

Cases and Materials on Constitutional Law

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Chapter 1 JUDICIAL POWER AND ITS LIMITS

§ 1.02 Limiting Judicial Power

[A] The Case or Controversy Requirement

[2] Other Conditions of Adjudication: Standing

[At page 59, add the following as new Note (8):]

(8) *The Specificity and Imminence Required for an Actual Injury: Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009). Various environmental organizations sought to prevent the United States Forest Service from enforcing its regulations that categorically exempted certain fire rehabilitation activities and salvage timber sales from the notice, comment, and appeal process mandated by Congress for land and resource management plans. The organizations filed suit shortly after the Forest Service used these regulations to approve, without providing for notice, comment, or appeal, the salvage sale of timber on 238 acres of land in Sequoia National Forest damaged by fire. Members of the organizations filed affidavits detailing that they had visited this part of the forest, had imminent plans to do so again, and their interests would be harmed by the proposed sale. After the district court issued a preliminary injunction to stop the sale, the parties resolved their dispute regarding the Sequoia timber sale. But despite the settlement, the environmental organizations proceeded to seek a nationwide injunction against the enforcement of the Forest Service's regulations in other unspecified locations. The district court granted the injunction, and the court of appeals affirmed, rejecting the Forest Service's argument that the organizations lacked the necessary injury in fact to challenge the regulations after the resolution of the Sequoia timber sale.

The Supreme Court, in a 5–4 decision by Justice Scalia, agreed with the Forest Service. Relying predominantly on *Lujan*, the majority reasoned that the environmental organizations no longer had standing to challenge the regulations in the absence of an identified concrete application of the regulations that created an imminent and concrete threat of harm. The affidavit of one member stating that he had visited many National Forests, planned to continue to do so in the future, and would be injured by development under the regulations that the Forest Service admitted would be used thousands of times in the future did not suffice, according to the Court, because it was not concrete and particularized enough to constitute an injury in fact. In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the affidavit was sufficient to demonstrate a realistic threat of future harm even though “the plaintiff cannot specify precise times, dates, and GPS coordinates. . . . To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive.”

What should the environmental organizations have done differently to satisfy the actual injury requirement and ensure standing? Not settled the Sequoia timber sale? Waited until the regulations were enforced again? Provided more detailed affidavits before the rendition of judgment in the district court?

Chapter 3
FEDERALISM: NATIONAL POWER AS
AFFECTING THE POWERS OF THE STATES

§ 3.01 Preemption of State Power by Congressional Action: The Supremacy Clause

[B] Express Preemption

[At page 179, add the following as new Note (5), and renumber existing Notes (5) - (8) on pages 178-79 as Notes (6) - (9):]

(5) *Revisiting the Cipollone Presumptions: Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008). Good filed suit against Philip Morris and its parent corporation Altria for violating the Maine Unfair Trade Practices Act by fraudulently conveying that their “light” cigarettes delivered less tar and nicotine, even though the companies allegedly knew that consumers would unwittingly inhale as much tar and nicotine by taking larger or more frequent puffs. The district court granted summary judgment to the cigarette companies on preemption grounds under the Cigarette Labeling and Advertising Act and its Amendments, but was reversed on appeal.

Justice Stevens’ majority opinion applied most of the analysis from his writing in *Cipollone* to hold that Good’s claims were not preempted. The Court first indicated that the analysis must begin with an “assumption” against preemption, and this “assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States.” The Court then reasoned that *Cipollone*’s holding that common-law fraud claims were not expressly preempted by the Labeling Act was equally applicable to Good’s statutorily-based fraud claims. The Court finally turned to implied preemption. Without mentioning *Cipollone*’s resolution of the implied preemption argument, which was discussed in Note (3) above, the Court emphasized that the government in its briefing had disavowed any governmental policy or objective in favor of describing cigarettes as “light” or “low tar.” Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented, reiterating many of the arguments from Justice Scalia’s *Cipollone* dissent in opining that Good’s claims were expressly preempted.

Chapter 8
THE BASIC PROCEDURAL STRUCTURE OF DUE PROCESS

§ 8.03 Procedural Due Process

[C] What Process Is “Due” (i.e., Constitutionally Required)?

[5] An Ostensibly “Impartial” Factfinder

[At page 461, add the following as new Note (4):]

(4) *“Extraordinary” Campaign Expenditures Creating a Probability of Bias: Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).* After a West Virginia state court jury returned a \$50 million verdict against A.T. Massey Coal Co., its chairman, CEO, and president, Don Blankenship, spent \$3 million to unseat an incumbent judge on the West Virginia Supreme Court and elect attorney Brent Benjamin in his place. Blankenship’s expenditures provided 60% of the funds supporting Benjamin’s candidacy in a race Benjamin won by less than 50,000 votes. When the appeal of the \$50 million judgment against Massey was heard by the West Virginia Supreme Court, Justice Benjamin refused to recuse, joining the majority in a 3–2 decision in favor of Massey. The Supreme Court, however, in a 5–4 decision, held that Justice Benjamin’s failure to recuse violated due process. Justice Kennedy, writing for the majority, reasoned that, as in *Ward* and *Aetna*, sometimes the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,” even if no proof of actual bias exists. Although not every campaign contribution by a litigant or attorney creates such a probability of bias, the exceptional nature of the expenditures in this case led to the conclusion that “a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” Examining the relative size of the expenditures, their timing, and their apparent impact, the Court opined that serious fears of bias arose when a litigant, without the consent of the other parties, chooses the judge in its own cause. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, contending that the “probability of bias” standard announced by the majority provided insufficient guidance for future cases and would increase strategic allegations of judicial bias.

Chapter 9
DUE PROCESS: SUBSTANTIVE RIGHTS OF “PRIVACY”
AND PERSONAL AUTONOMY

§ 9.05 Other Issues Related to Privacy or Autonomy: The Rights to Control One’s Personality, to Treatment, to Die, or to Be Let Alone

[B] Personality, Reputation, and Related Issues

[At page 554, add the following as new Note (4):]

(4) *Another Rejection of a Novel Due Process Claim — No Right of Post-Conviction Access to DNA Evidence: District Attorney’s Office v. Osborne, 129 S. Ct. 2308 (2009).* The Court, in a 5–4 opinion by Chief Justice Roberts, rejected a convicted rapist’s claims, including a substantive due process claim, seeking post-conviction access to the state’s evidence for more precise DNA testing. The Court, relying on *Collins*, first reiterated its reluctance to expand the concept of substantive due process to encompass novel claims of purported rights unsupported by a long history. The Court also emphasized the legislative response of Congress, as well as the legislative and judicial response of all but one of the states, authorizing access to DNA evidence under certain circumstances. The Court reasoned that it should not short-circuit this process by enlisting “the Federal Judiciary in creating a new constitutional code of rules for handling DNA.” Justice Stevens dissented, arguing that the state’s failure to provide access to the evidence was arbitrary in light of the weighty individual interests and minimal governmental interests at stake.

Chapter 10 EQUAL PROTECTION

§ 10.03 The “Upper Tier”: Strict Scrutiny and “Compelling” Governmental Interests

[A] Race and Other “Suspect Classifications”

[6] Affirmative Action: Addressing General Societal Effects by “Benign” Consideration of Race — or “Reverse” Discrimination?

[At page 665, add the following as new Note (5):]

(5) *The “Strong Basis in Evidence” Standard Applied to Governmental Conduct Designed to Avoid A Racially Disproportionate Impact: Ricci v. DeStefano, 129 S. Ct. __ (2009).* The results of a promotion exam for firefighters in New Haven, Connecticut, would have resulted in 17 whites, 2 Hispanics, and no blacks being promoted, despite the fact that the qualified applicant pool was more than 20% black. Moreover, the passage rate for minorities on the exam was one-half the passage rate for whites. As a result, the city refused to certify the examination results, concerned about a lawsuit by minorities under Title VII’s statutory prohibition against employment decisions with a disparate impact on minorities. The firefighters who would have been entitled to a promotion if the exam had been certified filed suit, claiming that the city’s action constituted intentional discrimination under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

Although the Supreme Court, in a 5–4 decision authored by Justice Kennedy, rendered judgment against the city based solely under Title VII, the Court drew analogies from equal protection precedents in reaching its result. The Court reasoned that the city had intentionally engaged in race-based decisionmaking by declining to certify the results solely because of the statistical disparity between the performance of minority and white candidates. Noting that its Equal Protection Clause decisions had held that government actions designed to remedy past racial discrimination are permissible only when there is a “strong basis in evidence” that the remedial actions were necessary, the Court borrowed this standard for Title VII. This meant that the City had to have a strong basis in evidence of disparate-impact liability before it could refuse to certify the test, which the Court held had not been met when the City relied on the statistics alone without evidence that the tests were unrelated to the job and inconsistent with business necessity.

Justice Scalia, while joining the Court’s opinion in full, authored a concurring opinion highlighting the tension between the disparate-impact provisions of Title VII and the commands of the Equal Protection Clause. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented, urging that the failure to certify the test due to good-faith concerns about disparate impact was not intentional discrimination “because of” race.

Chapter 11 SPEECH, PRESS AND ASSOCIATION

§ 11.08 When Government Functions Are Intertwined with Speech: Public Schools, Elections, Government Employees, and Government Subsidy

[C] Government Speech: The Government as Speaker or the Government's Message

[1] Government Subsidy or Support

[At page 923, add the following as new Note (6):]

(6) *Permanent Monuments Displayed on Private Property as Government Speech: Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009)*. After Pleasant Grove rejected the request of a religious organization, Summum, to place a permanent monument in a city park that contained other privately donated monuments, Summum sued, urging that the city thereby violated the Free Speech Clause. Summum argued that, by erecting monuments from other private organizations in a public park, including a Ten Commandments monument donated by the Fraternal Order of Eagles, the city had created a public forum and therefore strict scrutiny applied. The city responded that its determination of which privately donated monuments to erect was properly analyzed as government speech, barring the application of the Free Speech Clause.

The Supreme Court unanimously agreed with the city that the placement of permanent monuments in a public park was a form of government speech, although several separate opinions were delivered. Justice Alito authored the majority opinion, reasoning that observers would reasonably interpret permanent donated monuments on public land as conveying some message on the government's behalf, especially in light of the general government practice of "selective receptivity" of such monuments throughout American history. It was unnecessary for the city to formally adopt a particular message for each donated monument, the Court explained, because the meaning of monuments frequently varies among observers and evolves over time. The Court then rejected Summum's public forum argument, declaring that forum analysis only applied in those situations in which the property "was capable of accommodating a large number of public speakers without defeating [its] essential function," such as speakers in a park who would eventually depart. Here, though, only a finite and limited number of permanent monuments could be placed in the park, so no public forum existed.

Despite joining the majority opinion, Justices Stevens, Ginsburg, and Breyer articulated concerns regarding the scope of the government speech doctrine in prior cases such as *Rust* and *Johanns*. Justice Souter merely concurred in the judgment, expressing "qualms" about the categorical acceptance of public as government speech, especially in light of potential Establishment Clause concerns when some religious monuments are preferred by the government (the Establishment Clause is covered below in §12.02). Justices Scalia and Thomas, while joining the Court's opinion, offered their view that the city had not violated the Establishment Clause under these circumstances.

Chapter 14 CONGRESSIONAL ENFORCEMENT OF THE CIVIL RIGHTS AMENDMENTS

§ 14.02 Enforcing the Fourteenth and Fifteenth Amendments Against State Action

[At page 1053, add the following as new Note (4), and renumber existing Notes (4) - (9) on pages 1053-55 as Notes (5) - (10):]

(4) *The 2006 Extension of the Preclearance Requirements of the Voting Rights Act “Raises Serious Constitutional Concerns”*: *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. ___ (2009). The preclearance requirements of the Voting Rights Act of 1965, which require covered jurisdictions to seek federal approval before changing anything about elections, were originally scheduled to be effective for only five years. But Congress extended the provisions in 1970 (for five years), 1975 (for seven years), 1982 (for 25 years), and again in 2006 (for another twenty-five years). The Court had upheld all the reauthorizations before the twenty-first century, concluding that circumstances continued to justify the provisions. But, in reviewing the 2006 extension, the Court noted that it raised “serious constitutional concerns.”

A small utility district in Austin, Texas, with an elected board was required to obtain preclearance from the Justice Department before it could change any aspect of those elections (including moving the elections from a private garage to a local school), even though there was no evidence the district had ever employed a racially discriminatory voting practice. The district filed suit challenging the application of the preclearance requirements. Although the Court’s opinion by Chief Justice Roberts decided the case on the narrow statutory grounds that the district was eligible to seek an exemption from the preclearance requirements, the Court provided an extensive discussion of the potential Constitutional infirmities of the 2006 extension. The Court recognized that the preclearance requirements severely interfered with state sovereignty in a manner that may no longer be appropriate as the registration gap between white and black voters in covered states was approaching parity and minority candidates held elected office at unprecedented levels. In addition, the coverage formula had not been updated for more than 35 years, raising concerns that it no longer accounted for current conditions, especially considering that covered jurisdictions actually had less of a racial gap in voting registration and turnout than the nationwide average. Justice Thomas dissented in part, urging that the Court should strike down the 2006 extension of the preclearance requirements as exceeding Congress’ power to enforce the Fifteenth Amendment because the intrusive remedy was no longer appropriate in light of the current lack of evidence of racial discrimination in voting.