

Readings

In General

... You will probably have finished reading *The Oath* by our first meeting. What follows are about an hour's additional readings for each session. These consist of marked excerpts from *The Oath*, some additional articles and excerpts from cases to give you a flavor of the times and the Justices' thinking in their own words or those of the reporters who wrote the syllabuses, and some excerpts from Wikipedia or other sources that may be helpful as technical references. Anything from *The Oath* will be fair game for discussion. But in addition, the readings are intended as background for matters that Toobin could not have foreseen-like the dramatic change in the executive branch-since he wrote the book. And don't forget the Constitution! The dramatic and continuing differences between conservatives and progressives described in *The Oath* are justified largely on different interpretations of just a few words:

*The Congress shall have the power...To regulate Commerce...among the several States...*in Article I, Section 8;

*To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...*just preceding Article 1, Section 9;

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the Laws... in Section 1 of the 14th Amendment;

and, of course, the First Amendment -*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.*

The First Session

The Oath 86-88

...It is easy, if unwise, to romanticize the history of the Supreme Court. During John Marshall's tenure as chief justice, from 1801 to 1835, the Court built a noble template for American democracy. **Marshall himself, more than any framer of the Constitution or even any president, defined the terms of separation of powers, the breadth of federal power, the relationship between the national government and the states,**

and the place of the Supreme Court in the government of the young nation.

Thanks to Marshall, the Court made a glorious debut.

For the next twelve decades, however, the Supreme Court was for the most part a malign force in American life. The landmarks of this era, which still constitutes more than half the history of the Court, were nearly all negative. In 1857, to the eternal shame of the institution, the Court held in *Dred Scott v. Sanford* that African Americans were property and that they could never possess the rights that belonged to human beings. This decision hastened the Civil War and was technically overruled by the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. The Court then proceeded to give those amendments such cramped and narrow meanings that the justices allowed African Americans to endure perpetual discrimination, and much violence, for a great many more years. In *Plessy v. Ferguson*, from 1896, the Court gave its formal imprimatur to American apartheid by approving Louisiana's system of separate railcars for blacks and whites....

The Oath 147-48

...In an early attempt to protect workers from exploitation, New York passed a law prohibiting bakery employees from working more than sixty hours a week. In the 1905 case known as *Lochner v. New York*, the Court declared the state law unconstitutional on the ground that it interfered with the "right of contract" of both the employer and the employee. "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution," Justice Rufus Peckham wrote for the 5-4 majority. In short, the New York law was an "unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family." In simple terms, the majority in *Lochner* turned the Fourteenth Amendment, which was enacted to protect the rights of newly freed slaves, into a mechanism to advance the interest of business owners.

The implications of *Lochner* were breathtaking. The Court basically asserted that all attempts to regulate the private marketplace, or to protect workers, were unconstitutional. In the words of the legal historian Morton J. Horwitz, *Lochner* "expressed, above all, the post Civil War triumph of laissez-faire principles in political economy and of the view that 'the government is best which governs least.' " The concept of "judicial activism," if not that precise term, dates to this period at the end of the nineteenth and early part of the twentieth centuries. During this time, the democratically elected branches of government passed a variety of laws to

protect workers and other individuals. But the Court imposed itself as a super legislature, rejecting many of these laws as violating the right to contract and due process of law. **The *Lochner* era at the Supreme Court reflected conservative judicial activism; later, in the Warren Court era, there would be liberal judicial activism when the justices began overturning laws that violated the rights of minorities and women.**

The conservative extremism of the *Lochner* era at the Supreme Court, and its broader political implications, eventually generated a backlash. Around the turn of the century, disparate reform movements began gaining traction. Antitrust legislation, food safety rules, child labor laws, women's suffrage, a tax on income—all came together under the broad rubric of Progressivism. Theodore Roosevelt, who became president in 1901, made the movement his own.... In his annual message to Congress on December 5, 1905, he recommended that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law."

SUPREME COURT OF THE UNITED STATES

Lochner v. New York

198 U.S. 45

Syllabus

Argued: February 23, 24, 1905 --- Decided: April 17, 1905

The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power. Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. **There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified as a health law to safeguard the public health, or the health of the individuals following that occupation.**

Section 110 of the labor law of the State of New York, providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution....

Lochner v. New York

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judgment ... in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U.S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy*, 169 U.S. 366. **Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.** ... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion

tends to become a law. **I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.** It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work....

SUPREME COURT OF THE UNITED STATES

A. L. A. Schechter Poultry Corp. v. United States

295 U.S. 495

Syllabus

No. 854 Argued: May 2, 3, 1935 --- Decided: May 27, 1935 [*]

1. Extraordinary conditions, such as an economic crisis, may call for extraordinary remedies, but they cannot create or enlarge constitutional power...

6. Defendants were engaged in the business of slaughtering chickens and selling them to retailers. They bought their fowls from commission men in a market where most of the supply was shipped in from other States, transported them to their slaughterhouses, and there held them for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. **They were indicted for disobeying the requirements of a "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York," approved by the President under § 3 of the National Industrial Recovery Act. The alleged violations were: failure to observe in their place of business provisions fixing minimum wages and maximum hours for employees;** permitting customers to select individual chickens from particular coops and half-coops; sale of an unfit chicken; sales without compliance with municipal inspection regulations and to slaughterers and dealers not licensed under such regulations; making false reports, and failure to make reports relating to range of daily prices and volume of sales.

Held:

(1) When the poultry had reached the defendants' slaughterhouses, the interstate commerce had ended, and subsequent transactions in their business, including the matters charged in the indictment, were transactions in intrastate commerce. P. 542....

(3) The distinction between intrastate acts that directly affect interstate commerce, and therefore are subject to federal regulation, and those that affect it only indirectly, and therefore remain subject to the power of the States exclusively, is clear in principle, though the precise line can be drawn only as individual cases arise. Pp. 544, 546.

(4) If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. P. 546.

(5) The distinction between direct and indirect effects has long been clearly recognized in the application of the Anti-Trust Act. It is fundamental and essential to the maintenance of our constitutional system. P. 547.

(6) The Federal Government cannot regulate the wages and hours of labor of persons employed in the internal commerce of a State. No justification for such regulation is to be found in the fact that wages and hours affect costs and prices, and so indirectly affect interstate commerce, nor in the fact that failure of some States to regulate wages and hours diverts commerce from the States that do regulate them. P. 548.

(7) The provisions of the code which are alleged to have been violated in this case are not a valid exercise of federal power....



March 6, 1937, *New York Herald-Tribune*, "The Modern Navigator"

SUPREME COURT OF THE UNITED STATES

West Coast Hotel Co. v. Parrish

300 U.S. 379

Syllabus

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 293 Argued: December 16, 17, 1936 --- Decided: March 29, 1937

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process...

2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.

3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

(1) The health of women is peculiarly related to the vigor of the race;

(2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

(3) This exploitation and denial of a living wage is not only detrimental to the health and wellbeing of the women affected, but casts a direct burden for their support upon the community. Pp. 394, 398, *et seq.*

4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.

5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.

This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract and a larger amount computed on the minimum wage fixed by a state board or commission.

Syllabus

SUPREME COURT OF THE UNITED STATES

317 U.S. 111

Wickard v. Filburn (No. 59)

Argued: May 4, 1942

Decided: November 9, 1942

... 2. The wheat marketing quota and attendant penalty provisions of the Agricultural Adjustment Act of 1938, as amended,...when applied to wheat not intended in any part for commerce but wholly for consumption on the farm, are within the commerce power of Congress.

3. The effect of the Act is to restrict the amount of wheat which may be produced for market and the extent as well to which one may forestall resort to the market by producing for his own needs.

4. That the production of wheat for consumption on the farm may be trivial in the particular case is not enough to remove the grower from the scope of federal regulation where his contribution, taken with that of many others similarly situated, is far from trivial.

5. The power to regulate interstate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.

6. A factor of such volume and variability as wheat grown for home consumption would have a substantial influence on price conditions on the wheat market, both because such wheat, with rising prices, may flow into the market and check price increases and, because, though never marketed, it supplies the need of the grower which would otherwise be satisfied by his purchases in the open market...

Syllabus

SUPREME COURT OF THE UNITED STATES

347 U.S. 483

Brown v. Board of Education of Topeka

Argued: Argued December 9, 1952 Reargued December 8, 1953 --- Decided: Decided
May 17, 1954

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment -- even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486-496.(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education....**The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation...** Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms... Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal... **The "separate but equal" doctrine adopted in *Plessy v. Ferguson*,...has no place in the field of public education...**

Syllabus

SUPREME COURT OF THE UNITED STATES

Heart of Atlanta Motel, Inc. v. United States

Argued: October 5, 1964 --- Decided: December 14, 1964

Appellant, the owner of a large motel in Atlanta, Georgia, which restricts its clientele to white persons, three-fourths of whom are transient interstate travelers, sued for declaratory relief and to enjoin enforcement of the Civil Rights Act of 1964, contending that the prohibition of racial discrimination in places of public accommodation affecting commerce exceeded Congress' powers under the Commerce Clause and violated other parts of the Constitution. A three-judge District Court upheld the constitutionality of Title II, §§ 201(a), (b)(1) and (c)(1), the provisions attacked, and, on appellees' counterclaim, permanently enjoined appellant from refusing to accommodate Negro guests for racial reasons.

1. Title II of the Civil Rights Act of 1964 is a valid exercise of Congress' power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers... (a) The interstate movement of persons is "commerce" which concerns more than one State. Pp. 255-256. (b) **The protection of interstate commerce is within the regulatory power of Congress under the Commerce Clause whether or not the transportation of persons between States is "commercial."** (c) Congress' action in removing the disruptive effect which it found racial discrimination has on interstate travel is not invalidated because Congress was

also legislating against what it considered to be moral wrongs....(d) **Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character, as Congress' power over interstate commerce extends to the regulation of local incidents thereof which might have a substantial and harmful effect upon that commerce.**

(2) The prohibition in Title II of racial discrimination in public accommodations affecting commerce does not violate the Fifth Amendment as being a deprivation of property or liberty without due process of law.

(3) Such prohibition does not violate the Thirteenth Amendment as being "involuntary servitude."

Excerpts from Wikipedia

The Tenth Amendment is similar to an earlier provision of the Articles of Confederation: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." [6] After the Constitution was ratified, South Carolina Representative Thomas Tudor Tucker and Massachusetts Representative Elbridge Gerry separately proposed similar amendments limiting the federal government to powers "expressly" delegated, which would have denied implied powers, **James Madison opposed the amendments, stating that "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutia."** [7] When a vote on this version of the amendment with "expressly delegated" was defeated, Connecticut Representative Roger Sherman drafted the Tenth Amendment in its ratified form, omitting "expressly." [8] Sherman's language allowed for an expansive reading of the powers implied by the **Necessary and Proper Clause**....

The Tenth Amendment, which makes explicit the idea that the federal government is limited to only the powers granted in the Constitution, has been declared to be a truism by the Supreme Court. In *United States v. Sprague* (1931) the Supreme Court asserted that the amendment "added nothing to the [Constitution] as originally ratified."

States and local governments have occasionally attempted to assert exemption from various federal regulations, especially in the areas of labor and environmental controls, using the Tenth Amendment as a basis for their claim. An often-repeated quote, from *United States v. Darby Lumber*, 312 U.S. 100, 124 (1941), reads as follows:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was

other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

The Supreme Court rarely declares laws unconstitutional for violating the Tenth Amendment. In the modern era, the Court has only done so where the federal government compels the states to enforce federal statutes. **In 1992, in *New York v. United States*, 505 U.S. 144 (1992), for only the second time in 55 years, the Supreme Court invalidated a portion of a federal law for violating the Tenth Amendment...**

In 1998, the Court again ruled that the Brady Handgun Violence Prevention Act violated the Tenth Amendment (*Printz v. United States*, 521 U.S. 898 (1997)). The act required state and local law enforcement officials to conduct background checks on people attempting to purchase handguns. **Justice Antonin Scalia, writing for the majority, applied *New York v. United States* to show that the law violated the Tenth Amendment. Since the act "forced participation of the State's executive in the actual administration of a federal program", it was unconstitutional.**

In 2012, in *National Federation of Independent Business v. Sebelius* (132 S.Ct. 2566 (2011)), Chief Justice John Roberts, writing for the Court, held that the Patient Protection and Affordable Care Act (commonly referred to as the ACA or Obamacare) improperly coerced the States to expand Medicaid. He classified the ACA's language as coercive because it effectively forced States to join the federal program by conditioning the continued provision of Medicaid funds on States agreeing to materially alter Medicaid eligibility to include all individuals who fell below 133% of the poverty line.

In modern times, **the Commerce Clause** has become one of the most frequently-used sources of Congress's power, and thus its interpretation is very important in determining the allowable scope of federal government....**In the 20th century, complex economic challenges arising from the Great Depression triggered a reevaluation in both Congress and the Supreme Court of the use of Commerce Clause powers to maintain a strong national economy.**[16]

In *Wickard v. Filburn* (1942), in the context of World War II, the Court ruled that federal regulations of wheat production could constitutionally be applied to wheat grown for "home consumption" on a farm – that is, wheat grown to be fed to farm animals or otherwise consumed on the farm. The rationale was that a farmer's growing "his own wheat" can have a substantial cumulative effect on interstate commerce, because if all farmers were to exceed their production quotas, a significant amount of wheat would either not be sold on the market or would be bought from other

producers. Hence, in the aggregate, if farmers were allowed to consume their own wheat, it would affect the interstate market in wheat.