Civil Rights in Public Service

Promises of justice and equality made in the U.S. Constitution, numerous Amendments, and decisions of the Supreme Court are hallmarks of American civil rights. Yet the realities of inequality remain facts of modern life for too many Native Americans, African Americans, and Latino Americans, even though state-mandated racial segregation has been outlawed for years. Women still face a variety of forms of discrimination—some subtle and others more overt. There remain many laws that treat people differently because of sexual orientation. People with disabilities are supposed to be protected by a variety of statutes, but many of these policies remain unfulfilled promises. These are just some of the many challenges of civil rights that persist in a nation that proudly points to the words above the entrance to the U.S. Supreme Court that read "Equal Justice Under Law."

This text is for public service professionals—whether they are in government agencies, in nonprofit organizations that provide social services for government, or contractors who operate as state actors—who face a twofold challenge. First, they serve an increasingly diverse community with a range of complex challenges. Second, they work and manage within organizations that, fortunately, are themselves more diverse than ever before. For those who work and serve in such settings, civil rights is not an abstract academic study, but a critically important and very practical fact of daily life. Through an engaging exploration of edited court cases, legislation, and speeches, this text examines the civil rights law and policy pertaining to African Americans, Native Americans, Latinos/Latinas, gender, sexual orientation, and disabilities, to learn what civil rights require, but also to come to a more empathetic understanding of how different groups of people understand civil rights and the unique challenges they face. Each chapter further considers key public policy hurdles in the fight for civil rights as well as the implications for public service practice.

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For Dr. Carol Locust, a strong, but sensitive teacher and advocate, guiding others in understanding the great heritage of Native American culture as well as contemporary challenges faced by tribal people. She helps those she serves and teaches to meet the needs of today's society, with mind, body, and spirit in harmony in her own life and with lessons for the rest of us.

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Preface

It is now more than two hundred years since "We the people" declared that our common purpose in creating the Constitution was "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." It has been more than one hundred and fifty years since the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution, following a devastating civil war when the union faced a fundamental threat to its continued existence, in part because we had not truly established justice or promoted the blessings of liberty for so many of our people, and particularly for those held in bondage or relegated to conditions of inequality, such that even many of those who were supposedly free were nevertheless unable to vote or participate fully in their own governance or enjoy the full protections of the legal rights of citizens. Thus, the Fourteenth Amendment declared that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is now more than fifty years since the Supreme Court declared "unanimously" that public programs operated in a manner separated by race, even if equal in terms of physical conditions, are "inherently unequal." Yet inequality in educational opportunities remains a reality of modern life for too many Native Americans, African Americans, and Latino Americans, even though state-mandated racial segregation has been outlawed for all those years. Women still face a variety of forms of discrimination—some subtle and others more overt. Despite the 2015 Supreme Court ruling holding that same-sex marriage is safeguarded by equal protection and due process of law, Congress has, session after session, refused to pass legislation that would make Title VII protections against discrimination, including discrimination on the grounds of sexual orientation and identity. People with disabilities are supposed to be protected by a variety of statutes like the Americans with Disabilities Act and the Individuals with Disabilities Education Act, but judicial interpretations of those statutes have raised a host of difficulties. These are just some of the many challenges of civil rights that remain in a nation that proudly points to the words above the entrance to the U.S. Supreme Court that read "EQUAL JUSTICE UNDER LAW."

For public service professionals, whatever their chosen field and whether they are in government agencies, in nonprofit organizations that provide social services for government, or contractors who operate as state actors, conducting a range of functions from the operation of corrections institutions to those who adjudicate social service claims on behalf of government, the challenges are twofold. First, they serve an increasingly diverse community with a range of complex challenges. Second, they work and manage within organizations that, fortunately, are themselves more diverse than ever before. For those who work and serve in such settings, civil rights is not an abstract academic study, but a critically important

and practical fact of daily life. It is not the preserve of lawyers or law professors, but of each and every public service professional—and indeed of every American.

Unfortunately, many who anticipate a career in public service, in government or elsewhere, have never seriously engaged civil rights. For those who have studied the subject, it was usually in an undergraduate constitutional rights and liberties class in which civil rights was treated as half or less of a one-term course, taught along with civil liberties like those protected by the First Amendment and sometimes even issues related to constitutional criminal process issues such as search and seizure or fair trial rights. Some have been exposed to training courses on the job, but these are often extremely thin and limited attempts to explain the rules and policies of a particular agency or even more general efforts to encourage sensitivity to diversity issues. Although certainly better than no training at all—and with apologies to the fine people who present such training programs—they are not sufficient in the contemporary context to provide public service professionals with the range and depth of knowledge they require.

Even where public service professionals have taken civil rights-related courses, the courses and the texts these courses employed have focused primarily, indeed overwhelmingly, on the essential history of the effort to address discrimination against African Americans in the years from the enunciation by the U.S. Supreme Court of the so-called separate but equal doctrine in 1896 to the rejection of that line of cases in 1954, along with the battles to make the promise of the *Brown v. Board of Education* ruling a reality in the face of massive resistance and later more subtle roadblocks to equality. That is a critically important, indeed vital, part of the civil rights story in the United States, but it is not the whole story and too often even that part of the story is not adequately conveyed.

It becomes clear to those who study the challenges facing different groups of people in our society that they share many of the challenges that have faced African Americans in modern America, but that each group has encountered different problems, and may and often do see their challenges as different from one another. If public service professionals are to serve their diverse communities adequately, and function productively within their complex organizational communities as well, it is critically important to attempt to understand in depth the different ways in which different groups understand civil rights challenges and what the bases for those concerns may be. That tells us much about what employees bring to work with them and what those in the community carry with them when they come to our organizations for any of the services we provide or regulatory programs we operate.

This book grows out of many years of dissatisfaction with the limited traditional method of teaching civil rights law and policy, and with the texts that have not provided what is needed to address the more complex reality of civil rights that contemporary professionals engage on a daily basis. It begins with the traditional material that faces the terrible history of legalized slavery of African Americans, and the battle to end segregation and achieve equal protection of the law. However, it starts well before the 1896 *Plessy v. Ferguson* ruling. It then seeks to develop an understanding of the quite different and also terrible history of discrimination against Native Americans as well as the law that developed in that area. It turns next to a Latino perspective, which provides yet a third, and to some perhaps surprisingly different set of civil rights law and challenges.

Whatever their ethnocultural heritage, women have also faced a particular history of discrimination and the battle to end it. Civil rights law addressing gender-based discrimination is far more complex than is often understood. The text addresses this little understood set of challenges. Quite recently the U.S. Supreme Court and other courts at both the federal and state levels have begun to recognize protections related to sexual orientation and identity, but the challenges that people face in this area are only beginning to be understood. Finally, it comes as a particular surprise to many Americans that persons with disabilities have for

so long enjoyed so little protection under the Constitution and have largely been dependent upon a series of relatively recent civil rights statutes for protection against discrimination. The text addresses this little understood set of challenges.

This book brings the student along on a journey through the law and policy in each of these areas, both to learn what civil rights requires, but also to come to a more empathetic understanding of how different groups of people understand civil rights and the special challenges they see. This journey relies principally upon a series of edited judicial opinions to achieve those goals, but other materials and new analyses as well.

For civil rights scholars, this book provides an analysis different in several respects from what has been done before. In the process of its analysis and in a consideration in the final chapter of the agenda of civil rights law and policy for the future, it presents challenges not only to policy and administration but also opportunities to reconsider how the literature frames, analyzes, and addresses the state of civil rights for everyone in this country and how to contemplate the work yet to be done.

Because of the different perspective taken in this book, the opinions have not been edited for traditional law school purposes, but to provide not only the law, but also the context, character, and development of the field, again with an effort to present a better sense of how one who walks in the shoes of a person in that group might see the challenges. The tone and attitudes conveyed in those materials matter. The materials presented here go beyond just the edited cases and seek to convey the reality that today civil rights law and policy is not merely a body of Supreme Court opinions interpreting the Constitution of the United States, but is also a fabric woven from constitutional law, legislative enactments, and administrative action.

Each chapter ends with a section on "Issues for Policy and Practice" that examines the key public policy challenges that are presented by the discussions in each chapter and also the implications for public service practice. These sections are written for both government professionals and nonprofit executives who are so intimately involved in the delivery of public services throughout contracts with federal, state, and local governments. The concluding chapter of the book considers the agenda for policy and practice going forward. This is key, since one of the important themes of the text is that civil rights is very much a work in progress and far from finished, not just with regard to issues receiving obvious attention such as same-sex marriage or continuing challenges to gender equality, but also across the range of problems identified in the text.

Acknowledgments

This book owes a great debt to people who never met the author, or did so only briefly, and had no idea they were teaching someone who would like to think he is a teacher and advocate of civil rights. I have learned about civil rights progress and the lack of it in many parts of this country and abroad, and from people of many backgrounds and experiences.

The volume also owes a great deal to the many students in my civil rights classes over the years. The students at the University of Vermont and at Portland State University have been particularly important, since they experienced the course using the approach taken in this volume and with many of the cases and materials presented here. They demonstrated in the clearest terms that they learned from this approach far better than through the use of other texts or approaches that I have tried or have seen others employ in the past.

I have also learned from judges and other policymakers and administrators whose experiences have provided perspective on so many aspects of civil rights law and policy.

Sadly, this work was also inspired by a history of injustice that is far from over. On completing this project, it was difficult to see how often it was necessary to say that efforts in the various areas of civil rights in the United States are, at best, works in progress. In other places, it is difficult even to use the word "progress."

I have appreciated the good wishes and support of my colleagues at the Hatfield School, Douglas Morgan and Craig Shinn.

Dr. Carol Locust was kind enough to read the chapters on Native American civil rights. Elizabeth Furse, former director of the Institute for Tribal Government in the Mark O. Hatfield School of Government at Portland State University, was also kind enough to read those parts of the manuscript.

In addition, John Rohr, for many years a distinguished faculty member at Virginia Polytechnic and State University, was a colleague who has departed physically but whose memory and influence remain with me. John was convinced, and convinced many others, of the importance of judicial opinions as journals that record the great debates and issues of American life, in addition to their specific legal importance. He knew of their power as teaching tools and foci for reflection on the state of society and its needs in the future.

Most of all, I am grateful to Dr. Claudia María Vargas. During an extremely challenging period, she took the time to read drafts of this manuscript and to comment on virtually every aspect of the project as I worked through it. She is also a wonderful and careful editor who knows how to relate content and style. More than anything, her passion for this field and the problems of civil rights in the community matches and indeed exceeds my own.

Apart from her professional contributions to the project, she is in this, as in everything, a wonderful partner. There are no words to thank her enough for all that she is and does.

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1 Miles' Law and the Challenge of Civil Rights in the United States

In 1949 Rufus Miles, then a branch chief in the Bureau of the Budget, coined a saying that has since become a widely acknowledged principle of human behavior known as Miles' Law. "Where you stand depends on where you sit."[1] The point is not that people are narrowly self-interested in interpreting their life and its challenges, but that we cannot help but see the world with our own eyes, which function from a place and with a set of lenses that are shaped by our history and our current condition. Indeed, we can never completely put ourselves in someone else's place and see with his or her eyes. What we can do is to try to understand why they might see the world as they do and what biases we bring to that conversation. This challenge is sometimes referred to as the effort to bring empathy and respect to our understanding of and our relationship with others.

For public service professionals, who work with and for increasingly diverse communities and in organizations that are also complex and diverse, both empathy and respect are important characteristics of our efforts. We also work within a framework of law and public policy that provides a variety of civil rights protections for those who receive public services and those who are employed in public agencies as well as for the nonprofit or for-profit organizations that work with government to deliver public services. The term "constitutional rights and liberties" is often applied to this set of protections. Civil liberties refers to the protections for individual freedoms provided essentially by the Bill of Rights, such as freedom of speech and press, free exercise of religion, and the prohibition against the establishment of religion. Civil rights, by contrast, are, in American constitutional history, most often seen as protections from discrimination against individuals based on the fact that they are members of a particular group such as women, Native Americans, Latinos, and African Americans. Additionally, although it is true that civil rights protections flow from the Constitution, particularly the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, even more protections are provided by legislative enactments. These include such important laws as the Civil Rights Act of 1964, Equal Opportunity Amendments of 1972, Civil Rights Act of 1991, Age Discrimination in Employment Act of 1967, Americans with Disabilities Act (ADA) of 1990, and many others.

However, as will be clear in the chapters that follow, different groups of people understand what civil rights protection means in very different ways. There are cross-cutting issues about discrimination, to be sure, but the particular kinds of problems and concerns vary, at least from the perspective of those most affected by them. For Native Americans, for example, issues of tribal sovereignty and control of lands and resources are very much civil rights matters. Many women see issues in employment or protections against harassment that differ from the kinds of issues that are commonly discussed with regard to race discrimination. Latinos often experience civil rights from a perspective that has some similarities with, but also differences from, African Americans. Thus, Miles' Law in civil rights reaches even to

the very definition of just what civil rights are and what they mean for different groups with different historical experiences.

Civil Rights, Courts, and other Policymakers: The Dialogue Continues on the Unfinished Agenda

The chapters that follow explore that body of civil rights law and policy from the perspective of diverse groups of people and from the view of public service professionals who work with and serve those varied people. In particular, the chapters do so through an exploration of the opinions of courts, and mostly of the Supreme Court of the United States, on civil rights issues. As John Rohr explained, these judicial opinions provide not only a statement of what the law is on the subject and how it came to be that way, but also an ongoing structured conversation about some of the most important problems in American life. We learn both from the rulings and from the arguments that support them as well as from the concurring and dissenting opinions offered by other members of the Court that explain the debate among the justices.[2]

These opinions are structured and presented according to a particular form of logic known as legal reasoning and are expected to meet a set of standards that require support for the arguments from properly applied legal authorities, including judicial precedents. Some of the opinions are beautifully written and state noble principles that reaffirm what Americans think the Constitution and laws ought to do. In other cases, they are badly written and surprisingly, to many readers, anything but supportive of the conception of equality under the law to which many Americans would subscribe. Yet they are all part of the story that has produced the law and policy of civil rights that apply today and shape the discussion for the years ahead.

These judicial opinions are not ultimate statements of law that end debate. Indeed, those opinions often come in cases that flowed from a statute passed by the legislature or enforcement actions taken by an executive branch agency. Once the court has ruled on the case, the other branches in their turn will decide on next steps in something Louis Fisher has referred to as a constitutional dialogue.[3] Thus, when Congress passed and the president signed the ADA Amendments Act of 2008, the legislature stated plainly that the new statute was intended to reverse interpretations of the ADA by the U.S. Supreme Court and the Equal Employment Opportunity Commission that violated the purposes of that law.

> (b) PURPOSES.—The purposes of this Act are—
>
> (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;
>
> (2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) … that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
>
> (3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) … and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits" … has created an inappropriately high level of limitation necessary to obtain coverage under the ADA …; and
(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.[4]

Of course, following the passage of that new legislation, it became the responsibility of the courts to interpret it in particular cases. In part because it is an ongoing discussion, the substance and logic of the judicial opinions, and not just their legal holdings (announcement of the rule on which the decision was made), are important.

Miles' Law in Civil Rights

These opinions are important as well because they have contributed to the successes and sometimes to the failures in the civil rights history of the United States. It is one thing to know that *Brown v. Board of Education*[5] declared segregated education to be a violation of the Constitution, but quite another to read the language of earlier rulings like *Dred Scott*[6] that not only pronounced discrimination to be lawful but also denigrated those who sought equal justice under law. It is informative to know that the courts began to work through some of the problems of gender discrimination in the early 1970s, but it is also a part of the discussion that the Supreme Court had blocked gender equality under the law at the very time that the Fourteenth Amendment, with its promise that no state could "deny to any person within its jurisdiction the equal protection of the laws," went into effect a century earlier. In so doing, the Court used language in its opinions that not only damaged the law but also contributed to a history of demeaning treatment of women.[7] There is no doubt that Native Americans have suffered a long history of discrimination—even to the point of efforts by the U.S. government to eliminate them—but quite another to read the actual language of the U.S. Supreme Court, pronouncing that the government has full authority over them by right of conquest, and to see themselves described by that Court as "domestic dependent nations" such that "Their relation to the United States resembles that of a ward to his guardian."[8] It is important to know the failures of our civil rights story as well as its successes.

As these observations about civil rights case law indicate, the story of civil rights, past or present, is different for various groups in the society who have been, and in too many cases still are, subjected to discrimination. While the story of African Americans' efforts to achieve equal protection of the laws, from the days of slavery to the end of lawful state-imposed segregation in *Brown v. Board of Education* and beyond, through massive resistance by the states and more subtle forms of discrimination to follow, is a critically important part of the civil rights story, there are other parts as well. Certainly Native Americans are justified in seeing

U.S. civil rights through their own eyes, from which perspective it is clear that there have been and continue to be a string of official pronouncements that do not meet the promise of full protection of equality of rights.[9] Many people have suffered cruel discrimination because of their sexual orientation or identity. They are only recently seeing some advances, but there are still no national protections against discrimination in employment in the civil rights statutes other Americans can access. Persons with disabilities continue to see opinions by justices of the Supreme Court that have been far from supportive and, in some cases, patently offensive.[10]

In some instances the problems and frustrations come from direct rulings or extremely blunt and sometimes even offensive language, while in others the difficulties arise from complex procedural rulings that seem to address arcane points of law that are of interest only to legal scholars and practicing attorneys. Thus, rulings that make it difficult for those alleging discrimination even to get their cases heard or to carry onerous burdens of proof can be as important in practical effect as others that are more direct and obvious rulings on the substance of civil rights protections.[11] Indeed, as will become clear, it is in part because of some of these kinds of rulings with regard to constitutional provisions and some statutes that those seeking to enforce their civil rights are increasingly relying on legislation rather than constitutional claims to make their cases.

As Miles would say, where civil rights law and policy stand depends upon where one sits in the diverse American community. By any measure, though, it is a work in progress, with many serious inadequacies yet to be resolved. In the chapters that follow the edited opinions will take the reader from the foundation points in the development of civil rights law for each of these groups to the rulings that operate presently. As the reader moves through this material, it is important to consider six important questions. First, how do different groups of people understand civil rights given their history and life experience? Second, how has the law developed to this point? Third, what is the current state of civil rights law with respect to each of the kinds of people and problems presented? Fourth, how does the quality and character of the constitutional dialogue, as Fisher puts it, affect an individual as he or she seeks to understand his or her ability to enjoy the equal protection of the laws? Fifth, what is the unfinished business of civil rights that needs to be addressed going forward? Finally, how can the answers to these five questions inform professional practice in public service to diverse communities and within diverse organizations?

Notes on Reading and Analyzing Judicial Opinions

Many public service professionals have never learned how to find or read judicial opinions or other legal authorities. This part of the chapter explains how to find, read, and analyze judicial opinions. The next section provides a brief primer on the process of legal reasoning. The next few pages walk through the steps required to read and analyze virtually any legal opinion issued by any court in the United States.[12] This process is sometimes referred to as briefing a case—a kind of systematic way to summarize an opinion. (This is different from another use of the term "briefing," which refers to the preparation of the full formal written arguments submitted to the Court by the parties in the case.)

1. Understand the Citation to the Opinion

This is the way we identify opinions and find them as well as the way we refer to them in other materials. The citation consists of two parts: the case title and the reference. Consider, for example:

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

The title of the case [*DeShaney v. Winnebago County Department of Social Services*] is underlined or italicized as a proper title. It is made up of the names of the parties in the case. Thus, this was a case brought on behalf of Joshua DeShaney against the Winnebago County Department of Social Services. The name that appears first is that of the person or organization bringing the suit. Of course, this case came up through the court system to the U.S. Supreme Court, so the first name is the name of the party who petitioned to have the case heard on appeal. Not surprisingly, that person is called the petitioner. Just as logically, we call the party answering that petition the respondent. (It may seem complicated at first blush, but it is actually quite logical.)

The reference in a citation [489 U.S. 189 (1989)] indicates where the cited opinion may be found. It begins with the volume number in which the item is found. The initials abbreviate the name of the publication in which the item is printed. The second number indicates the page on which the case begins. Finally, the date in parentheses tells the reader the year in which the opinion was published. *DeShaney*, then, may be found in volume 489 of the *United States Reports* (the official reporter for the U.S. Supreme Court), beginning on page 189, decided in 1989. There are two other commonly cited, commercially produced series of books that also publish the opinions of the Supreme Court [L.Ed.2d, which stands for Lawyer's Edition, Second Series; and S. Ct., which stands for Supreme Court Reporter]. Do not worry about all of this complexity; the language from the opinion is the same in all three. Just use the U.S. citation.

The citations for lower court opinions are slightly different, but the reason for this difference is also logical. Remember that there are three levels of federal courts: U.S. District Courts, the U.S. Courts of Appeals for the several circuits, and the U.S. Supreme Court (with a parallel structure in most states). Lower court rulings, such as the U.S. District Court for the District of Oregon or the U.S. Court of Appeals for the 9th Circuit (which covers the West Coast, Alaska, and Hawaii), are only binding within the area covered by those courts—their jurisdiction. So, in the reference part of the citation below, we include the volume number (20), the book in which the opinion appears (F. Supp. 2d, which stands for the *Federal Supplement, Second Series*, which reports the rulings of federal district courts), the page on which the opinion begins (675), and the date and the court that issued the opinion (District Court for the District of Vermont issued in 1998).

St. Johnsbury Academy v. D.H., 20 F. Supp. 2d 675 (DVT 1998).

This was an important case about the obligations of private schools as compared with the local school district with respect to student services under the Individuals with Disabilities Education Act (IDEA). St. Johnsbury Academy lost in the District Court and took an appeal to the next higher level, which is the U.S. Court of Appeals for the 2nd Circuit. The Academy won at that level and the opinion was reported at volume 240 of the *Federal Reporter, Third Series* [the Federal Reporter provides opinions of the U.S. Courts of Appeals], beginning on page 163, rendered by the U.S. Court of Appeals for the Second Circuit in 2001:

St. Johnsbury Academy v. D.H., 240 F.3d 163 (2nd Cir. 2001).

The next level above the U.S. Circuit Court of Appeals is the U.S. Supreme Court. The *St. Johnsbury* case did not go to that last step.

The same basic form for citations applies in court opinions, statutes, regulations, and even law review articles. Now let us turn back to how to think about the substance of an opinion.

2. Get the Facts

Read the report to find out the story of the case. What happened that brought about the case in the first place? What is often called the fact pattern consists of the who, what, when, where, and why of the case. Be specific in your understanding (and, if you are writing a brief, in your description of the facts). Think of it chronologically. What happened from the earliest event to the current status in the Court? That often reaches back to when a policy was created, such as by the passage of legislation or the adoption of administrative regulations. Do not begin a brief with "This case comes to the Supreme Court from the U.S. Circuit Court of Appeals." There were many things that happened to bring the case to its present point before it ever got anywhere near a court.

In the chapters to follow most of the edited cases have an introduction that comes before the opinion that announces that "Justice___ delivered the opinion of the Court." The introduction to the edited cases is not part of the opinion handed down by the Court, but is provided by the text author. Many of these opinions were extremely lengthy in their original form and contained pages of discussion just of the facts. In order to reduce them to a readable size, the text author provides some of the factual material in summary form in these introductions. Where the Court's discussion of the facts is particularly interesting or important, the edited version of the opinion may be slightly longer than normal in this book and may include some of the recitation of the facts from the opinion itself.

3. Clarify the Issues

What is the issue (or issues) the Court was asked to resolve? The issues should be phrased in the form of questions. The easiest method (and perfectly adequate) is to think of the issues as questions that can be answered with a simple "yes" or "no." Do not simply ask whether a particular statute or activity is "constitutional" or "legal." Consider which part of the Constitution or what law has allegedly been violated. For example, was the question about a violation of the due process clause of the Fourteenth Amendment, did it concern the IDEA, or did it perhaps present a claim about some other provision of law? There may be more than one question in a given case. Keep the issues as clear and as simple as you can make them. An issue statement, whether in public policy or in law, should be clear and complete enough that it can stand alone and still convey to the reader a clear sense of what it is about and why it matters.

Sometimes the judges will be kind and lay out the issues clearly right at the beginning of the opinion. Unfortunately, that is not always the case.

Here again, the opinions in the chapters to follow are often edited so as to eliminate a number of the issues that are not central to the purpose for which the case is presented in this text. Usually, these are procedural issues that are raised in an attempt to stop further consideration of the merits of the case (the substantive questions that were presented). Where those issues are key to the case or the development of civil rights law, they are included in the edited opinions.

4. What Was the Decision?

This section of a brief is nothing more than an answer to the question presented in the "issues" section. A simple "yes" or "no" answer is all that is needed.

There are two other ways of thinking about the Court's decision. One of these is to concentrate on what is termed the *holding* in the case, which means the legal principle announced by the Court that controlled the ruling in the case. The other commonly used term is the *disposition* of the case. That is, did the Court *affirm* the lower court ruling, *reverse* it, *remand* it (send it back for further proceedings), or *vacate* it (totally reject the case and the record supporting it to that point, requiring the parties to start over if they really want to proceed with the case)?

5. What Was the Majority's Rationale?

This is the section of the opinion of greatest long-term value for most of us, most of the time. It tells us not merely what the Court decided, but why it came to that conclusion in this case and what it is telling us about how the law will be going forward. The central feature of the rationale is the logic that took the Court from the issue to the legal premise where it began its reasoning (whether it is a part of the Constitution or a piece of legislation) to whatever statement of the law it reached and the application of that interpretation to the facts of the present case. Of course, a description of logic is not merely a listing of reasons, but an explanation as to the premise used by the Justice writing the opinion, and the reasoning by which he or she moved from premise to conclusion. Like most things in life, it takes a bit of practice to sort out what really matters and what does not amidst all of that language (referred to as *obiter dictum* or just *dicta*, which means language not essential to the holding or reasoning of the court). In seeking to understand the logic of the opinion, be open to the language the judge is using and the way it speaks of the people involved in the case. The tone and nature of some of these rulings find their way into a variety of aspects of our national conversation about equality before the law. That tone can alienate people or bring them together in ways far more real than might be immediately apparent.

6. What Separate Opinions Were Filed by Members of the Court in the Case?

The Supreme Court—or other courts with several members—decides cases by majority vote. The author of the majority opinion tries to attract as many other members of the Court to agree with his or her opinion as possible. However, some justices may agree with the conclusion reached by the Court, but disagree with the reasoning used by the majority to reach its conclusion. They may publish what is called a *concurring opinion*, explaining the basis for the disagreement. If there are justices who disagree with the Court's conclusion in the case, they may file *dissenting opinions*, explaining their criticisms of the majority opinion. It is useful to read them, particularly for the purposes that opinions are presented in this text, and to make a brief note about the basis for the disagreements.

There are two reasons for noting the separate opinions. First, they help us to better understand the debate within the Court by emphasizing where there was agreement and disagreement. This provides a sense about how the Court might rule in the future. The second reason is that, over time, dissents or concurrences may be turned into law by later cases. For example, when the Supreme Court upheld racial segregation in 1896, only Justice Harlan dissented from the *Plessy v. Ferguson* decision. However, his opinion was an important influence on many judges in the decades that followed and, in 1954, in *Brown v. Board of Education of Topeka*, *Plessy* was reversed and Harlan's view vindicated.

What follows is a sample of a simple brief in one important U.S. Supreme Court case.

Griswold v. Connecticut

381 U.S. 479 (1965)

FACTS: The Connecticut Planned Parenthood organization opened a family planning clinic at which contraceptives and information concerning birth control were provided. A Connecticut criminal statute prohibited the use of contraceptives or counseling someone to use them. The clinic provided birth control counseling to a married couple. The Director of Planned Parenthood was convicted and fined under the statute.

ISSUE: (1) Does the Constitution provide a right to privacy that is applied to the state through the due process clause of the Fourteenth Amendment?

(2) Does a statute that punishes the counseling of married couples to use contraceptives violate the right to privacy applied to the states through the due process clause of the Fourteenth Amendment?

DECISION: Yes.

RATIONALE: (Douglas) The Court has recognized a number of rights not specifically mentioned in the Constitution. These include the right to marry and raise children, the freedom of association and privacy in those associations, and a number of implied related rights under the freedoms of speech and press. The right to privacy is an implied right, based in freedom of association protected by the First Amendment and is also supported by the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Decisions regarding the right to bear children are some of the most intensely private matters involving the family, the most basic unit of association. Government actions touching upon those decisions must serve compelling interests and the means chosen to enforce those ends may not "sweep unnecessarily broad." The Connecticut restrictions do not meet either part of this test.

CONCURRING: (Goldberg) The Ninth Amendment is the appropriate constitutional provision for protection of the right to privacy.

(Harlan) There is a right to privacy of the sort described by the Court, but it stems from the concept of liberty protected by the due process clause of the Fourteenth Amendment and not specific Bill of Rights guarantees.

(White) A law of this sort is not "reasonably necessary for the effectuation of a legitimate and substantial end."

DISSENTING: (Black) There is no specific constitutional language which supports a right to privacy and he is not willing to read either the Bill of Rights or the due process clause so broadly as to create one.

(Stewart) Though this is a "silly law," it is for the legislature to remove it from the books, not the Court.

Legal Reasoning: A Structured Logic Based in Legal Authority

In order to understand a judicial opinion and to see the rationale that takes the reader from the issues, through the premise, and to the holding in the case, one needs to understand the process known as legal reasoning. Consider two important caveats at the outset and then the three different types of reasoning that make up the larger term, legal reasoning.

The first caveat is that although politicians and lawyers repeat the mantra that judges should not make law, and should only interpret it, that statement is simply not possible in a common law-based legal system like that of the United States. The Constitution was intentionally

written for the most part in broad language that was not intended to speak to each situation that might arise over the centuries and it was expected to endure. Therefore, the application of that law requires interpretation. An authoritative interpretation of the law by a court like the United States Supreme Court is a legal precedent. In that sense, judicial opinions do make law. Even a decision not to decide a case for procedural reasons, like a lack of standing to sue by the parties, can set precedent. Judge-made law is just as likely to be produced by conservatives as by liberals, although the substantive conclusions those jurists reach may be different. Political rhetoric to the contrary is just that—political rhetoric and not reality.

Second, and related to that first point, it is not helpful to approach the reading and interpretation of judicial opinions with ideological baggage and language like "judicial activism" or "judicial restraint." While there are certainly arguments that can be made about what these terms truly mean at their core, over time they have come to be little more than ideologically applied labels. Opinions that one likes are often labeled exemplars of judicial restraint and those that one dislikes are often simply termed activist decisions that exceed the proper boundaries of judicial behavior. Again, both ends of the political spectrum participate in these verbal broadsides.

This book will avoid both of these two unhelpful practices. The author asks the reader to do the same and to concentrate instead on a careful and thoughtful analysis of the opinions. Indeed, one of the points that is important to legal reasoning is that because there are some understood conventions as to how legal arguments are to be constructed, it is possible to read an opinion that reaches a conclusion with which the reader disagrees and yet consider that it is well written and well reasoned. By contrast, it is also possible to read opinions that came to the correct conclusion, in the reader's mind, and yet find that the opinion was badly crafted.[13] It is not acceptable for a judge, even a justice of the Supreme Court, simply to ignore the existing body of law. Precedents are to be used according to an accepted set of principles of usage. There are canons (principles) of statutory interpretation.

That said, there are two sets of considerations to keep in mind when reading an opinion. The first concerns the standard process of legal reasoning. The second concerns the structure of an opinion.

Legal Reasoning: Really Three Types of Logic Often Used in a Single Case

The United States operates from a written Constitution, a collection of federal and state statutes, and a set of administrative rules having the force of law. In that sense, it is what is termed a positive law system. However, the United States also borrowed portions of the British common law system, which relies on judicial interpretation and precedent as an important force in the development of the law. When we speak of legal reasoning in the United States, therefore, we refer to constitutional reasoning, statutory reasoning, and common law reasoning. Which types of reasoning are required depends upon the legal issue in the case.

Consider first a case that raises a constitutional issue. Since the Constitution is a written document that is the highest source of law in the land, judges begin with the language of the Constitution as the starting point. Unfortunately, as noted above, much of the Constitution is written in broad and quite general language. There are rare exceptions, and in those cases it is relatively easy to reach a decision. For example, when Congress passed legislation providing for the so-called line item veto, under which the president could veto portions of some spending legislation while signing the rest into law, the Supreme Court had little difficulty applying the language of the so-called presentment clause of Article I, Section 7 to strike down the statute.[14] The language is quite clear as to the process to be followed when a bill is adopted by Congress and goes to the president.

But since the language is rarely clear enough to resolve a constitutional question, the next step in legal reasoning is to establish the intent of the framers to the extent that information is available and provides a clear statement.[15] Again, the presentment clause interpretation was helped by the fact that the history of the constitutional convention was relatively clear about the desire to both provide enough power for an effective executive branch and chief executive, but also to place boundaries around the powers of the president, including the veto power, so that he or she would not become a home-grown version of the king against whom the colonies had rebelled. Often, however, there is considerable debate over just what the framers intended and, in any case, quite a number of them, led by James Madison, rejected the idea that the interpretations of the eighteenth century should be frozen into the Constitution to bind future generations whose circumstances were unknown and unknowable to the founders.

Third, judges turn to what is sometimes known as the judicial gloss that has been placed on the language of the document in the two centuries since its adoption. Another way of saying this is to refer to the precedents that have been handed down by the courts in their interpretation of constitutional provisions. Thus, when the Supreme Court decides an equal protection of the law case today, it draws on dozens of prior precedents interpreting just what the equal protection clause of the Fourteenth Amendment means. (The Court has also read the due process clause of the Fifth Amendment to incorporate the concept of equal protection of the law where the federal government is concerned.)[16] Every now and again, however, cases known as "cases of first impression" arise for which there is no clear precedent. And even where there are a good many precedents, new circumstances arise for which existing precedents are not a good fit.

Judges then determine whether there is a need to factor in the changed circumstances of society. Thus, when Justice Douglas authored the *Griswold v. Connecticut* opinion announcing a right to privacy,[17] there was broad criticism, but some years later even one of the most vocal of those critics announced, during confirmation hearings on his nomination to the Supreme Court, that he would not reverse the *Griswold* conclusion that there was a right to privacy.[18] More recently, the Court pointed to such a need for change in rendering its decision in *Lawrence v. Texas*, concerning a claim that the Constitution protects the rights of homosexuals.[19] The Court found that there was "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[20]

Needless to say, there are continuing debates among scholars, judges, political figures, and the public about one or more of these factors used in constitutional interpretation, but they remain the most common features of constitutional reasoning. That said, judges are mindful that a mistaken interpretation of the Constitution requires either that the Court later reverse itself to correct its error, which judges sometimes but rarely do, or that the Constitution be amended, which is an extremely difficult process.

Statutory interpretation, on the other hand, is quite different. Over time the language of legislation has become increasingly detailed. There is certainly more detailed and contemporary information than is presented in the Constitution. Judges are also aware that Congress can and often does change legislation to correct what it considers to be misinterpretations by the courts or to address problems in the legislation pointed out in judicial opinions. Therefore, the starting point for statutory interpretation is a strict application of the language of the legislation. Even here there can be difficulties, such as in the fact that some fields of activity change so rapidly that legislation can quickly become outdated or at least does not encompass new developments. Thus, although telecommunications legislation was passed in 1996, the courts soon found that there were problems arising on a day-to-day basis that Congress did not contemplate in that relatively modern statute because contemporary Internet technologies

like social media did not exist at the time. Thus, the Court found itself dealing with a case that discussed the fact that many Americans carry so much information about so many facets of their lives on a smartphone that allowing a police officer to rummage through it without a warrant presents serious search and seizure issues under the Fourth Amendment.[21]

Courts often start their interpretation of statutes by granting a considerable degree of deference to the initial interpretation of legislation by the administrative agency charged with its enforcement.[22] The reason for this is simply that those agencies have traditionally been thought to have both expertise and experience in the subject matter and the law that applies to their work. So the Supreme Court deferred to the conclusion by the Equal Employment Opportunity Commission (EEOC) that sexual harassment is sex discrimination in violation of Title VII of the Civil Rights Act of 1964, and that became the foundation for later judicial rulings on the subject.[23] Of course, while the courts start from that deferential position, they may nevertheless conclude that the agency got it wrong. A clear example of this was the Supreme Court's ruling that the Environmental Protection Agency misinterpreted the Clean Air Act when it refused to issue rules governing vehicle emissions that contribute to global warming.[24]

Judges turn to what is called the judicial gloss placed on the language of the statute by previous judicial opinions. This is a complex task, since there may be many cases that address a single point of a statute and there may be conflicts among some courts. The effort to resolve such conflicts is one of the reasons that the U.S. Supreme Court frequently gives for agreeing to hear a particular case.

Finally, as is true of constitutional reasoning, courts will sometimes consider the need to adapt to changing conditions that have emerged since the legislation was adopted. That has been a common problem in laws dealing with telecommunications, finance, and a number of other rapidly developing fields where there are statutes that may not have kept pace with recent changes in practice in the field.

The third type of reasoning is common law reasoning. Common law reasoning developed in the context of cases where there was no legislation or constitutional provision that addressed a problem. The courts fashioned rules to fit the new situation based either on analogies to other existing law or because they simply had to create new rules where there seemed to be no clear guidance from existing bodies of law. That said, today common law reasoning is used not only in those types of cases, but also wherever there is an attempt to apply, challenge, or change existing judicial precedents. So, yes, the technique is used in statutory and constitutional reasoning as well.

Common law reasoning starts from the basic premise that equal justice under law requires that people in similar situations should be treated similarly. Thus, if a client takes a problem to an attorney, he or she will seek to determine whether there are existing precedents that apply to the situation. If so, the attorney will advise the client to press forward with a legal action if the law is in his or her favor, or perhaps to settle if it is clear that existing precedents mean the client is likely to lose.

All of this is based on a three-step process of discovery, synthesis, and analogy. The parties attempt to assist the judge in discovering what the correct legal authority (precedent) is for a given problem. Obviously, that means that the facts and the question of law in the case in question is comparable to the facts and law in the precedent. Once the controlling authority is discovered, it is time to synthesize that precedent to determine the rule and reasoning on which it was decided. Clearly, both sides in a case will seek to convince the judge that their analysis is correct. Finally, the judge uses a process of analogy to apply the rule of the precedent case to the new case. If the fit is a good one, then the rule of the precedent can be applied directly and the case is relatively easy. If the new case is close, but still somewhat different from the precedent, then the judge may have to modify the rule from the precedent in order to fit the

new situation. If the circumstances in the new case are sufficiently novel, the judge may simply have to create a new rule if he or she concludes that the precedent simply will not fit the changed circumstance.

Consider the following example of the use of common law reasoning in a civil rights setting involving a constitutional issue. The Supreme Court had decided that policies that treated people differently on the basis of race were inherently suspect and should be judged according to something called strict judicial scrutiny. (The legal criteria for deciding a case is often termed a standard or a test.) That standard required that the burden of proof would be placed on the government to demonstrate that its actions were justified by a compelling state interest and that the means chosen to achieve that end were narrowly tailored.[25] The Court was then faced with the claim that the same standard should be applied to policies that treat people differently on the basis of their gender. A majority of the members of the Court was not willing to agree that gender was a suspect classification and therefore would not apply the same kind of strict judicial scrutiny that applied to race-based classifications.[26] However, Justice William Brennan was able to argue successfully that even if the strictest standard did not apply, some kind of elevated standard was necessary. He was therefore able to convince the Court to adopt what has sometimes been called a middle standard because it was not as stringent as the standard for race-based classifications but was more rigorous than the usual standard that is applied to ordinary government actions, known as the rational basis test.[27] From then on, gender-based classifications were judged according to that new standard.[28]

The Structure of a Legal Opinion: Not Always Observed in Practice

An understanding that judges use precedent is necessary but not sufficient to really explain how judicial opinions are constructed, and therefore how to read them. Actually the structure is relatively clear, and particularly so when the judge involved is a good craftsperson.

Judicial opinions usually have some kind of brief introduction followed by major sections marked by Roman numerals. If the judge is particularly good, he or she will state, in a very brief introduction of the legal issues presented by the case, the court's answers to those questions, the disposition of the case as a whole, and perhaps even something about the organization of the remainder of the opinion.

Roman numeral I usually marks the beginning of the section in which the court explains the facts of the case. Lower court opinions usually provide more detail concerning the facts since they make decisions on trial level or first level appeal questions. By the time a case gets to the U.S. Supreme Court, the discussion of facts in the opinion tends to be relatively limited. Even so, the author of the opinion will usually be careful to provide a discussion of the facts that are particularly relevant to the legal issues addressed by the court.

Roman numeral II often addresses any procedural or jurisdictional questions that the court finds it necessary to resolve before moving on to what is called the merits (substantive issues). There are often a number of procedural issues presented in a case, since the party that won in the lower courts will try diligently to find a reason to keep the case from moving on to the appellate levels.

Roman numeral III is often the first substantive issue in a case. There may be several. If there are questions about statutes and constitutional issues, the court will often take up the statutory question first. If the case can be resolved on those grounds, it is then unnecessary to take on the larger constitutional concerns.

The court then takes the other substantive issues in turn, addressing as many of them as the court considers necessary to resolve the case. That means that the court may not decide

all of the issues that were presented by the parties in the case. Often, in fact, if the court concludes that a new legal standard should be applied, it will state that standard and send the case back down (*remand*) for further consideration in the lower courts according to that new standard.

Once the judge starts into each issue discussion, we look for the classic signs of an effective deductive logic. It is helpful if the judge starts by restating the issue clearly and completely. Then we look for the premise, a generalization that will be understood and accepted by both sides and supported by the authority raised by the issue. Thus, if the issue is about a constitutional provision, we expect a premise that starts from that part of the Constitution. If it concerns a statute, such as Title IX of the Education Amendments of 1972, we expect that the premise will be grounded in that law. If the issue concerns an administrative agency's application of a regulation, we would expect the premise to start there.

After the premise is established, we try to follow the judge's logic, moving from the premise down to the standard or rule that is to be applied in the kind of situation presented by the issue. For example, it might be the strict scrutiny standard discussed earlier in this section of the chapter. We then look to see how the judge applies that standard to the case before the court. We also look to see what precedents or other authorities the judge uses to support each of his or her points of argument, the choice of legal standard to be applied, and the way he or she applies that standard in the present case.

We then look to the concurring opinion or dissents, if any, to see what else they may tell us about the majority's argument.

Conclusion

The study of civil rights in public service concerns both the need to understand the diverse communities that public service professionals serve and also the increasingly diverse groups of people who work in government agencies or nonprofit service agencies who work on behalf of government. That requires not only an understanding of civil rights law and policy, but also the perspectives of the various groups who have suffered discrimination over the history of our nation.

We can learn the law and policy by studying the judicial opinions issued by the U.S. Supreme Court and some important lower court opinions that explain not only what the Constitution and civil rights statutes require, but also how those interpretations have been developed and applied over time in various types of situations. In order to do that, it is important to understand how to access, read, and analyze judicial opinions. While that may seem a daunting challenge at first, there are some relatively easy-to-apply techniques for doing so, as discussed in the chapter.

But there is more to learn from reading judicial opinions that trace the development of civil rights protections over time. There is also a story there about the way different groups of people, such as African Americans, Native Americans, Latinos, women, persons with disabilities, and gays and lesbians, have been treated and the language that has been used to characterize and discuss them over the decades of our nation's history. That narrative not only provides context for understanding the more specific civil rights issues, but also helps us to develop an understanding as to why they may see and experience civil rights as they do from their perspective. Since, as Miles' Law explains, where one stands often depends upon where one sits, that kind of empathy can be extremely helpful to all of us and particularly to those of us who seek to serve diverse communities.

I. Issues for Policy and Practice

A. How do existing public policies ensure that Americans understand the meaning of civil rights and what they protect? Do they? If not, are there potential policy options that could assist in that effort?
B. How does the education system prepare students to understand, respect, and support civil rights? Does it? Given the reduction in time and attention to social studies and what was termed civics in the K-12 system, what options are there to address this challenge?
C. Is there a clear and coherent national civil rights policy? If not, is there an organizing framework that allows public service professionals and community members to find and understand the policies?
D. Do we know how people within our organization understand civil rights on a day-to-day basis and their significance among colleagues?
E. How can a local government understand how the local community perceives civil rights needs and concerns?

II. Discussion Questions

This chapter poses six questions to consider throughout the reading of the book, through any course that one might be taking, and as a public service practitioner.

A. First, how do different groups of people understand civil rights given their history and life experience?
B. Second, how has the law developed to this point?
C. Third, what is the current state of civil rights law with respect to each of the kinds of people and problems presented?
D. Fourth, how does the quality and character of the constitutional dialogue, as Fisher puts it, affect an individual as he or she seeks to understand his or her ability to enjoy the equal protection of the laws?
E. Fifth, what is the unfinished business of civil rights that needs to be addressed going forward?
F. Finally, how can the answers to the other five questions inform professional practice in public service to diverse communities and within diverse organizations?

Notes

1 Rufus Miles, "The Origin and Meaning of Miles' Law," *Public Administration Review* 38 (Sep/Oct 1978): 399.
2 See generally, John Rohr, *Ethics for Bureaucrats*, 2nd edn. (New York: Marcel Dekker, 1989).
3 Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988). See also Fisher, *Constitutional Conflicts Between Congress and the President*, 4th edn., Revised. (Lawrence, KS: Kansas University Press, 1997); Fisher, *The Constitution Between Friends: Congress, the President and the Law* (New York: St. Martin's Press, 1978).
4 ADA Amendments Act of 2008, P.L. 110–325, 122 Stat. 3553 Section 2(b).
5 347 U.S. 483 (1954).
6 *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
7 See *Bradwell v. State*, 83 U.S. 130 (1873); *Minor v. Happersett*, 88 U.S. 162 (1874).
8 *Cherokee Nation v. Georgia*, 30 U.S. 1, 33 (1831).
9 See e.g., *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005).
10 See e.g., the opinion for the Court by Chief Justice Rehnquist in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) and Justice Scalia's dissenting opinion in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).
11 See *Alexander v. Sandoval*, 532 U.S. 275 (2001) denying individuals the ability to bring cases as implied private rights of action under Title VI of the Civil Rights Act of 1964. See also *Schaffer v. Weast*, 546

U.S. 49 (2005), placing the burden on parents, rather than the schools, to prove that the individualized education plan met the requirement of a "free and appropriate public education in the least restrictive environment" under the provisions of the Individuals with Disabilities Education Act.

12 While many of the points are similar in other countries, some, like Canada, do not present a single unified opinion for the court but what are called seriatim opinions in which the individual justices each offer their reasoning. Opinions that are issued by countries that have a continental European heritage, like Spain or France, are also different since they work from a code law base rather than a common law system like that of the U.S.

13 This subject is treated at greater length in Phillip J. Cooper and Howard Ball, *The U.S. Supreme Court From the Inside Out* (Englewood Cliffs, NJ: Prentice-Hall, 1995), Ch.10.

14 *Clinton v. City of New York*, 524 U.S. 417 (1998).

15 Sources commonly used by the Supreme Court include Max Farrand, ed., *Records of the Federal Convention of 1787*, revised edn., 4 vols. (New Haven, CT: Yale University Press, 1966); Jonathan Elliott, *Debates in the Several States on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 2nd edn. (New York: Burt Franklin, 1888); and Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor, 1961).

16 See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

17 381 U.S. 479 (1965).

18 That critic was Robert Bork, who had attacked Justice Douglas' opinion in a widely cited law review article, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (No.1 1971): 1–35.

19 539 U.S. 558 (2003).

20 Id., at 572.

21 *Riley v. California*, 134 S. Ct. 2473 (2014).

22 *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

23 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

24 *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

25 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

26 See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

27 *Craig v. Boren*, 429 U.S. 190 (1976).

28 See e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

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