Appendix E

Understanding
Supreme Court Opinions

Constitutional interpretation is not and should not be solely the province of judges. The task of ensuring fidelity to the values of the Constitution is one all governmental officials and citizens must share, a point underscored by Justice Frankfurter’s dissent in *West Virginia v. Barnette* (1943). “Reliance for the most precious interests of civilization,” he reminded us, “must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits of actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.”

Any citizen of the Constitution, therefore, must have some basic understanding of its rules, principles, and commitments. Judicial opinions construing the Constitution are an obvious and critically important source for learning about those commitments. Unfortunately, their odd form and peculiar cant may make them seem inaccessible to many students.1 Our experience in teaching these materials has taught us that students may come to understand Supreme Court opinions more quickly and with somewhat less pain if they use some of the following tools.

**How to Read an Opinion**

A judicial opinion is an act both of explanation and of persuasion. Most opinions purport to explain how the judge or judges arrived at their decision, usually by tracing a series of questions, answers, and arguments from a set beginning to a seemingly inevitable end. In this sense, a judicial opinion helps to assure the accountability of power—a fundamental constitutional imperative—by declaring in public the reasons why a case has been decided in a particular way. An opinion is also an exercise in persuasion. Difficult cases, at least, often admit of more than one solution; and, any judge who fails to say why his or her solution is preferable to another, no less obvious solution, is a judge who has failed to understand the difference between judicial *power*, or the capacity to reach a decision, and judicial *authority*, or when it is constitutionally appropriate to reach a decision. The latter requires an understanding of the proper nature and limits of judicial power in a constitutional democracy and why a judge has an obligation to tell us why—to persuade us—his or her solution is superior.

The twin purposes of explanation and persuasion suggest that when we read opinions we should remember that they often have more than one purpose—sometimes to settle a contested point of law, sometimes to teach, and sometimes to preach—and more than one audience—sometimes the litigants alone, sometimes the legal academy, and sometimes the entire polity. As you read the opinions, you will also find it helpful to assess them in light of the three themes—interpretive, normative, and comparative—we identified in the introduction. Every opinion, for example, adopts one or more methods of constitutional interpretation. Similarly, in every opinion the justices wrestle—sometimes explicitly, sometimes not—with the political theory and ideals that inform the Constitution and give it meaning.

In every case, then, students should read for the following information:

1. **Legal Doctrine.** What question of law does the case raise? How do the judges or justices answer that question? What doctrines of law do they utilize or formulate? Does their answer conform to existing legal doctrine or does it change it?

2. **Institutional Role.** Almost every constitutional case decided by the Supreme Court involves some question about the proper role of the Court in the political process. What understanding of judicial power does the majority embrace? Does the opinion envision a broad or a narrow role for the power of judges? Does that vision rest upon a particular understanding of democratic theory and of the authority of the community to govern

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itself through the means of majoritarian politics? Does it rest upon a particular view about when judges should protect individual liberty from regulation by a majority?
3. Method and Strategies of Constitutional Interpretation. Translating the “majestic generalities” of the Constitution into a practical instrument of governance requires interpretation. What methods and strategies of interpretation do the judges employ? Do they explicitly acknowledge their choices? Do they justify them? What sorts of justifications and evidence does the opinion marshal to support its argument?
4. Commentary on the American Polity. We wrote in the introduction that a course on constitutional law should be a “commentary on the meaning of America.” Judicial opinions can be a rich source for such commentary. As you read them, consider what an opinion says about American history, about contemporary politics, about political theory, and about the success or failure of the American experiment.

How to Brief a Case

Seemingly endless generations of first-year law students have spent hours learning the law by “briefing cases.” Some of us harbored doubts about the practice and gave it up as soon as we could, but case briefs can be an excellent tool for learning how to read judicial opinions. A good brief can help students to focus on what is essential in a case and what is frill. Moreover, a brief can be a useful study tool at the end of semester, when there may be a hundred or more cases to review for a final exam.

A case brief is essentially a short summary, no more than a page or two, of the main features of a case. A typical brief follows a format similar to this:

1. The Facts. In the United States the Supreme Court does not decide hypothetical cases or cases that are not ripe. Every case therefore arises in a particular factual context. The facts may or may not have a substantial influence on how the Court decides the case. The facts themselves are sometimes subject to interpretation and a source of disagreement among the justices. The facts should include the statute or policy challenged and the various constitutional provisions implicated in the case.
2. The Question Presented. What question of constitutional law does the case present? Frequently a case involves several constitutional provisions and consequently several constitutional questions for resolution. We find it most useful to try to pose the questions in a format that yields a “yes-no” response.
3. The Holding. How does the Court answer the questions? Usually the response is contained in the majority opinion, but not infrequently the decisive holding must be constructed through a reading of several different opinions in the case.
4. The Rationale. This is a summary and analysis of the reasoning and evidence the Court uses in its decision. What strategies and methods of interpretation does the opinion employ? What kinds of evidence does it muster on behalf of its argument? What are the implications of the opinion for future cases? How does the Court describe its role in the political process?
5. Concurring and Dissenting Opinions. This should also contain a summary and analysis of the various opinions. In what precise ways do the concurring or dissenting opinions agree with or differ from the majority opinion?
6. Significance of the Case. Why is the case important? What general principles of constitutional law does this case create, reaffirm, or reject? Students may find it helpful here to consider again the questions we focused upon in “How to Read an Opinion” above. What does this case tell us about the Constitution? What does it tell us about the American polity?


Bowers v. Hardwick
478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)

(1) Facts of the Case. Hardwick committed consensual sodomy with another man in private. He was arrested for violating a Georgia law prohibiting sodomy. The law carried a prison term of no less than one year and no more than twenty years. Hardwick challenged the law, claiming it violated his constitutional rights to privacy, expression and association. The federal district court rejected his claim, but the circuit court reversed, finding that Georgia’s statute violated Hardwick’s rights to private and intimate association. The state appealed to the United States Supreme Court.

(2) The Question Presented.
   a. Does a statute criminalizing sodomy between consenting adults violate the right to privacy, as protected by the due process clause of the Fourteenth Amendment?
   b. Does the statute violate the freedom of intimate expression in one’s home, as protected by the First Amendment?

(3) The Holding.
   a. No. The right to privacy does not include a “fundamental right . . . to engage in sodomy . . . .”
   b. No. The right to intimate expression in one’s home does not always make “otherwise illegal conduct” immune from regulation.

(4) The Rationale. (White) Nothing in the constitutional text authorizes an individual to commit sodomy. In addition, the Court’s prior cases involving a right to privacy involve matters of family, marriage, and procreation. They do not extend to homosexual activity. Moreover, they make clear that private conduct is protected only when the interest or conduct “are implicit in the concept of ordered liberty” (Palko) or “deeply rooted in this Nation’s history and tradition” (Moore.) Protection for homosexual sodomy does not satisfy these criteria; indeed, history and tradition show that sodomy has long been proscribed by the states. Consequently, the Court should be wary of creating a new fundamental right in their absence. Thus, there is no fundamental right to homosexual sodomy. The state must still advance a rational basis
for the proscription of such conduct. Here, the state’s rational basis is the protection of majoritarian moral preferences.

(5) Concurring and Dissenting opinions.

a. Justice Burger, concurring: Proscriptions against sodomy have ancient roots and the state’s ban against sodomy is supported by “a millennia of moral teaching . . .”

b. Justice Powell, concurring: If he had been convicted, Hardwick might have been imprisoned for twenty years. This might violate the cruel and unusual punishment clause of the Eighth Amendment.

c. Justice Blackmun, dissenting: This case does not involve a right to homosexual sodomy, but instead whether individuals have a “right to decide for themselves whether to engage in particular forms of private, consensual sexual activity.” Prior cases stand for the proposition that individuals have a right to privacy because it forms a central part of an individual’s life. Hence the state may interfere with that right only when it has a compelling reason. The protection of a community’s shared moral sense is not compelling because there “is no real interference with the rights of others . . .”

d. Justice Stevens, dissenting: The Georgia statute applies to heterosexual and homosexual activity alike. Prior cases make it clear that the state may not without a compelling reason interfere with the sexual conduct of unmarried heterosexual adults (Eisenstadt). Moreover, Georgia has advanced no interest in selecting out homosexual activity except “habitual dislike for, or ignorance about, the disfavored group.”

(6) Significance of the case. Bowers is important for several reasons. First, the majority opinion restates the criteria for determining what kinds of activity will be protected by the right to privacy. Second, its reassertion of those criteria is directly related to a specific understanding of the limits of judicial power in a democracy. The majority believes that the Court should not set aside majoritarian preferences absent a clear constitutional warrant for doing so. Similarly, the majority’s use of precedent and appeals to history and tradition are informed by this understanding of judicial power. The dissenting opinions embrace a more expansive view of judicial power. Consequently, although they adopt similar methods of interpretation, they reach a different result from the majority. Finally, this case reflects the politics of sexuality and its prominence in the political and cultural life of the nation.

Selected Bibliography


