizations to use religion as a weapon in claiming exemptions to to all sorts of laws.

O'Connor, J., dissenting, joined in part by Breyer, J. The Court bases its decision on the flawed holding of Smith. The Free Exercise Clause gives Congress considerable discretion in choosing the means to protect the free exercise of religion. The Court's decision places too great a restriction on Congress.

Souter, J., dissenting. The holding of Smith is flawed. The Court should order re-argument of the current case.

Breyer, J., dissenting. Assuming Smith is correct, the Court need not consider the constitutionality of the RFRA under section 5 of the Fourteenth Amendment.

United States v. Morrison, Part I
529 U.S. 598 (2000)

Squib. The Supreme Court struck down a federal statute creating a cause of action for women who had been victimized by gender-based violence. The Court held that the Fourteenth Amendment applied only to state action. Since gender-based violence was not the result of state action, Congress had no authority to pass the law.

Kimel v. Florida Board of Regents
528 U.S. 62 (2000)

Squib. The Supreme Court held that Congress could not extend the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) to regulate state governments. The Court found that neither age discrimination nor discrimination on the basis of disability fell within the scope of the Fourteenth Amendment.

Board of Trustees of the University of Alabama v. Garrett
531 U.S. 356 (2001)

Squib. The Supreme Court held that extension of the ADEA and ADA to state governments would allow Congress to redefine the substantive scope of the Fourteenth Amendment.

Nevada Department of Human Resources v. Hibbs
538 U.S. 721 (2003)

Squib. The Supreme Court upheld the application of the Family Medical Leave Act (FMLA) to state governments.

Tennessee v. Lane
541 U.S. 509 (2004)

Squib. The Supreme Court upheld a portion of the ADA that applied to public buildings. Lane, a paraplegic, had been forced to crawl up two flights of stairs in a courthouse because the building lacked elevators or wheelchair ramps. The Court found that the ADA, when applied to courthouses, not only protected persons against discrimination but also guarded those constitutional rights whose exercised entailed going before a court.

Limits on the Commerce Power

United States v. Lopez
514 U.S. 549 (1995)

Overview

A dispute arose as to whether Congress had the authority to pass the Gun-Free School Zones Act of 1990.

Facts

Lopez, a twelfth-grade student, had brought a concealed handgun to school. He was subsequently charged under the Act. Lopez challenged the At on the ground that Congress had no authority to pass it under the Commerce Clause.

Issue

Did the Commerce Clause give Congress the authority to pass the Act?

Holding

The Commerce Clause did not give Congress the authority to pass the Act.

Reasoning

Rehnquist, C.J. The Commerce Clause allows Congress to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce or persons and things in interstate commerce, and (3) activities that "substantially affect" interstate commerce. Since the Act addresses neither of the first two factors, its constitutionality turns on whether it regulates any activity that substantially affects interstate commerce. The Act fails to pass muster under the third factor. It is a criminal statute that does not purport to address any issue related to commerce, and it does not form part of a larger scheme that would relate to commerce. The government has stated only tenuous relationships between the possession of guns on school premises and interstate commerce. The government essentially argues that the presence of guns in schools would lead to a higher risk of violence, which would in turn disrupt education. Disruption of education would then reduce the national productivity. This reasoning, however, is so broad as to leave no subject outside the scope of congressional regulation. Such a reading of the Constitution does not comport with the separation of state and federal powers.

Justice Kennedy, with whom Justice O'Connor joins, concurring. The Act tends to erode the boundaries between state and federal powers. The states already have adequate legislative power to deal with the presence of guns on school grounds. Indeed, some 40 states have already enacted their own statutes criminalizing the possession of firearms on school premises. Since Congress has failed to demonstrate any meaningful link between the provisions of the Act and interstate commerce, the states should have the discretion to experiment with potential solutions to the problem.

Justice Thomas, concurring. A faithful construction of the Commerce Clause would not authorize the Act. Historical evidence makes it clear that "commerce," as that term was used in the Constitution, referred only to transporting and trading in goods as contrasted with the manufacture of those goods. The text of the Constitution also does not say that Congress should have the power to regulate all activities "substantially affecting" interstate commerce. The interpretation advocated by the government would give Congress such broad discretion that it would be unnecessary for the Constitution to set forth many of the enumerated powers delegated to Congress.

Justice Stevens, dissenting. Guns themselves are articles of interstate commerce. Congress can therefore act to restrain the traffic in guns and especially the presence of guns in particular locations. The alarming prevalence of gun possession by students justifies the Act.

Justice Souter, dissenting. The Court long ago abandoned the untenable distinction between "direct" and "indirect" effects on inter-

state commerce. Since then, the Court has consistently deferred to Congress in the regulation of interstate commerce. Today's decision takes a step backward, toward a time when the Court engaged in exacting scrutiny of congressional decisions on the subject. Congress has stated a legitimate reason for the Act; under rational-basis review, Congress need not do anything more.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting. Historical evidence establishes a firm link between education and interstate commerce. Until well after the beginning of the twentieth century, the vast majority of Americans received secondary education through apprenticeships or training programs established by large businesses. Such businesses ran such programs because they had found that investment in "human capital" tended to produce gains that significantly outstripped those derived from other sorts of investment. That public education has since replaced privately run training programs does not mean that the link between education and commerce has grown any weaker. To the contrary, abundant evidence shows that better education leads to an economically robust workforce whereas inadequate education disadvantages workers.

The evidence also shows that gun possession in schools is a major problem. A substantial fraction of students have reported bringing guns to school at least occasionally. A substantial fraction of students have also reported being threatened with guns. Such threats, in turn, tend to interfere with the educational environment. The evidence shows that Congress had a more-than-adequate rational basis for concluding that the Act was necessary to promote interstate commerce.

United States v. Morrison, Part II
529 U.S. 598 (2000)

Squib. The Supreme Court struck down the Violence Against Women Act of 1994 (VAWA) on the ground that Congress had no power to pass the Act under the Commerce Clause. The Court reasoned that violence against women, despite being a major problem, was neither "interstate" nor "commercial" in character.

Gonzales v. Raich
545 U.S. 1 (2005)

Squib. Raich challenged a federal ban on marijuana because the ban extended to medical uses that were permitted by California legislation. Raich argued in particular that the marijuana she used had been grown in-state and therefore was not a subject of interstate commerce.

The majority of the Court found that the principle established in Wickard applied. Even though the particular marijuana used by Raich may indeed never have crossed any state lines, private use of such marijuana nonetheless affected interstate commerce by affecting the demand for marijuana in the market at large. The Court took particular issue with the fact that individuals could possess up to three pounds of marijuana, enough to make more than 3,000 joints. The Court found it probable that some portion of that allotment would supply recreational, as opposed to medical, use.

Justice Scalia, concurring, noted that the fungibility of marijuana presented the constant risk that marijuana intended for medical use would find its way into other markets. Justice Scalia also noted that the prohibition would be justified even in the absence of such risk since it was necessary to effectuate broader anti-drug policies.

Justice O'Connor, dissenting, argued that the Court had eviscerated the holding of Lopez by allowing Congress to justify any ban as long as that ban could be characterized as a necessary component of some larger policy.

South Dakota v. Dole
483 U.S. 203 (1987)

Squib. South Dakota challenged the withholding of federal highway funds from states with a

legal drinking age below twenty-one years. The state challenged the policy on the theory that it violated the Twenty-First Amendment, which gave the states full discretion to make policy concerning the consumption of alcohol. The Court found that Congress could use its spending power to encourage states to adopt measures that could not be achieved under its enumerated powers. The Court found that such exercise of the spending power was constitutional as long as it (1) related to the general welfare, (2) set forth unambiguously the conditions for receiving federal funds, (3) related to federal interests in particular national projects or programs, and (4) comported with other constitutional limitations. The Court found that the policy fell plainly within the bounds of the first three criteria. As to the fourth, it found the policy to be constitutional because it did not infringe anyone's constitutional rights and did not withhold such large amounts of funding as to amount to compulsion.

Justice O'Connor, dissenting, argued that the link between interstate commerce and the drinking age to be too "attenuated." Justice Brennan, dissenting, argued that the Twenty-First Amendment gave states plenary power to establish the drinking age.

The Tenth Amendment

New York v. United States
505 U.S. 144 (1992)

Overview

A dispute arose as to the constitutionality of a federal statute directing states to regulate the disposal of radioactive waste.

Facts

After existing federal legislation proved ineffective in managing the disposal of radioactive waste, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act set forth three measures that encouraged states to enter regional compacts governing the disposal of radioactive waste generated within their borders. First, the Act allowed existing disposal sites to levy surcharges on waste arriving from other sites. Second, the Act authorized existing sites to reject out-of-state waste after certain deadlines had passed. Finally, the Act required states to take possession of waste generated within their borders after a certain deadline. The state would then shoulder any liability resulting from failure to dispose of the waste. New York challenged the Act on the ground that it violated the Tenth Amendment and the Guarantee Clause.

Issue

May Congress direct the states to enact regulations?

Holding

Congress may not direct the states to enact regulations.

Reasoning

O'Connor, J. Congress may not "commandeer" state legislatures for the purpose of promulgating its own regulations. The Framers realized that allowing Congress to dictate the direction of state legislation would tend to erode political accountability as well as the separation of state and federal powers. Congress would be tempted to deflect responsibility for unpopular legislation onto the states, and the states would be tempted to do the reverse. By contrast, Congress does have the power to encourage states to adopt its policies through means such as conditioning the availability of federal funds on compliance with federal regulations. Incentives, as opposed to outright coercion, allows states the choice to decline pursuing a federal agenda if it deems other legislative goals more important.

Here, Congress plainly has the power (1) to allow disposal sites to levy surcharges for out-of-state waste and (2) to stop accepting out-of-state waste after certain deadlines have passed. The former falls within the power granted by the Commerce Clause, and the latter falls under powers granted by both that

Clause and the taxing power. The "take-title" provision, however, amounts to congressional coercion of state legislatures. The Constitution does not give Congress the power to shift such a burden onto the states. While Congress might see fit to preempt state legislation with laws of its own, it may not force its will directly upon state legislatures. New York may not argue that the Act is constitutional because it received support from New York senators; an unconstitutional exercise of power does not become constitutional merely because both parties involved consent to the abuse. It is also no argument that the urgency of the problem demands an exception. The Constitution was drafted specifically to prevent exceptional circumstances from justifying a change in the structure of government.

Justice White, with whom Justice Blackmun and Justice Stevens join, concurring in part and dissenting in part. New York, having taken of advantage of the interstate waste-disposal agreements, should be estopped from challenging the Act, which made those advantages possible. The Court relies excessively on dicta of questionable relevance in determining that the Act amounts to a usurpation of the states' legislative authority. The states collaborated with each other and with the federal government in deciding the provisions of the Act. The Court has interfered with efforts to solve a pressing problem.

Justice Stevens, concurring in part and dissenting in part. Nothing in the Constitution prohibits Congress from issuing directives to the states under its Article I powers. Indeed, the federal government already regulates a significant number of state-run institutions, such as elections, prisons, and school systems. Given these examples, there is no reason that Congress should be prohibited from regulating the disposal of radioactive waste as well.

Printz v. United States
521 U.S. 898 (1997)

Overview

A dispute arose as to the constitutionality of a gun-control law imposing certain responsibilities upon state officials.

Facts

Congress had passed the 1993 Brady Handgun Violence Prevention Act, which mandated the establishment of a national system for performing background checks on gun purchasers. The Act also required the "chief law enforcement officer" (CLEO) of each local jurisdiction to conduct such background checks until the national system was in place.

Issue

Does the Act impose on the states an unconstitutional burden to implement federal policy?

Holding

The Act imposes on the states an unconstitutional burden to implement federal policy.

Reasoning

Scalia, J. The history and structure of the Constitution indicate that the Act has transgressed constitutional bounds by requiring state officials to bear the burden of implementing federal policy. Early legislation shows that Congress was willing to impose burdens only on state courts; there is little evidence that Congress ever directed the executive branches of state governments to take particular actions. The historical evidence shows that Congress could not direct state action without the consent of the states.

Historical evidence aside, the Act also tends to erode the separation of powers at the federal level. The Constitution makes it clear that the executive branch is to oversee enforcement of the laws. If Congress is allowed to direct the states to act through CLEOs or other officers, then it could effectively circumvent presidential

authority by requiring the states to implement its legislation.

O'Connor, J., concurring. The Court's decision does not necessarily nullify the Act since CLEOs are still free to implement federal policy voluntarily.

Thomas, J., concurring. Congress is apparently trying to regulate the intrastate sale of firearms. It is questionable that the gun sales to be regulated "substantially affect" interstate commerce. Furthermore, the restrictions may also run afoul of the Second Amendment.

Justice Stevens, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting. The history of the Constitution shows that Congress was indeed authorized to direct state officials to perform such duties as tax collection. The Court points out that Congress has generally issued commands only to state judiciaries, but it ignores that state judges have historically performed functions now associated with the executive. The Court has not established any meaningful distinction between the Act and similar legislation requiring the states to report missing children, traffic fatalities, and other facts. Indeed, the Court seems to have ignored that the Act would be perfectly constitutional if it applied to private individuals as opposed to state officials.

Justice Souter, dissenting. The Federalist provides adequate support for the constitutionality of the Act.

Justice Breyer, with whom Justice Stevens joins, dissenting. The experience of other countries suggests that state implementation of federal policies may not be as detrimental as the Court imagines it to be.

War Powers

The Prize Cases
67 U.S. 635 (1863)

Overview

A dispute arose as to whether Lincoln had the constitutional power to order a blockade of the Confederacy prior to the official declaration of the Civil War.

Facts

Lincoln responded to the attack on Fort Sumter by ordering a blockade of Southern ports. At that time, the North had not yet declared war on the South. The owners of foreign ships challenged the blockade on the ground that Lincoln had no power to declare the blockade absent an official declaration of war.

Issue

Did Lincoln have the authority to order the blockade?

Holding

Lincoln had the authority to order the blockade.

Reasoning

Grier, J. Although the president may not himself declare war, relevant acts of Congress authorize him to respond to hostilities from foreign nations or from within the United States. The president has full discretion in deciding whether the hostility amounts to war and in choosing the response.

Nelson, J., dissenting, joined by Taney, C.J., and Catron and Clifford, JJ. The Constitution already provides the president with adequate power to respond to armed hostilities. The president may call forth the military as well as the state militias to suppress any threat to the nation. The power to declare a blockade, however, rests with Congress.

Ex parte Merryman
17 F. Cas. 144 (1861)

Overview

A dispute arose as to whether Lincoln could suspend habeas corpus during the Civil War.

Facts

The Union Army had detained Merryman during the course of the Civil War. Despite that a Circuit Court had issued two writs of habeas corpus requiring the Army to produce Merryman, the Army refused to comply.

Issue

May the president suspend habeas corpus during a time of war?

Holding

The president may not suspend habeas corpus during a time of war.

Reasoning

[Taney, C.J.] The Constitution plainly does not authorize the president to suspend habeas corpus. Article I expressly reserves that power to Congress. Had the Framers intended to the president to have a similar power, they doubtlessly would have stated their intentions plainly in Article II. There is no basis for believing that the president may suspend habeas corpus because he deems such a suspension necessary in light of some national emergency.

Ex parte Milligan
71 U.S. 2 (1866)

Overview

A dispute arose as to the constitutionality of trying persons in military courts.

Facts

Milligan had been charged with plotting to disrupt the Union war effort by seizing Union weapons, liberating Confederate prisoners of war, and kidnapping the governor of Indiana. Although the Indiana courts were open, the military was wary that Confederate sympathies would make it difficult to obtain a jury willing to convict Milligan. The military therefore decided to try Milligan in a military court.

Issue

May a person be tried in a military court when the civilian courts are open?

Holding

A person accused may not be tried in a military court when the civilian courts are open.

Reasoning

Davis, J. History makes it clear that the Constitution was intended to protect the right to trial by jury. Indeed, the Constitution probably would never have been ratified without promises that the Bill of Rights would reinforce the right to a jury trial. When war has forced the civilian courts to close, a person may be tried in a military court for lack of an alternative. This temporary measure, however, ceases to be acceptable when civilian courts again become available. Here, it is undisputed that the Indiana courts were open and available to rule on the current case. The military therefore has no justification for seeking to try Milligan in a military court.

Chase, J., concurring. The war powers of Congress includes the power to order persons to be tried in military tribunals when it has reason to believe that the civilian courts would be incapable of protecting the nation against an imminent threat. Indeed, the Constitution expressly excepts cases arising from war from the constraints of the Fifth Amendment and similar provisions.

Ex parte Quirin
317 U.S. 1 (1942)

Overview

A dispute arose as to whether a person who is technically a citizen of the United States may

be tried by a military tribunal for violating the law of war.

Facts

During World War II, eight Nazi saboteurs landed in the United States for the purpose of disrupting the American war effort. After one of the saboteurs turned himself in to the FBI, the FBI arrested the remaining saboteurs, among whom was Haupt. President Roosevelt then issued an executive order authorizing saboteurs to be tried by a military tribunal. Haupt petitioned for habeas corpus on the ground that he had been born in the United States and had technically never renounced his American citizenship.

Issue

May Quirin be tried by a military tribunal?

Holding

Quirin may be tried by a military tribunal.

Reasoning

Stone, C.J. Congress has authorized persons violating the laws of war to be tried by military tribunals. There is universal agreement as to the distinction between lawful and unlawful combatants. The former encompasses uniformed soldiers, and the latter includes spies or those who otherwise surreptitiously enter enemy territory. There is no question that Haupt was an unlawful combatant. That Haupt is technically an American citizen cannot excuse him from responsibility for his conduct. The current case differs from Milligan. In that case, it was never demonstrated that Milligan was a combatant.

Hamdi v. Rumsfeld
542 U.S. 507 (2004)

Overview

A dispute arose as to the process due to a person detained as an enemy combatant.

Facts

Following the 9/11 attacks, Congress enacted the Authorization for Use of Military Force (AUMF), which gave the president broad discretion to order military operations against terrorists posing a threat to the United States. Hamdi surrendered to the Northern Alliance during the ensuing war in Afghanistan. Upon discovering that Hamdi was an American citizen, the United States military transferred him to a brig in South Carolina. The United States then declared Hamdi an "enemy combatant" and argued that his status as such allowed the government to detain him without formal charges or proceedings.

Hamdi's father then petitioned for a writ of habeas corpus on his behalf. According to his father, Hamdi had gone to Afghanistan to do relief work and had become trapped in the country when war broke out. In response to the petition, the government filed the Mobbs Declaration, which provides the only documentary evidence concerning Hamdi's alleged involvement with the Taliban. Much of the information contained in the Declaration was obtained during military interrogations of Hamdi.

Issue

May the government detain Hamdi without providing with any further opportunity to challenge his status as an enemy combatant before a neutral arbiter?

Holding

The government may not so detain Hamdi.

Reasoning

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join. No general principle prevents the government from detaining individuals suspected of engaging in hostilities against the United States in a time of war. The AUMF plainly authorizes the president to order military detentions at his discretion. The AUMF also removes any constitutional provisions that might ordinarily limit the executive

branch. That Hamdi is an American citizen does not change the analysis. The Court held in Quirin that any unlawful combatant, including those who are American citizens, may be detained an tried by military authorities.

Despite his status as an enemy combatant, Hamdi nonetheless has a constitutional right to due process. Since the writ of habeas corpus has not been suspended, Hamdi has the right to challenge the facts underpinning his detention. The government argues that the Mobbs Declaration provides all the evidence necessary to support Hamdi's detention, but this conclusion is premature. The facts are far from "undisputed," as the government claims. Indeed, the military's own report on Hamdi states only that he resided in Afghanistan at the time of capture. It says nothing about his participation in any combat against the United States. Whatever "process" Hamdi may have received during interrogation, it plainly does not qualify as any process guaranteed by the Due Process Clause.

The proper solution requires the Court to balance the United States' ability to wage war against the liberty interest of a person classified as an enemy combatant. At the very least, a detainee must receive notice of the factual basis for his detention and the opportunity to rebut those facts. At the same time, the exigencies of war may require the courts to relax evidentiary rules against the government. Hearsay, for instance, may have to be admitted. Such a process would allow a detainee the meaningful opportunity to challenge his detention without unduly burdening the military with litigation.

Justice Souter, with whom Justice Ginsburg joins, concurring in part, dissenting in part, and concurring in the judgment. The president has no authority to detain Hamdi merely because he has been classified as an enemy combatant. While the AUMF authorizes the president to use military force against terrorist organizations, it contains no provision specifically allowing the detention of individuals. Indeed, the Non-Detention Act supports Hamdi's argument for release: Congress passed that Act in order to prevent the sort of arbitrary internment that had occurred during World War II. That Hamdi's status as an enemy combatant is in doubt is also no reason to detain him indefinitely. The Geneva Convention specifies that all combatants are to be treated as prisoners of war unless their status is determined to be otherwise through appropriate procedures. Furthermore, the government cannot justify its conduct as a response to an emergency. While extraordinary circumstances might demand that the president order individuals to be detained without further inquiry, no such emergency exists here. Hamdi has been detained for nearly two years.

Justice Scalia, with whom Justice Stevens joins, dissenting. The Court has used a result-oriented approach to circumvent the Suspension Clause. The Court suggests that detention is appropriate whenever Congress deems that detention to be appropriate by passing a statute. This approach blatantly disregards that a detainee has the unqualified right to petition for habeas corpus absent an express suspension of that device. In any case, the Court has overstepped its bounds by grafting the rule of Mathews v. Eldridge onto the current case. The factual circumstances of that case involved the suspension of Social Security benefits, not the rights of an individual captured during war.

Justice Thomas, dissenting. The Constitution unambiguously delegates to the president the responsibility of conducting wars. The Framers realized the realities of war necessitated decisions by a unitary authority and that the executive branch, as such, was the most suitable for that end. The inherent war powers of the executive, coupled with the congressional authorization to act in AUMF, show that the president should be afforded the greatest possible leeway in determining what measures are necessary to achieve victory. At the same time, the judiciary is ill-suited to the task of reviewing the president's military decisions. Such decisions often rest on secret information; even if such information could be safely disclosed to the courts, the courts may still be unable to render any principled judgment since military decisions often entail speculation. The president need only exercise good faith in making decisions relating to war. Even if a decision is

mistaken, the fact of the mistake does not make that decision unconstitutional.

Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952)

Overview

A dispute arose as to whether the president had the authority to seize and operate civilian industries during wartime.

Facts

During the Korean War, a labor dispute arose between steel mills and the United Steel Workers of America, the labor union representing steelworkers. Despite extensive efforts to reach an agreement, no settlement was forthcoming. The labor union declared that a nationwide strike would begin immediately after the expiration of the existing terms of employment. President Truman then issued an executive order directing the secretary of state to seize and operate the steel mills in order to prevent any strike from interfering with the production of steel for the war effort.

Issue

Did the president have the power to seize and operate the steel mills?

Holding

The president did not have the power to seize and operate the steel mills.

Reasoning

Mr. Justice Black delivered the opinion of the Court. Neither the Constitution nor any statute enacted by Congress gives the president the power to seize and operate the steel mills. The president attempts to justify the executive order on the ground that it constitutes an exercise of his war powers. While it is true that the president has great discretion in conducting war, activities relating to war cannot be defined so broadly as to include the seizure and operation of civilian industries. The executive order, in fact, resembles presidential lawmaking. It outlines a policy and the underlying rationales, and it authorizes agents of the president to further that policy. Any such legislative power should be reserved to Congress.

Mr. Justice Frankfurter, concurring. The Labor Management Relations Act of 1947 states in unambiguous terms that Congress alone has the power to seize and operate civilian industries during a national emergency. Since the seizure in question is not implicitly authorized by longstanding practice, the president must defer to the provisions of the Act.

Mr. Justice Douglas, concurring. The Constitution expressly entrusts to Congress the power to take property for public use. While the president may effect such a taking in a time of emergency, that taking not constitutional until it is ratified by Congress. To hold otherwise would drastically expand the power of the executive granted in Article II.

Mr. Justice Jackson, concurring in the judgment and opinion of the Court. There are three circumstances under which the president acts: (1) when he acts with congressional authorization; (2) when he acts with neither the authorization nor the disapproval of congress; and (3) when he acts in a way incompatible with the powers of Congress. The last scenario applies here. Although the Constitution states that the president shall be the Commander in Chief of the military, it also reserves many necessary functions of war to Congress. Congress, for instance, has the power to fund the military. Even in a time of war, the Third Amendment prohibition against quartering troops in private homes cannot be abrogated absent an act of Congress. It is also no argument to say that the president may exceed the normal limits on his power in times of emergency. The Framers knew well the threats that might arise from a national emergency, yet they refrained from writing into the Constitution any provision for "emergency powers." The ready availability of emergency powers creates the temptation to declare emergencies in the first place.

Mr. Justice Burton, concurring in both the opinion and judgment of the Court. Congress has already provided legislation designed

to deal with disputes such as the one currently under question. The president has intruded upon the domain of Congress by using an executive order to address what Congress has already addressed through legislation.

Mr. Justice Clark, concurring in the judgment of the Court. The president should have made an effort to comply with the procedures established in the Selective Service Act of 1948.

Mr. Chief Justice Vinson, with whom Mr. Justice Reed and Mr. Justice Minton join, dissenting. The Court fails to recognize the gravity of the situation and the scope of the president's power. That the Constitution delegates to Congress the power of eminent domain does not mean that the president does not also have the power to take private property for public use. During the Civil War, Congress unambiguously approved of Lincoln's seizure of the railroads leading to Washington despite that the seizure had been carried out without express congressional authorization. Here, the president has not acted on his own whims; he has acted to protect the legislative schemes for military procurement and price controls on steel until Congress can further act on the issue. Indeed, the president has notified Congress that he is prepared to comply with any congressional decision as to the validity of the seizure.

Boumediene v. Bush
553 U.S. 723 (2008)

Overview

A dispute arose as to the constitutionality of the Detainee Treatment Act of 2005 (DTA).

Facts

Following Hamdi v. Rumsfeld, the Secretary of Defense established Combat Status Review Tribunals (CSRTs) to determine the status of purported enemy combatants detained at Guantanamo Bay. At the same time, Congress enacted the DTA, which effectively stated (1) that no Guantanamo detainee was entitled to habeas review and (2) that determinations made by the CSRTs could be reviewed only by the Court of Appeals for the District of Columbia Circuit. When disputes subsequently arose as to whether the DTA applied retroactively to habeas petitions filed before the DTA took effect, Congress enacted the Military Commissions Act (MCA), which gave the DTA retroactive effect. Detainees at Guantanamo then challenged the constitutionality of the restrictions on habeas review.

Issue

Does the DTA amount to an unconstitutional curtailment of habeas review?

Holding

The DTA amounts to an unconstitutional curtailment of habeas review.

Reasoning

Justice Kennedy delivered the opinion of the Court. The case law does not definitively establish whether the Constitution fully applies in Guantanamo Bay. The government adverts to English cases holding that habeas corpus did not extend extraterritorial jurisdictions such as the Channel Islands, but those decisions may have stemmed from prudential concerns rather than legal ones. One should not blindly insist on de jure jurisdiction as the standard for determining constitutional reach. The American government may not technically own Guantanamo Bay, but it exercises complete military and civil control over the area. Given the de facto sovereignty of the United States over Guantanamo Bay, the government may not deprive detainees of habeas review unless Congress formally invokes the Suspension Clause.

The DTA does not provide an adequate substitute for habeas review. It does not allow detainees to be represented by counsel before the CSRTs, nor does it allow detainees to challenge the evidentiary grounds for their detention. The unlimited admissibility of hearsay tends to bias the evidence against any detainee seeking review. The Court of Appeals has the power to review only the procedural aspects of CSRT proceedings as opposed to any substantive grounds

for detention. At the very least, a reviewing court must have the power to order the release of any person it finds to have been erroneously detained.

Justice Souter, with whom Justice Ginsburg and Justice Breyer join, concurring. Many of the detainees have been held at Guantanamo Bay for more than six years without any meaningful opportunity to challenge the grounds for the their detention. The Court correctly demands that the detainees have access to a more comprehensive review process.

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting. The Court has struck down a well-considered system of review without proposing an acceptable alternative. Indeed, the Court has merely shifted the task of structuring review from the executive and legislative branches to the judiciary. There is no evidence to suggest that the federal judiciary will be any more efficient in reviewing detainees than the system established by the DTA; to the contrary, the case-by-case approach of the courts may prove considerably less workable. In any case, the DTA already gives detainees more rights than at any other time in American history.

Justice Scalia, with whom the Chief Justice, Justice Thomas, and Justice Alito join, dissenting. The Court has exceeded its authority in striking down a system of review approved by both the executive and legislative branches. In doing so, it has hampered the nation's ability to wage war. The Court misinterprets the case law in concluding that habeas review should run to Guantanamo Bay. Meanwhile, detainees released in accordance with court orders have returned to combat against American forces, and information disclosed in courtrooms have found their way into the hands of terrorists.