

Topic Committee Report: Supreme Court Topic Area

By

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Steve Mancuso commissioned our group as a sub-committee following the release of the topic areas to report to the committee on the Supreme Court topic area. This paper is divided into three sections: 1) the “meta-issues” governing the topic; 2) specific wording questions that will arise under the topic; 3) a discussion of Supreme Court cases that may be appropriate for the topic.

Meta-Issues

Meta-Issue #1: A stable mechanism:

However the topic is created, the issue of a stable mechanism seems critical. Whether the cases are listed or referred to via a general theme, it seems the stable axis point of the mechanism for action should stay the same. This is alluded to in the Federalism topic paper, Elliot’s post on this subject to edebate, and Ross’ post to the topic committee on this issue. Ross believed there was a consensus at the topic meeting on this issue, as he indicates, “The key points of agreement, in my opinion, were that the area should not be limited to federalism, that it should include other important areas of constitutional controversy [sic], and that the emphasis be on the *mechanism* of Supreme Court precedent setting.”

Meta-Issue #2: Related Theme

In addition to the question of the stable mechanism, the committee should decide on the question of whether the topic should include only cases related to a central core issue. The 1991-1992 topic dealt with the theme of the “fundamental right to privacy.”¹ The committee may decide to use privacy, substantive due process, the first amendment, federalism, or another related theme. Arguably, “overruling one of its decisions” could be considered a “theme,” but most concerned about this issue seem to be concerned with a *subject matter* theme and not a *procedural* theme such as what should be done with Supreme Court cases/precedents.

Meta-Issue #3: Directionality

Another question for the committee is whether or not we should have the cases go in the same general direction in terms of increasing or decreasing rights, arguably in a given area. Ross Smith has argued for a topic that had cases all tilting in a “liberal direction” to help lock in both generic ground for the Negative as well as uniqueness ground, as the court is arguably generally conservative. While one could quibble with the general conservative nature of the Court, given the general perception of the two new justices, a decision that was a radical promotion of individual rights would most likely be an unexpected move by the new Court. The issue of directionality is one that, to some degree, trades off with case selection. It may be the case that if all cases on a given topic had to go in a “liberal” direction, “conservative” cases might be limited out.

An interesting exchange also occurred in separate emails from Eric Truett and Marcia Tiersky. The original “Federalism” paper was designed with a sort of built in

¹ Whether the topic succeeded in debating the intended theme is up for debate, as many teams ran 4th Amendment cases which arguable dealt with “common law” privacy and not the Constitutional right to privacy embedded in the penumbra analysis announced in Griswold v. Connecticut.

Counterplan defense, in that the Court would be required to overrule a decision which had *denied* Congress the right to do something. Therefore, Congress “doing it again” would be irrelevant, as the Court would strike it down again. Mancuso has made reference to this before, and Truett further explains this position in an email to me:

I talked with Mancuso about this a few years ago, but the way to get around the CP is to remove a current restriction on federal and/or state power. For example, *Boerne v. Flores* limits the ability of Congress to interpret and extend the 14th Amendment. You can't CP around that (beyond ConCon). Same with commerce clause limitations, takings cases, procedural due process cases, and others of that ilk.

Tiersky replies that this doesn't guarantee that the Congress actually *would* reinstitute the laws/statutes that were struck down:

He [Galloway] talks about having a resolution where the Supreme Court overrules decisions that had struck down particular types of statutes. There's sort of a conceptual problem for me with the Court overruling a decision striking down a statute. Once the Court has made the initial ruling (e.g. this gun statute is unconstitutional), the issue doesn't recur. The statute, for all intents and purposes, goes away. Sometimes it is actually repealed or replaced by different statutes. Sometimes it's left on the book but flagged as not being the law. But, in any event, it never comes into play again, so it's hard to see how you'd get a second case to the Court for it to overrule itself. I know, "fiat" but even still I find it difficult to see.

So Tiersky raises some potential fiat questions and whether or not the Congress would, via normal means, reinstitute such legislation. Nevertheless, the question of the Court overruling itself on a decision where it struck down a previous law from Congress may provide directionality to the topic while helping the Affirmative with a defense against certain types of Counterplans. This issue is also discussed in the Federalism paper and in an edebate discussion from 2005² on the Courts/Federalism paper.

² See Galloway, "Congress do it Counterplan?" <http://www.ndtceda.com/archives/200504/0297.html>; Hall, "Re: [eDebate] potential china resolutions" <http://www.ndtceda.com/archives/200504/0294.html>.

Meta-Issue #4: Side Bias

One of the biggest concerns about this topic is the question of side bias. The statistic of “90% AFF win percentage” in elimination rounds has been cited as the reason to not put another “Bowers v. Hardwick” in the topic. In addition, there is a widespread belief that “Courts disads suck.” Many may feel that putting in too many easily defensible Affirmatives will undermine Negative win percentages.

These concerns are counterbalanced with the notion that the Negative has been winning over 50% of its debates in recent years, largely with an arsenal of arguments that have gained widespread legitimacy (process counterplans, Kritiks, procedurals, topicality, etc.) It may be that the committee needs to “give the AFF. a fighting chance” by either including strong Affirmative cases or giving the AFF. a high degree of flexibility in case construction. Many people advocate AFF. flexibility for any one of a number of reasons, but side bias may also be a contributing factor.

Wording Issues***Wording Issue #1: The Agent of Action***

Two arguments seem to lend themselves in favor of using the US federal government over specifying the Supreme Court overruling one of its decisions. Paul Skiermont chimed in via email to argue that:

On the courts topic I think a USFG agent might be more appropriate. SCOTUS reversals of itself are rare and even more unrealistic if you want to reverse a recent decision. My impression is that the way most SCOTUS decisions get overturned is through legislation. (This would not work for all topics, notably many constitutional issues, but if SCOTUS action is required the Aff can specify the agent).

So Paul’s concern may not be applicable on the constitutional issues we are discussing, but there may be merit in not locking the AFF. into the US Supreme Court as the agent of

action, at least because of the Counterplans it guaranteed locks in for the Negative. Some of this is guided by Ross' blog comments on the need to give the Affirmative more ground and the above commentary on why giving the Affirmative more options than they presently get is appropriate.

Adam Lee makes the argument that it may be more difficult to find “overrule good” evidence on given cases than “the case itself is bad:”

Don't know why i'm reading edebate, but there seems to be little justification for the primary assumption that everyone seems to be making. That being that the default affirmative agent MUST be the Supreme Court. I think Joe's and others' "procedural" concerns are highly legitimate and buttressed by the fact that there will be ostensibly no correlation between harms/advantage evidence and solvency evidence for any "plan" that would have the Supreme Court straight up overrule precedent (with the single possible exception of Roe, you will have a nearly impossible time finding Law Review articles that create a discussion of Solvency based on the Supreme Court overturning its precedent).

This also augments the committee's task in the next phase of tightening up solvency evidence for the Affirmative on the question of overruling decisions. Both of these arguments lend themselves to “The United States federal government should overrule one or more United States Supreme Court decisions...”

Wording Issue #2: overrule vs. reverse vs. overturn

The main “mechanism” that has been discussed is reversal of a Supreme Court decision. Three terms of art quickly arise in the literature surrounding this question. The Dictionary of Modern Legal Usage discusses overrule, overturn, and reverse in the following quote:

ENTRY: overrule; overturn; reverse; set aside; vacate. Overrule is usually employed in reference to procedural points throughout a trial, as in evidence <"Objection|" "Overruled.">. Overrule is also used to describe what a superior court does to a precedent that it decides should no longer be controlling law, whether that precedent is a lower court's or its own. Overturn and reverse are

terms to describe an appellate court's change to the opposite result from that by the lower court in a given case.

The second definition of “overrule” seems to apply to what the Affirmative should be required to do under the topic, with the Court declaring that a precedent should no longer be controlling law. Note that this may be “writing the agent back in” as the court is referring to its own precedent. We should also be cautious to ensure that the Affirmative is overruling a United States Supreme Court decision, and not a lower court decision.

This definition also implies that “overturn” and “reverse” apply to the action taken to the *appellate court decision* that is reviewed by the higher court. This certainly seems to be the case with “reverse.” Patricia Jones³ points out the distinction between “reversing” the appellate court and “overturning” the *Bowers v. Hardwick* case:

The United States Supreme Court **reversed the decision of the Court of Appeals** for the Texas Fourteenth District and ruled the Texas statute unconstitutional. 13 The Court held that the Due Process Clause granted Lawrence and Gardener the right to engage in private sexual intimacy without interference from the government. 14 The Court **also overturned Bowers**. 15

There is literature defending “overturn” as being functionally synonymous with “overrule” as will be further discussed in this section. However, “overrule” seems to get at the fundamental question of the resolution, that the Court should fundamentally change a prior existing precedent, as the Court did in the decisions of Lawrence v. Texas and Brown v. Board of Education.

Several sub-issues quickly arise with the question of “overruling” a decision. As debate discussion has developed on this issue, many have argued that “overruling” is broad enough to allow the Affirmative wide discretion as to what to do with the case

³ Patricia A. Jones, Washington and Lee Race and Ethnic Ancestry Law Journal, Spring, 2004, 10 Wash. & Lee R.E.A.L. J. 143, CASE NOTE: LAWRENCE V. TEXAS, 123 S. CT. 2472 (2003)

itself (liberal overrules of Roe have been the prominent example). However, Gavin Scotti⁴ argues that “overruling” requires deciding on the opposite *grounds* of the original case, distinguishing between Lawrence v. Texas as overruling Bowers, while Romer v. Evans did not overrule Bowers:

On June 23, 2003, the United States Supreme Court handed down its decision in Lawrence v. Texas, 12 which invalidated a Texas statute that outlawed homosexual sodomy 13 and **overruled** its 1986 decision in Bowers v. Hardwick... In Romer v. Evans, 30 the Court struck down a Colorado constitutional amendment that prohibited legislative, executive, or judicial action designed to protect homosexuals from discrimination. 32 and, therefore, **did not overrule Bowers, which was decided on due process grounds.** 33 Evans focused on status rather than conduct.

Mitchell Katine⁵ further illustrates that because Romer dealt with Equal Protection, while Bowers dealt with substantive due process and the right to privacy, that Romer v. Evans did not overrule Bowers v. Hardwick:

The Romer decision would be helpful in presenting **an Equal Protection argument**, but would not support a challenge of the statute as a violation of Due Process or privacy. To succeed in our **Due Process** and **right to privacy claims**, the Court would have to **overrule its prior decision in Bowers**. This seemed unlikely.

Therefore, there is reason to believe that a decision is only “overruled” if the grounds for the decision are the opposite of what the Court originally decided upon.

Another issue with relation to “overruling” a decision is that the Court rarely does so.

Michael Gerhardt⁶ points out that, “The Court has expressly overruled more than 130 of

⁴ Gavin W. Scotti, St. John's Law Review, Summer, 2004, 78 St. John's L. Rev. 897, “NOTE: QUEER EYE FOR THE MILITARY GUY: WILL "DON'T ASK, DON'T TELL" SURVIVE IN THE WAKE OF LAWRENCE V. TEXAS?”

⁵ Mitchell Katine, South Texas Law Review, Winter, 2004, 46 S. Tex. L. Rev. 245, “LAWRENCE V. TEXAS SYMPOSIUM ISSUE: LAWRENCE V. TEXAS SYMPOSIUM: FOREWORD.” See also Joel A. Holt, Akron Law Review, 2005, 38 Akron L. Rev. 413, “NOTE: Treat all Men Alike+: An Analysis of United States v. White Mountain Apache Tribe and Suggestions for True Reparation”

its prior decisions.” Gerhardt also argues that the Court overruled fewer than twenty precedents in the nineteenth century, and more than one hundred and twenty since then. The committee can decide whether that is a sufficient number, but there are at least numerous examples of time periods where the Court has overruled previous precedent, with two of the most notable being Lawrence v. Texas and Brown v. Board of Education.

A huge debate exists surrounding the case of *City of Boerne v. Flores* as to whether the Congress can overrule a Supreme Court decision. In a backchannel discussion with Adam Lee on this issue, he indicates that the Boerne precedent has been narrowly limited, and there is no bright-line rule that prevents Congressional overrule of its decisions. Nevertheless, there is a great deal of law review evidence about whether or not Congressional overrules violate Separation of Powers and whether or not Congressional overrules could constitute “normal means.” This may become a concern of the committee, or it may just be an issue that the committee wishes debaters to hash out during the rounds. So as not to clutter the paper with a large discussion of this arcane issue, we will merely footnote relevant articles on this question before moving on to discuss other concerns with “overruling” decisions⁷.

⁶ Michael J. Gerhardt, *University of Pennsylvania Journal of Constitutional Law*, April, 2005, 7 U. Pa. J. Const. L. 903, “THE LIMITED PATH DEPENDENCY OF PRECEDENT”

⁷ See Luria, *University of Pennsylvania Journal of Constitutional Law*, October, 2005, 7 U. Pa. J. Const. L. 1229, Lexis; Alison K. Hayden, *The John Marshall Law School Review of Intellectual Property Law*, Fall, 2005, 5 J. Marshall Rev. Intell. Prop. L. 94, “Patent Tying Agreements: Presumptively Illegal?” James M. Underwood, *Akron Law Review*, 2004, 37 Akron L. Rev. 653, “Supplemental Serendipity: Congress' Accidental Improvement of Supplemental Jurisdiction;” Michael E. Waterstone, *Alabama Law Review*, Spring, 2005, 56 Ala. L. Rev. 793, “LANE, FUNDAMENTAL RIGHTS, AND VOTING”

Another concern with the phrase “overrule” was mentioned by Stefan on the blog and has been echoed by others, which is what part of a decision must be “overruled.”

Even if one argues that a *precedent* must be overruled, the question of what the precedent is may be difficult to decipher. Kelly Dunbar posed a few hypotheticals on this question:

I agree that the community would probably settle around some pragmatic, common sense view of overrule, so it might not [sic not] be a big deal. Although the last time a court topic happened, exclusionary CPs/PICs were not as common. Accordingly, precision in terms is more crucial. So, the law school AA case said applied strict scrutiny but held that (1) diversity is a compelling interest; (2) the law school plan wasn't narrowly tailored. What does it mean to overrule? Could mean lots of things (and that isn't necessarily bad): (1) overturn on the ground that strict scrutiny shouldn't apply to "begin" racial classifications; (2) overturn on the ground that diversity is not a compelling interest; or (3) overturn on the ground that the law school plan was narrowly tailored. Essentially, that makes the case bi-directional -- the aff. could increase AA or essentially do away with it by holding diversity doesn't count (other decisions have already held that remedying historical disc. doesn't count).

In addition to what Affirmative teams could do, Kelly also worried about the Negative Counterplan options:

Another *problem* is the distinguish or narrow but not overrule CP. Against, a diversity isn't a compelling interest (AA bad case), the CP to narrow to all context except military promotion rather than overrule completely seems hard to beat. My point is that overrule seemingly makes everything short of overruling competitive. Again, maybe that isn't solvable. It worked OK on the privacy topic, so I suspect people will cope. Although that argument might not be comfort for concerned people now.

Depending on the literature base surrounding cases and Lee's concern about the term “overrule” it may be worth investigating in the next phase the idea of “narrowing” a precedent, “distinguishing” a precedent, or even “substantially narrowing” a precedent. It all depends on how strong the defense of overruling versus other types of Counterplans will be. Much of this will depend on the context of the given cases the committee decides to include in the topic.

Michael Gottlieb also added a great deal on the question of “overrule” defending that there are some issues, but “I’m not sure any of them are fatal:”

1. There are a lot of ways to overrule a case. You can overrule part of it. You can overrule all of it. You can overrule it by saying "Bowers v. Hardwick is overruled," or you can overrule it by simply stating contrary doctrine ("abortion precedents shall be overruled by declaring that there is no constitutional right to have an abortion"). So you'd have to be pretty specific about actual cases that the aff had to overrule, or you'd have really quite a lot of ground in a micro sense, even if limited in a sort of macro sense. Perhaps that's a good thing. I don't really know.

This echoes Dunbar and Bauschard’s concerns about what it means to overrule a decision. Perhaps Harrison’s discussion of overruling a *precedent* is more valuable? Gottlieb also recommends, “If you want to avoid the ability to overrule just one part of a case, you would have to require them to "overrule in whole one or more full decisions in the following areas" (or something similar).” This is an issue the committee should explore in the next phase.

At this point, the phrase “overrule” seems to get at the question of dealing with an existing Supreme Court decision and requiring that the Affirmative go the opposite direction on the grounds of the original decision. More severe questions exist on the issue of “what is being overruled” and how to illustrate that the precedent should be overruled and not just a small part of the decision. The Counterplan options in question could also be a boon or a curse, in that they may lead to very specific debates on the nuances of the case, or a nightmare for the Affirmative where the Negative can prick an element of the Affirmative “overrule” and go from there. While Affirmatives did quite well on the original privacy topic, the committee may be sufficiently concerned about these ideas to move toward “overrule the precedent of...” or

“significantly/substantially narrow the precedent of...” This issue should be more thoroughly investigated before the committee meets in full.

The Cases

The bulk of the topic committee discussion will likely center around which cases to include, and whether or not to list given cases or move toward an “area approach.” Following the direction of Mancuso, at this phase of the process the subcommittee investigated a wide range of cases, seeking input from legal alumni, as well as surveying the literature for relevant cases. Many of these cases are the same as ones found in the original two topic papers on the question, however, more nuance in the discussion can often be found in this paper.

Case Area #1: Abortion

The subcommittee is hesitant to foreground the case area selection with abortion, given the controversy on edebate surrounding the issue. Nevertheless, the Court frequently deals with abortion related cases, it has been a core controversy surrounding the Court since 1973, and every judicial nominee in the modern era is constantly questioned on the issue. Whether or not such cases should ultimately appear on the ballot, abortion cases are certainly worthy of the committee’s consideration.

Some cases to consider include Roe v. Wade, 410 U.S. 113 (1973), which “legalized abortion” in the United States by creating a trimester system of viability, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), which established limitations on the abortion rights in the United States, and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) which allowed for further restrictions on the abortion right, but upheld the Roe v. Wade precedent.

The literature on abortion rights is incredibly fruitful, and this paper would do no justice to the depth of the controversy by cursorily citing a few articles on the question. Potential advantages to cases which upheld a woman's right to choose would include: overpopulation (both via modeling and domestic), patriarchy, racism, fundamental rights, the separation of church and state, etc. Potential disadvantages include massive links to politics, slippery slope, and ethical questions concerning the rights/status of the fetus. There is also a plethora of literature on the question of whether or not Roe itself is a strong engine in actually protecting a woman's right to choose to have an abortion.

Case Area #2: Affirmative Action:

Jonah Feldman submitted the following section to the subcommittee on the question of Affirmative Action. Keep in mind, it would be easy to go either way on Affirmative Action in the writing of the topic, Jonah chose to argue against Affirmative Action in this subsection of the paper.

I strongly recommend that the case used for the aff action section should be the Supreme Court's 2003 5-4 decision in Grutter v Bollinger 123 S. Ct. 2325 (2003) that upheld the use of racial affirmative action as a means of increasing student diversity at the University of Michigan Law School. In Grutter, the Court held that the University of Michigan's use of race among other factors in its law school admissions program was constitutional because the program furthered a compelling interest in obtaining "an educational benefit that flows from student body diversity". The Court also found that the law school's program was narrowly tailored; it was flexible, and provided for a "holistic" review of each applicant.

In her majority opinion, Justice O'Connor said that the law school used a "highly individualized, holistic review of each applicant's file." Race, she said, was not used in a "mechanical way." Therefore, the university's program was consistent with the requirement of "individualized consideration" set in 1978's *Bakke* case. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," O'Connor said.

Important aspects of the decision

- The consideration of race in university admissions is not prohibited by the Equal Protection Clause of the 14th amendment
- Diversity can constitute a compelling state interest for purposes of strict scrutiny
- Prohibition on the use of racial quotas in affirmative action programs on the grounds that the pursuit of racial balance is a "patently unconstitutional" governmental objective.

Main arguments for choosing this case

- Relatively Recent Decision
- Lots of Literature
- Good spillover ground. The decision is often described as "a road map not just for universities, but affirmative action generally." (Supreme Court Appellate Attorney Thomas Goldstein)
- There is lots of room for aff innovation throughout the year because there are six different opinions, including concurrences, partial concurrences and dissents

Aff Advantages

Rejection of Racial Balance increases Racism

Spann 2005 (7 U. Pa. J. Const. L. 633)

Grutter tends to be viewed as a case that is beneficial to racial minorities because it upholds the use of racial affirmative action in an educational context, and holds that diversity can constitute a compelling state interest for purposes of strict scrutiny. However, Grutter is likely to do more harm than good for minority interests, because it emphatically insists that the pursuit of racial balance as part of an affirmative action program is "patently unconstitutional." By outlawing the pursuit of racial balance in the name of colorblind race neutrality, Grutter prohibits the only remedy that is likely to be effective in combating contemporary racial discrimination.

Hegemony

Fair 2005 (7 U. Pa. J. Const. L. 721)

When legal historians examine the rise and fall of the United States, undoubtedly one of the major questions will be why an allegedly great nation would close off effective educational opportunities to so many of its citizens, rendering those educational outsiders at sea, with little ability to compete for global opportunities. n1 Is racism too entrenched to educate everyone to the same extent as those in the white, ruling elite? n2 Modern racial disparities in attainment and performance reflect a longstanding practice of unequal educational opportunity. n3 Educational caste is a legacy of discriminatory laws. [*722] The Supreme Court has never dismantled educational caste. It has provided no remedy to restore those persons mired in caste to the positions they would occupy absent discrimination. n4...My thesis is that the jurisprudential framework employed by Justice O'Connor in Grutter is on a collision course with itself. On one hand, Justice O'Connor opines the significant benefits of educational diversity, creating a pool of diverse, educated leaders representing all the citizens of the United States. On the other, Justice O'Connor concludes that taking account of racial classifications violates core equal protection values and thus must be limited in scope and time. Yet, Justice O'Connor fails to anchor her limiting theory to invidiousness or the smoke-out rationale that she has regularly cited for distinguishing illegitimate and legitimate uses of racial classifications. Justice O'Connor has said repeatedly that context matters, but she does not explain why context in Grutter is not likely to be dispositive in upholding educational diversity in twenty-five years and beyond. Thus, in Grutter, the Court postpones for another day the taking of racial caste seriously.

Whitewashing

Fair 2005 (7 U. Pa. J. Const. L. 721)

One broad critique of cases like Bakke and Grutter is that the Court has whitewashed the relevant contextual history. As in so many of its opinions, the Court writes in both cases as if history never happened and the most salient, pernicious historical facts are rendered superfluous to contemporary legal reform. Almost no one asks why there are significant disparities in standardized test scores for different ethnic groups or what has been done to close the gaps. Is it one of the lingering effects of past discrimination or is it genetic? Does it matter what the cause is? Is it fair that so few Native Americans, African Americans, Pacific Islanders, and Latinos can gain admission at the best schools in the nation? Is the solution better schools or subsidized preparatory courses? Are these minorities simply not working hard enough?

Undermines Asians and Latino/a's Romero 2005 (7 U. Pa. J. Const. L. 765)

During the summer of 2003, I had the privilege of participating in a round table discussion on the likely impact of the Supreme Court's affirmative action holdings in Grutter v. Bollinger n1 and Gratz v. Bollinger. n2 Hosted by the New York University Asian/Pacific/American Studies Program & Institute, all of the discussants were Filipina Americans from government, academia, and the private sector, keenly interested in how the Court's rulings impact our community. As the lone law teacher n3 present, I was specifically asked to present Grutter and Gratz, and I did so on the assumption that Filipinas n4 self-identify as Asians because of the Philippines's location in the South Pacific. After outlining the Court's holdings, I opined that because Asians were not viewed to be underrepresented in the University of Michigan's law and undergraduate schools, the affirmative action programs in Grutter and Gratz did not apply to them. The Court was silent with respect to Asians, and therefore, silent with respect to Filipinas. Furthermore, even with respect to the minorities the programs did favor, Justice O'Connor's majority opinion in Grutter suggested that she would expect the eventual phasing out of affirmative action policies over the next twenty-five years. n5

Neg Args

Spillover to Employment: Diversity key to economy Estlund 2005 (26 Berkeley J. Emp. & Lab. L. 1)

The next front in the legal battle over affirmative action may well be the workplace, where diversity has become a widely endorsed desideratum of organizational life. That upcoming showdown may have been on the minds of the numerous "major American businesses" that lined up in support of affirmative action in Grutter. n3 Arguing in defense of the elite and integrated institutions from which these firms draw much of their managerial workforces, these business leaders persuaded the Court that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." n4 But their briefs may also have planted the seeds for a defense of the corporate amici's own employment policies. Affirmative action, including preferential consideration of women and people of color, undoubtedly plays some role in the hiring and promotional decisions that go into creating the diverse workforces whose virtues these companies tout. n5 A day of reckoning in the courts cannot be far off.

Diversity in Education Good Estlund 2005 (26 Berkeley J. Emp. & Lab. L. 1)

The Supreme Court's recent decision in Grutter v. Bollinger n1 gave a blinking yellow light to affirmative action programs in higher education. A majority of the Court recognized that racial and ethnic diversity within a student body was a "compelling state interest" that, if pursued by appropriate means, could justify some race-based preferences for underrepresented groups in university admissions. n2 Universities have accordingly turned their attention to the design of admissions procedures that are both lawful and practicable means of producing a diverse student body out of the thousands of applications that must be processed during a short admissions season.

Key to race based civil liberty gains Brown-Nagin 2005 (7 U. Pa. J. Const. L. 787)

Here, I consider Justice Thomas's dissenting and concurring opinion in Grutter v. Bollinger n39 and reach an unexpected conclusion. On the face of it, Justice O'Connor's majority opinion deserves the greatest attention. By her swing vote, Justice O'Connor gave liberal civil rights advocates a victory, snatched from the jaws of defeat

Grutter Solves**Aka 2005 (42 Cal. W. L. Rev. 1)**

The Article argues that Grutter was inevitable as a culmination and jellification of best practices on the use of race as a factor in admissions to law schools that has been building since the Supreme Court's decision in *Regents of the University of California v. Bakke* in [*3] 1978. n5 Logically, such an argument leaves little room for any analysis of impact. But, that is not the sense in which impact in this Article is used. Instead, the basis and significance of the analysis of impact here - and another argument of the Article - is that despite its inevitability as a congealment of best practices in affirmative action, Grutter is still momentous because public higher educational institutions n6 can now openly use race in their admissions decisions rather than resort, as in the past, to "winks, nods, and disguises" and related techniques to camouflage their use of race. n7

Aff/Neg ground

- Equal Protection Good/Bad
- Self-determination/Devolution

Other education cases:

If you wanted to go the other way you could choose *Gratz v Bollinger* 123 S. Ct. 2411 (2003) which struck down the Michigan Undergraduate aff action case. In *Gratz*, the Court rejected the undergraduate admissions program at the College of Literature, Science and the Arts, which granted points based on race and ethnicity and did not provide for a review of each applicant's entire file.

University of California v. Bakke (1978) upheld the use of race as one factor in choosing among qualified applicants for admission. At the same time, it also ruled unlawful the University Medical School's practice of reserving 18 seats in each entering class of 100 for disadvantaged minority students.

Texas v. Hopwood (1996) the U.S. Court of Appeals for the Fifth Circuit ruled against the University of Texas, deciding that its law school's policy of considering race in the admissions process was a violation of the Constitution's equal-protection

guarantee. The U.S. Supreme Court declined to hear an appeal of the ruling because the program at issue was no longer in use.

Employment cases:

United Steel Workers of America, AFL-CIO v. Weber (1979) the court ruled that race-conscious affirmative action efforts designed to eliminate a conspicuous racial imbalance in an employer's workforce resulting from past discrimination are permissible if they are temporary and do not violate the rights of white employees.

The Supreme Court in Local 128 of the Sheet Metal Workers' International Association v. EEOC (1986) upheld a judicially-ordered 29% minority "membership admission goal" for a union that had intentionally discriminated against minorities, confirming that courts may order race-conscious relief to correct and prevent future discrimination.

The Supreme Court ruled in Johnson v. Transportation Agency, Santa Clara County, California (1987) that a severe under representation of women and minorities justified the use of race or sex as "one factor" in choosing among qualified candidates. The Supreme Court in City of Richmond v. J.A. Croson Co.(1989) struck down Richmond's minority contracting program as unconstitutional, requiring that a state or local affirmative action program be supported by a "compelling interest" and be narrowly tailored to ensure that the program furthers that interest.

In Adarand Constructors, Inc. v. Peña (1994) the Supreme Court held that a federal affirmative action program remains constitutional when narrowly tailored to accomplish a compelling government interest such as remedying discrimination. In City

of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), a municipal set aside plan for minority contractors was struck down.

Case Area #3: Executive Power

The Supreme Court has frequently dealt with the issue of executive power in the United States, including and especially during wartime situations. While the “executive power” topic was defeated, the “Courts” topic has always been unique in its ability to access other case areas because of the scope of what the Court does. Some cases the committee could consider include: Korematsu v. United States, 323 U.S. 214 (1944), which upheld Roosevelt’s executive order to intern Japanese-Americans during World War II; Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), which recognized the power of the government to detain unlawful combatants, but ruled that detainees must have the ability to challenge their detention before an impartial judge; Hamdan v. Rumsfeld, a case the Court is currently considering questioning the legality of Guantanamo military commissions set up by the Bush administration (the decision is not expected till the summer); Clinton v. Jones, 520 US 681 (1997), which established that a sitting President has no immunity from civil litigation against him, for facts unrelated to the President’s term in office.

The subcommittee has significant concerns about Korematsu because of the likelihood of Affirmative side bias. Hamdi v. Rumsfeld might go the wrong way, assuming that people would want to limit executive power. Clinton v. Jones is interesting, but doesn’t directly access the spying debate/GITMO debate that people want to. The Hamdan v. Rumsfeld case that Neal Katyal tried on oral argument before the Court looks very exciting, and was mentioned by several legal alums, but without the

decision being handed down yet, there is some concern the case might not be a good one to include because of concerns of directionality (we do not know how the Court will decide) and ease of overrule (the Court might hand down a multi-tiered decision). The committee should probably look more deeply into a good way to access executive power via the Court rubric.

Case Area #4: Federalism

Perhaps ill-named, this section deals with the significant questions raised by the Court's increasing willingness to strike down Congressional statutes designed to protect individual rights. The committee might consider the following cases: United States v. Morrison, 529 U.S. 598 (2000), which stated that Congress did not have the authority to establish civil remedies in federal court through the Violence Against Women Act (VAWA)⁸; US v. Lopez, 514 U.S. 549 (1995), which struck down the Gun Free School Zones Act, but perhaps most importantly, spawned one of the most well-known debate Counterplans of the modern era; Seminole Tribe of Florida v. Florida, which deals with whether or not the federal government has the power to allow Indian Tribes to sue a state and disrupt its sovereignty;⁹ City of Boerne v. Flores, where the Supreme Court struck down the Religious Freedom Restoration Act; and Board of Trustees of the University of Alabama v. Garrett, (531 U.S. 356, 365 (2001), where the Court held that a nurse who held a job at a state hospital had no legal cause of action in federal court under the Americans With Disabilities Act (ADA). The Alabama Law Review spent an entire issue debating the implications of this decision¹⁰.

⁸ See Banks, Akron Law Review, 36 Akron L. Rev. 425, 2003.

⁹ Banks, Ibid.

¹⁰ See Alabama Law Review, Summer, 2002, 53 Ala. L. Rev. 1075.

The subcommittee strongly recommends a close look at US v. Morrison. Several debate alumni, including Dunbar, Tushnet, and Zive all independently named this case, and there is a great deal of literature on this case. It may be Affirmatively biased, but a second backchannel email with Kelly Dunbar confirms that at least he thinks the debates would be good, and the case accesses the gender and federalism debates very well.

Dunbar states:

I agree VAWA would be a hard case to beat, especially in light of the community's general priveleging of preference over process. There is at a minimum good CP grounds. Lots of good stuff that VAWA was rightly decided on commerce clause grounds -- but that the Court paid short shrift to the 14th Amendment. So, it depends on how a team overruled. The 14th Amendment CP would devastate the do it on commerce clause grounds (in my opinion). Not even close. The reason we have moral outrage against violence against women has nothing to do with its impact on commerce but everything to do with how that violence is a part of a system of the creation of a gender caste that denies women full citizenship -- something the 14th Amendment was designed to eradicate (the CP would require redefining state action but that would be an added advantage). But a team doing it on commerce clause grounds could probably defend VAWA on commerce clause in terms of other benefits to reversing commere clause jurisprudence, like env. regulation (e.g., the ESA). Plus the permutation to do on both grounds can be answered with a dicta argument: 2 alternative grounds for the same outcome and one is going to be treated as dicta and not followed. I think most think VAWA would do little directly; the symbolism cards were good, but those could be used to be linked to any variety of symbolic reform bad arguments. I agree the ground might be harder if you set aside process CPs.

While a federalism sub-section falls prey to perhaps being overly generic or too process oriented, the specific federalism cases in question access women's rights, religious rights, and "disabled" rights in unique ways that provide the Negative built-in disadvantage ground.

Case #5: *Eminent Domain*

Joe Patrice wrote the following analysis of the Kelo v. New London case recently

handed down by the Supreme Court.

Kelo v. City of New London, 125 S. Ct. 2655 (2005)

Introduction

In February 1998, Pfizer Corporation announced it would build a \$ 300 million facility in the Fort Trumbull area of New London. In 2000, New London approved a development plan intended to revitalize the distressed city through increased tax revenues and creation of jobs. In order to implement the plan, New London began to purchase needed land from willing sellers and proposed to use the power of eminent domain to obtain the land from unwilling landowners in exchange for just compensation.

The Court, in a 5-4 decision, upheld the actions of New London, holding that courts should defer to legislatures where there is no evidence of an illegitimate purpose. In short, where a taking has a rational basis, the Court will not strike it down. In this case, the majority justified the taking because it would be carried out in accordance with a "carefully considered" development plan, which would benefit the general public.

The Fifth Amendment of the United States Constitution declares that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." There are three categories of takings which justify the "public use" clause, two of them more straight-forward than the other. The first type of taking, premised on the most obvious type of public use, occurs when the government takes land from private entities in order to use it for a school, road, military facility, or hospital. Essentially, the "public" or the government owns the property. A second type of taking occurs when private property is transferred to private owners of a common carrier or utility. This type of taking, although transferred to

a private entity, allows the public equal access to the service it provides. The third, a more controversial and confusing type of taking, involves the transfer of private land to a private entity that will ultimately serve a "public purpose." It is this third type of taking that was commonly rejected throughout the nineteenth century, but has become increasingly widespread in recent years, and is the form of taking upheld in the *Kelo* decision.

History

Berman

In 1954, the United States Supreme Court decided *Berman v. Parker*, in which it upheld the District of Columbia Redevelopment Act of 1945. The Act involved takings for the purpose of "slum clearing" and found that conditions in parts of Washington, D.C. were so substandard they were "injurious to the public health, safety, morals, and welfare." This Act gave the government the power to eliminate harmful conditions by any "means necessary and appropriate for the purpose," including acquiring and assembling, "by eminent domain and otherwise, real property for 'the redevelopment of blighted territory' The majority of the land would be sold or leased to private developers because preference was given to private entities over public agencies.

Berman, a department store owner whose non-blighted property was located inside a targeted area, objected to the taking of his land. The Supreme Court upheld the Redevelopment Act, allowing the taking of *Berman's* property. The Court stated the legislature's job is to determine how to use its police powers, and the judiciary's job is to decide whether the power is being used for a public use.

Although Berman's land was not blighted, the Court stated that in order for the community to be redeveloped in such a way as to avoid future blight, the whole area had to be redesigned.

Midkiff

In *Hawaii Housing Authority v. Midkiff*, the Court unanimously affirmed Berman. The Hawaii legislature had determined the historical land ownership oligopoly was a public detriment and passed the Land Reform Act of 1967, which allowed current lessees of property to petition the government to condemn their land in order to relieve the seller of high taxes and promote a friendlier housing market.

The Court, affirmed Berman, and concluded that eminent domain could be used to achieve any purpose falling under the government's police power, promoting a rational basis review of eminent domain for economic development, giving almost complete deference to the legislature. Despite the fact that neither the legislature nor the public would have access to the taken land, the *Midkiff* Court concluded "a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases."

Alternatives

There are two potential affirmatives stemming from this case, both of which were outlined in the two dissents to the decision.

O'Connor

Justice O'Connor explained that while the Court has historically given full deference to legislatures in determining the bounds of public use, leaving the public/private distinction solely to the political branches would render the Public Use Clause "little more than hortatory fluff." The danger in leaving the full determination to local governments rests in the opportunity for corruption by those private entities looking for a profit.

This dissent represents something of a middle way – the government may take land for private development but only where a social harm is directly being addressed. Justice O'Connor wrote the unanimous opinion in *Midkiff* and found a distinction between the two cases. Justice O'Connor pointed out that in *Berman* the blighted neighborhood was composed of 64.3% dwellings that presented injurious conditions to the general public and the redevelopment plan for the neighborhood had the primary purpose of remedying social ills to preserve the health and safety of the general public. *New London* did not claim that the plaintiffs' homes were a source of "social harm," nor could *New London* make that claim without clearing the way for any single home to be condemned in order to erect an apartment building, retail store, or church.

Justice O'Connor contemplated the worrisome future of eminent domain policy. She expressed concern that developers and those with influential political power would take advantage of the new definition of "public use" in order to take property away from those with fewer political resources.

Thomas

Justice Thomas was farther reaching arguing that the *Berman* and *Midkiff* decisions were improperly decided. Justice Thomas stated the text of the Constitution suggests

"the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking." The Takings Clause is a limitation on legislative power that the Court should not be able to eliminate.

Justice Thomas criticized the *Kelo* Court for its deference to the legislature for such an obviously legal question. The Court did not defer to the legislature on questions of reasonable search and seizure in the home, but when the issue was whether to tear down a home, the Court accepted the judgment of the legislature. Justice Thomas also criticized equating police power with eminent domain power because, traditionally, police power was used to abate nuisances and did not necessitate compensation. Thus, police power contradicts the takings power which always requires just compensation.

Justice Thomas voiced concern about repercussions stemming from the Court's decision. He argued the government is incapable of providing compensation that reflects the subjective value of the individual's property and these economic development-type takings will most likely occur in poorer neighborhoods unable to make the most profitable use of their properties.

Issues

This case raises the fundamental conflict between the long-term need for urban planning and the risk of corruption and exploitation. Without the power to take land for urban renewal as in the *Berman* example, slumlords are allowed to keep people in a cycle of poverty. On the other hand, the real life misadventures of New York under Robert Moses demonstrates how "urban renewal" can further crush the economic or political

have-nots. Is it better to keep people living in slums or risk pricing them out of their homes?

In the end, neither of the dissenters would set a precedent that would prevent the worst abuses of slumlords, but without setting a bright-line there is a risk. Replacing slums with low income housing would meet the standards of both O'Connor and Thomas, but that may not be practical. Low income housing accomplishes nothing if there's no employer in town. And this brings us whole circle to the dilemma in *Kelo*, where the city sought to bring in an employer to revitalize the economy decimated by base closings.

This decision also raises environmental questions. An overturning of this decision is on par with the "takings" amendments of the late 80s, where Republican Senators consistently added to environmental legislation amendments with harsh language protecting private property from eminent domain takings in order to disrupt the legislation's ability to function. On the other hand, environmental scholars decry the *Kelo* decision because it risks allowing local governments to seize greenspaces for private developers.

In addition to the economic issues, there are racism issues, going both ways. While racism often plays a part in defining the political and economic have-nots that O'Connor and Thomas fear will lose out under this decision, takings policies have also operated to undermine historical injustices. Not unlike overcoming the Hawaiian oligopoly in *Midkiff*, the government has used takings policies to protect African-Americans from losing their land due to clouded titles stemming from probate mistakes in some cases dating back to the Reconstruction era.

There are articles defending the Kelo decision for sparking public awareness of, and political opposition to, recent urban renewal programs. Although many initially thought of Kelo as a fleecing of Americans' property rights, the overwhelming backlash from the Court's decision has raised awareness and created a movement to limit the government's use of eminent domain. This backlash has allied conservatives and liberals and has some people thinking the Kelo Court did them a favor by bringing the issue of economic development for public use to the forefront. These “movements” arguments operate better in the context of courts because there is a wealth of literature about the advantage of political solutions rather than judicial ones (politics links regarding “activist judges” or Congress taking credit for reversing the decision or bi-part all the way to CLS).

Procedural Risk

One of the risks of a case that sparks so much political unity is that there is risk of legislative overrule. However, in spite of the overwhelming support for the Sensenbrenner bill (H.R. 4128), at present there appears to be declining interest in the Senate to pass similar legislation. The passage of the FY06 TTHUD appropriations bill with the Bond amendment allows legislators to lay legitimate claim to having addressed the concerns of constituents arising out of the Kelo decision, thus lessening the immediate need for additional legislation. Legislators will most likely face this issue again when considering whether to renew the Bond amendment in the FY07 appropriations process.

Case Area #6: Death Penalty

Another area of interest to debaters over time has been the Supreme Court's line of jurisprudence on the death penalty. While the death penalty was debated on the treaties topic, it was debated in the context of an international treaty, and not US Supreme Court decisions on the death penalty itself. This may provide for enough of a differentiation where the committee would feel comfortable including death penalty cases as an affirmative area to overrule.

Probably the lead case a team wanting to ban the death penalty would go to is Gregg v. Georgia, 428 U.S. 153, 179-82 (1976). In this case, "the United States Supreme Court upheld the constitutionality of the death penalty.¹¹" While there have been other recent Supreme Court cases, most of these cases deal with issues where the Supreme Court has declared the death penalty unconstitutional in certain areas. In Atkins v. Virginia, 536 U.S. 304, 311-12 (2002), the Supreme Court banned the execution of people who are mentally retarded under the "evolving standards of decency" rationale. In, 2005, in the case of Roper v. Simmons, 125 S. Ct. at 1200 the Supreme Court held that the execution of individuals between the ages of fifteen and eighteen violated the Eighth Amendment prohibition against cruel and unusual punishment.

The death penalty is an exciting and debate-worthy area of the law. The subcommittee encourages the committee as a whole to further investigate the area of the death penalty for more nuanced cases dealing with the death penalty and/or to provide with cases striking at the heart of the question of whether or not the death penalty violates the ban on cruel on unusual punishment in the Constitution.

¹¹ Joshua Dressler, Akron Law Review, 2005, 38 Akron L. Rev. 853, "The Wisdom and Morality of Present-Day Criminal Sentencing"

Case Area #7: Education

There are two lead cases that come out of an exploration of the literature surrounding Supreme Court jurisprudence in the area of education. The first case is San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The case held that the Equal Protection Clause did not protect the right to an equal education. This case addresses poverty and equity issues in education, as well as disabled rights to gain an education. The decision has been called “deplorable” and is argued to “generally shutting down the expansion of both the fundamental rights strand of suspect classifications strand of equal protection analysis.¹²”

A more recent case, Zelman v. Simmons-Harris 536 U.S. 639 (2002) allowed school vouchers for both religious and non-religious private schools. The case has been challenged on the grounds that, despite its facially neutrality, the case actually violates the establishment of religion clause because of “practical factors that potentially undermine secular school participation in the program” and the concern that government funds would be used for religious purposes.¹³ It may be possible to look into other access to education cases as well.

Case Area #8: Criminal Law:

Numerous criminal law cases provide for a strong debate on both sides. A lead case that several lawyer alumni mentioned was Apprendi v. New Jersey 530 U.S. 466

¹² James E. Fleming, *Tulsa Law Review*, Spring, 2004, 39 *Tulsa L. Rev.* 563, “LEGAL SCHOLARSHIP SYMPOSIUM: THE SCHOLARSHIP OFFRANK I. MICHELMAN: LAWRENCE 'S REPUBLIC.”

¹³ Tobias G. Fenton, *Boston University Law Review*, June, 2003, 83 *B.U.L. Rev.* 647, “STUDENT SYMPOSIUM: RELIGIOUS SCHOOLS AFTER ZELMAN v. SIMMONS-HARRIS: THE NEED TO REVIVE THE ROLE OF LEGISLATIVE PURPOSE IN ESTABLISHMENT CLAUSE CASES.”

(2000). “In the case, The United States Supreme Court held that New Jersey's penalty-enhancement [for hate crimes] violates the Due Process Clause of the Fourteenth Amendment.¹⁴ Given the plethora of debates on hate crime penalty enhancements in the 1994-1995 season (including being the case run in the final round of the NDT), this case accesses numerous issues surrounding the role of hate crime protections for suspect classes in the United States.

Another controversial case in the search and seizure field is the case of Kyllo v. United States 533 U.S. 27 (2001). In the case, the Supreme Court held that, “the warrantless use of a thermal imager against the home constitutes a search¹⁵.” The Brill article argues that the protections in Kyllo were ill-crafted, and therefore risk not being permanent. Additionally, teams may decide to go the opposite direction, and argue that limitations on searches with thermal imaging devices might undermine the war against terrorism or the war on drugs.

Vernonia School District v. Acton 515 U.S. 646 (1995) is another case recommended by numerous alumni. In the case, the Supreme Court held that the student athlete drug policy did not violate the Fourth or Fourteenth Amendment to the Constitution. The Court further determined that, “the government interests in the health and safety of public school students outweighed any privacy interests student athletes

¹⁴Gregory Nearpass, Albany Law Review, 2003, 66 Alb. L. Rev. 547, “COMMENT: THE OVERLOOKED CONSTITUTIONAL OBJECTION AND PRACTICAL CONCERNS TO PENALTY-ENHANCEMENT PROVISIONS OF HATE CRIME LEGISLATION.”

¹⁵ Adam W. Brill, Arkansas Law Review, 2003, 56 Ark. L. Rev. 431, “CASE NOTE: Kyllo v. United States: Is the Court's Bright-Line Rule on Thermal Imaging Written in Disappearing Ink?”

asserted.¹⁶ This case accesses the core controversy of privacy rights versus public safety in the war on drugs in the educational setting, providing for fertile grounds on all sides of the question.

¹⁶Althea Izawa-Hayden, American University Journal of Gender, Social Policy & the Law, 2003, 11 Am. U.J. Gender Soc. Pol'y & L. 1067 "CURRENT EVENT: BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY v. EARLS 122 S. Ct. 2559 (2002)"