Unfit for Democracy –
The Roberts Court and
the Breakdown of
American Politics

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THE SCUSA DEMOCRACY GAP – this outline makes reference at appropriate places to the following documents, also attached:

American Exceptionalism, or Can it Happen Here? [an outline for a presentation on Jan. 7, 2016]

Democracy and the judicial impact on the distribution of resources [an outline prepared for presentation at the meeting of The International Society of Public Law (ICon-S) at NYU, July 2, 2015]

Additional Reading: Other articles by Prof. Stephen E. Gottlieb exploring ideas developed in the book include:

*The Roberts Court’s Hostility to the Equality of Minorities*, HUMAN RIGHTS vol. 41, issue 1 at 16 (Amer. Bar Assn. Section of Individual Rights and Responsibilities) (July 2015)

*Does What We Know About the Life Cycle Of Democracy Fit Constitutional Law?* 61 RUTGERS L. REV. 595 (2009)


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SPEAKER BIOGRAPHIES

DR. ALAN CHARTOCK is professor emeritus at the University at Albany. He hosts the weekly Capitol Connection series, heard on public radio stations around New York. The program for almost twelve years, highlighted interviews with Governor Mario Cuomo and now continues with conversations with state political leaders. Dr. Chartock also appears each week on The Media Project and the Roundtable and offers commentary on Morning Edition, weekdays at 7:37 am. During his long tenure at WAMC/Northeast Public Radio, Alan Chartock has interviewed interesting people of every stripe. From Governors, Senators and top lawmakers, to newsmakers including World War II heroes and former UN weapons inspectors. Dr. Chartock has also had the chance for in-depth chats with artists, musicians, actors and directors...authors...you name it!

PROF. STEPHEN E. GOTTLIEB, Albany Law School's Jay and Ruth Caplan Distinguished Professor of Law, is the author of Morality Imposed: The Rehnquist Court and the State of Liberty in America (NYU Press, 2000), co-author of Jurisprudence Cases and Materials: An Introduction to the Philosophy of Law and Its Applications (Third Edition, LexisNexis, 2015), and editor of Public Values in Constitutional Law (Ann Arbor: University of Michigan Press, 1993). He's under contract with Carolina Academic Press for a forthcoming book, Guide to the Birth of the American Constitution: Madison's Notes Supplemented with Tools and Explanations for Modern Readers. As an expert on the Supreme Court, constitutional theory and election campaign law, Prof. Gottlieb has penned articles for the New York University Law Review, Yale Law & Policy Review, Hastings Law Journal and Boston University Law Review, among many others. He has held chairs for distinguished visitors at Akron, Suffolk, Cleveland-Marshall and Marquette schools of law, and he has also taught at St. Louis University School of Law and West Virginia University College of Law. At Albany Law School, Prof. Gottlieb teaches U.S. Supreme Court Watch and other courses related to the Constitution. He also finds time to be a weekly commentator for WAMC/Northeast Public Radio, with segments touching on hot-button topics such as gun laws, Middle East politics, terrorism, and the global refugee crisis. Prof. Gottlieb is a veteran of the legal services sector, the Peace Corps in Iran and corporate practice in New York City. Educated at Princeton and Yale Law School, he serves on the board of the Capital Region chapter of the New York Civil Liberties Union.
THE SCUSA DEMOCRACY GAP
Steve Gottlieb

THE FOUNDING GENERATION’S WORKING ASSUMPTIONS

The Founders gave a great deal of thought to the survival of their governmental child, though time and distance have gradually separated us from our Founders’ understanding of their creation. Many people now share the belief that America will always be a democracy and that it is immune to the threats that have destroyed democracy in Europe and elsewhere. That belief is known as “American exceptionalism.” The Founders did not share it. They worried about the future of self-government, which they called “republican” government. [On the possibility that loss of self-government could happen here, see American Exceptionalism, or Can it Happen Here, attached.]

The Founders did not strive for license for all to do as they pleased. Instead they strove for the general welfare and made the welfare of the society paramount. National welfare consisted of the welfare of the people in it, not of conquest or imperial possession.

To secure those blessings, they strove for self-government as the very essence of liberty. They constructed self-government at the national level, and they promised and insisted in Article IV of the Constitution that each state would have a republican government. Americans, since the Jacksonian era, have substituted the term “democracy” for the earlier “republican” (the Republican Party came much later) though the meanings are not identical.

So that republican government would survive, the founding generation knew their republic needed much more than a constitution to survive. The Constitution needed to be supplemented by a set of working assumptions about what would keep republican government alive:

- The new nation needed unity—they had to forge one nation out of its many parts—e pluribus unum as our national motto puts it. Although the expression “melting pot” would come over a century later, they boasted about how people became Americans and understood from the start the need to integrate the various peoples that made up the new country to create the republican society that could manage a democratic system.
- Education would be necessary to inculcate republican principles for the success of popular government. It would be designed equitably, mixing everyone in town together.
- Their Constitution would disperse power to help prevent abuse by the president, the Congress, the courts, and the military.
- Dispersion of wealth was equally crucial to sustain the republic. Too great a concentration would threaten democracy.
- Federalism would distribute power and provide the national and state governments
each doing tasks more appropriate to their larger or smaller jurisdiction.

- And a bill of rights would enable the courts to help protect freedom and democracy.

In essence, for the security of their new democracy, the country turned to community, equality, republican character and the dispersion of power.

These principles have been reaffirmed by the experience of other democratic countries and by the evidence of political science.

Science
- Legal traditions
- Education
- Capitalism
- E pluribus unum
- Guns

But not by the Roberts Court

MAIN POINT – The Court has lost its democratic compass. There is a huge discrepancy between the democracy of its claims and the reality of its behavior.

THE DEMOCRACY GAP – Claim to base decisions on democratic principles but recognize NO democratic rights, and that failure has serious repercussions.

- The Founders
  - inclusive
    - created an elected government, guaranteed a republican government, which meant an elected one, and the nation later ratified a Fourteenth Amendment that imposed penalties if any male citizen was denied the right to vote except after conviction or participation in rebellion, and a Nineteenth Amendment that finally honored the right of women to vote, among many others extending the vote and making the government more democratic.
  - Opposition to entrenchment & concentration of power
    - “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny,” Madison, Federalist No. 47

- World
  - America successfully promoted democracy to much of the world and their courts, constitutions and governments concluded that democracy meant guaranteeing universal adult suffrage to their peoples including prisoners and former prisoners

- Democracy as the basis of rules of interpretation
  - Rehnquist described himself as basing his decisions on “positivism, democracy and relativism”, and as “a small “d” democrat devoted to
popular choice,” see, e.g. William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 706 (1976) (judicial creation of rights "is a formula for an end run around popular government")


- Political science ➔ the size of the electorate is crucial for survival of democratic systems
  - the fewer the rulers are responsible to, the easier to buy them off to maintain rule
  - the fewer the controlling group, the more they devote to keeping everyone else out

- But the Roberts Court narrows democratic rights
  - Preventing frauds that don’t happen while condoning those that do
  - Distorting the voting power in malapportioned or gerrymandered districts
  - Exclusion of African-Americans
    - No protection of Blacks who are under-represented
    - No effective enforcement of the Voting Rights Act
  - Protection of incumbents, political bosses and big donors

THE ECONOMIC GAP

- Founders
  - Madison, “unnecessary opportunities … to increase the inequality of property by an immoderate, and especially unmerited, accumulation of riches … [should be avoided] [b]y the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.” - National Gazette, January 23, 1792
  - Land
    - Independence
    - Property qualifications minimized to broaden suffrage
    - NW Ordinance ➔ small plots and schools
  - Monopolies limited in I:8:8 “for limited times”; other powers not specified because of fears of monopoly
  - tax and inheritance laws, among others, were designed, in Madison’s words, to “reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort,” National Gazette, January 23, 1792
  - dispersion of wealth important for the democratic process. Disparities threatened democratic process, allowing control for their own ends

- World
  - Freedom from want
  - Adoption of welfare language in constitutions of states and around the globe as an essential responsibility

- Science
  - The most consistent corollary of democracy
Increasing the stakes ➔ history of wealthy groups circling the wagons against the masses leading to civil war and destruction of democratic government

- Vulnerability of the poor
- Concentration of money ➔ corruption, exclusion and control

- Court [on the economic issues see also Democracy and the judicial impact on the distribution of resources, outline prepared for delivery at the I-Con-S meeting at NYU, July 2, 2015, attached]
  - Protection of big business
    - Arbitration cases
    - Immunity for aiders and abettors
    - Antitrust law
    - Class actions
    - Pre-emption excludes state attorney generals and particularly regulation of product liability
    - Limited punitive damages to no more than compensatory damages
  - In total these changes are significant, shifting assets from average or poor Americans to large corporate defendants and their managers
    - The courts have always been deeply involved in defining rights to the American economy, and their decisions have been implicated in such major economic events as the housing bubble and the deep recession that began in 2008. [Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Contact, and the Financial Crisis*, 66 NEW YORK U. ANN. SURV. OF AM. L. 641, ___ (2011).]
    - The very ordinariness of the Court’s economic decisions obscures its impact on the shape of the economy. Litigants spend large sums to get the decisions they want and, as Marc Galanter explained in a classic article, the very fact that large corporations are repeatedly in court allows them invest in fighting for precedents that have greater value than any individual case. [Marc

- Steering the rewards of the economy away from ordinary Americans and toward those who control large commercial and financial institutions increases the latter’s power as well as the stakes.
THE EDUCATION GAP

- Founders
  - The logic of republican ideology pushed toward inclusion
  - Importance of education for the success of democratic government
    - A moral and principled people necessary to run democratic government to the common welfare
    - Franklin \( \Rightarrow \) U. Pa.
    - Jefferson \( \Rightarrow \) U. Va.
    - Many founded between 1780 and 1800
  - Education was or soon became inclusive in much of the country re: class, gender
    - Towns
    - Horace Mann expressed inclusiveness as an ideology \( \Rightarrow \) states w/ local control partly explained, adopted and expanded what was already there
    - Note: philosophy of mixing also addressed to the militia by people like Sam Adams

- World
  - Rights to an education enshrined in state and national constitutions
  - But many parts of the world did not adopt cross-cultural education as a model

- Science
  - By contrast to Israel, India and other countries where children are largely segregated by faith for schooling
  - Democratic practice and attitudes can be conveyed by practice, & taught by example
    - Skills: CREMIN, AMERICAN EDUCATION; THE COLONIAL EXPERIENCE, 1607-1783
    - Vs.
      - Ethnocentrism, and
      - The history of intolerance in America: Stouffer; Sullivan; Gibson; McClosky and Zaller
    - Belief in democracy insufficient – U.S.S.R. after the fall of the Iron Curtain; Europe between the Wars (documented by Bermeo)
    - Participation matters for belief in democracy and others’ rights
  - Methods of understanding and evaluating can allow conversation and interchange
  - Fairness can replace exclusion, censorship and discipline as a method with advantages for understanding beyond unexamined instinct

- Court
  - Exclusion/indoctrination permissible – earlier decisions permitted indoctrination, see Ambach v. Norwich, 441 U.S. 68 (1979) (permitting exclusion of Scandinavian teachers in order to foster indoctrination of students);
  - Student religious separation via parallel publicly supported schools
  - Student racial separation

## THE BILL OF RIGHTS GAP
- **Founders** – due process in the 5th and 14th Amendments played a part; the Schurz Report
- **World** – the importance of due process
- **Science** – Robert A. Dahl, Jennifer Holmes, Paul Wilkinson
- **Court**
  - *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (absolute immunity for lengthy refusal to turn over exculpatory evidence)
  - *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (immunity for abuse of material witness statute)
  - Length of time before applying the right of habeas corpus, see *Boumediene v. Bush*, 553 U.S. 723 (2008)
  - See also *Chavez v. Martinez*, 538 U.S. 760 (2002) (torture not addressed by due process without testimonial use of evidence which results from torture)

## THE WEAPONS GAP
- **Founders**
  - Knew muzzle loaders and to the extent that people owned their own weapons that would have been what they had. Cannons and mortars were not tools for hunting or self-defense. Soldiers might bring their own muzzle loaders to training grounds.
  - Breech loaders became available during the Civil War. Even then repeating guns were rare and rudimentary.
  - None of those involved in writing either the 2nd or the 14th Amends. Had or could have had any idea of the destructive power of modern weapons.
So if we judge by their practices, as Scalia would have us do, we are all entitled to our own version of Revolutionary or Civil War weapons, not AK-47s or their equivalents.

The founders and the 39th Congress also had a good idea of the danger of weapons. Their struggle was between the states and the federal government, not between psychopaths and doves.

- World
  - Science
    - Private arms here as instruments of oppression
      - KKK toward murder and slaughter, the Colfax Massacre, Colfax, LA, April 13, 1873.
      - Militia suppression of strikes by massacre and running people out of towns, counties and states
      - Vigilantes which took the law into their own hands, often as racial conflict
    - Private arms crucial abroad in numerous coups d’etat – Blackshirts, Brownshirts, Contras, Death Squads as well as rebellions and civil wars
    - From Hobbes to Weber and many others since have concluded that people had to put their arms down in favor of the public peace

- Court
  - *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010);

THE UNITY GAP (including the polarization gap)

- Founders ➔ to bring the nation together
  - Montesquieu – "Commerce cures destructive prejudices."
  - IV:2 privileges & immunities + I:8 powers to build roads, post offices, etc.
  - Hamilton, the national bank and the national debt.
  - Republican education for civic minded people

- World
- Science
- Court
  - *Fisher v. University of Texas at Austin*, No. 11-345 (June 23, 2013), 20 n 122
[THE FEDERALISM GAP, omitted]

THE INTERPRETATION GAP

- Every theory for interpreting the American Constitution is itself based on claims about democracy, self-government, and popular sovereignty.
- It is logical inconsistent and incoherent for a theory of interpretation that is based on democracy to exclude from consideration the survival of democracy
- Therefore the Court should revise its treatment of the electoral system, economy, bill of rights, education, weapons, and national unity

A Postscript on Carolene Products and American tradition

At a national meeting I asked Justice Breyer why he had not mentioned Carolene Products in a book about democratic interpretation. Obviously understanding the significance of the omitted case, Breyer responded at length that he had forgotten. I guessed that the decision was omitted because it is not popular with his colleagues and he wanted to stay clear of it, but preferred to say he forgot.

Carolene Products had defined a generation on the Court, from the Hughes Court in 1938 through the Warren Court in 1969 and the thinking behind the decision still had influence on the Burger Court which ended in 1986, nearly five decades later.

It also reflected powerful American traditions.
- Paragraph one of the Carolene Products footnote reaffirmed the importance of the Bill of Rights in the shadow of totalitarianism in Europe. A Bill of Rights was demanded in the ratification process, proposed in the First Congress, promptly ratified, and then extended as the sine qua non for all governments in the United States by the privileges and immunities clause of the Fourteenth Amendment, although the Court was the last to get the word.
- Paragraph two of the Carolene Products footnote reaffirmed the importance of democracy, protecting and sharing it. The Founders created an elected government, guaranteed a republican government, which meant an elected one, and the nation later ratified a Fourteenth Amendment that imposed penalties if any male citizen was denied the right to vote except after conviction or participation in rebellion, and a Nineteenth Amendment that finally honored the right of women to vote, among many others extending the vote and making the government more democratic.
- Paragraph three of the Carolene Products footnote reaffirmed the importance of assimilating all Americans into the mainstream with all the advantages and burdens of citizenship, treating polarization and insularity as problems, not solutions; hostility to institutions and practices that would clog the process of political change. Americans had been boasting about assimilating diverse peoples since the eighteenth century. And the public school movement made that a method and purpose of education in the early nineteenth century. It incorporated class, gender, language, and religious groups within the same schoolhouse, and
the Army, struggling with assimilation, eventually followed suit for the World War I Army before racial integration was brought back in World War II and after.

This country projected Four Freedoms onto the world stage during and after World War II which also reflected American traditions:

- Freedom of speech and Freedom of religion were both referred to in *Carolene Products* but two looked beyond the legal traditions of that footnote
- Freedom from want – remember Rockwell’s picture of a Thanksgiving dinner – antipathy toward monopolies that could block anyone’s ability to make an honest dollar and an honest living – the delegates in the Convention; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837)
- Freedom from fear – remember Rockwell’s picture of parents tucking their child into bed for the night
  Rockwell’s Four Freedoms posters were created for the Four Freedoms campaign

All of these ideas are strongly reflected in modern political science, encompassing decades of work by many scientists using many different methods. And the Court has rejected them all.

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American Exceptionalism, or Can it Happen Here

Steve Gottlieb

Democracies fail when the disparities of wealth and power become too great. They fail when due process protections are lost. They fail when paramilitary organizations proliferate. They fail when the structures that hold the people together weaken. Examples of those issues that affect the survival of self-government can be found in decisions of the Roberts Court.

The founders of this country were students of the science of politics; they were in fact scientists advancing the science of politics and self-government. There is a lengthy history of study of why democracies fail. And it took off in the twentieth century because before that, there weren’t many. The totalitarian regimes of Hitler and Stalin unleashed a reign of terror in the twentieth century and we watched, in horror, as democracies failed. Then with decolonization, we watched new countries try to establish democratic government, and many of them failed. We know a great deal more now because there are so many more examples of democracies coming together, and of democracies failing, both in Europe and other parts of the globe.

We in this country have grown up thinking that democracy is simply a fact of our political life, part of being American, and not something vulnerable to collapse or takeover like so many countries of this world. That’s an aspect of what is called American exceptionalism; the belief that it can’t happen here.
It is important to stand back and look at Germany because it shouldn’t have happened there. By many of the standards political scientists had developed, Germany shouldn’t have had a problem.¹ They were a wealthy country, one of the leading countries of the world. They were going through hard times but no worse than here. They were civilized, one of the leading nations in every aspect of culture – philosophy, music, literature. And most shocking to theologians, they were thoroughly Christian.² And yet they succumbed to Hitler and behaved like barbarians.

For political scientists, the German experience was one of the two examples that needed to be explained. The other was India, for the opposite reasons – India was poor, largely uneducated, and not Christian. But when the first studies of why some countries were and others were not democratic, came out, India should not have been a democracy.³ I don’t know whether it will continue to be but Indian democracy has lasted nearly seven decades.

The political science since those early studies has focused on internal financial disparities. Disparities in Germany were enormous. And they fueled a battle between the left and the right that led to the gridlock now familiar to Americans. Left and right lost confidence they could live with each other. Paramilitaries of both sides attacked supporters of each other. Eventually German aristocrats concluded that they were more comfortable with Hitler than with democracy.⁴
Since World War II, political scientists have studied numerous breakdowns of democratic systems of government and they keep telling a similar story of the breakdown of democracies abandoned by their elites as the stakes of the struggle between left and right deepened. With too much to lose on one side and too little to defend on the other, systems of self-government became easy prey to takeover.

We could of course fill in many more details. But the details turn out to be related to that picture. Militaries that should have been a bulwark were eventually undermined by the struggle going on in civil society. Paramilitaries supposedly designed to defend self-government became its enemy until many chose safety over self-government.

Abuse of judicial process puts dissenters in prison where they can no longer oppose these developments. It imprisons whole portions of populations who are not part of the emerging power.

And divisive rhetoric pits groups against one another, again easing the path to takeover.

These are the stories told both by histories, statistical studies and game theoretic models of the breakdown of democracy.

For me the coup de grace was the work of Bruce Bueno de Mesquita and the team of political scientists working with him. Their point is the instability of political systems. Simply put there
are vicious and virtuous circles. The more people are cut out of the group whose support is needed for control, the more the controlling group can consolidate its power behind enormous financial grabs that can be variously labeled corruption, theft and kleptocracy. In turn the beneficiaries become ever more committed to protecting their ill-gotten gains, and the leaders who reward them.

Conversely the broader and more inclusive what the Bueno de Mesquita group describe as the selectorate, the more the governing group has to take account of the people’s welfare. That can be a virtuous circle.

Either way, the system is not stable. And that’s the point. The huge disparities that have become so obvious in America, of income, wealth, tax breaks and corporate loopholes, are not stable. The forces arrayed to enlarge them don’t moderate because corporations and their largest stakeholders take home so much more than they did in the age of Eisenhower; instead the push for more accelerates. More is at stake than fairness, no small matter to this ex-legal aid lawyer; self-government is at stake.

One can read the Reaganesque “government is the problem” and the legal economists’ insistence that capitalism solves things better, as the intellectual veneer of the attack on democracy. They are in fact claims that democracy is not good and can’t be allowed to control the corporations.
So is breakdown impossible here? I would not want to bet on it.


\[\text{See Daniel F. Rice, REINHOLD NIEBUHR REVISITED: ENGAGEMENTS WITH AN AMERICAN ORIGINAL 62, 84, 186 (Wm. B. Eerdmans Publishing, 2009).}

\[\text{Linz, supra note 11.}

\[\text{Nancy Bermeo, Ordinary People in Extraordinary Times: The Citizenry and the Breakdown of Democracy 38-41 (Princeton Univ. Press 2003); Linz ___; the studies Bermeo cited – was that Schmitter? ___}

\[\text{Id.}


Democracy and the judicial impact on the distribution of resources
For the I-Con-S meeting at NYU, July 2, 2015

Political scientists have been telling us for years, with increasingly impressive data, that a reasonable distribution of resources is crucial for the survival of democracy. The role of courts in that equation has been obscure. The discussion of the condition of the economy is driven by the executive and the legislature, no doubt because they are always up for election. Intervention of the courts in socio-economic rights is very controversial. Outside of the importance of the rule of law and impartial courts, it is natural to assume that legislatures, not courts, drive economic relations, particularly the share of the rewards of economic activity that different classes of people receive. I would like to challenge that for at least some countries. If that challenge is correct, then the contrast between the doctrines of state action in the U.S. and the doctrine of the direct horizontal effect of the constitution and the underlying terms of the constitutions themselves all become relevant.

Other departments of government do have considerable impact on distributive justice. Nevertheless, courts matter even with respect to distributive justice. The legislature writes laws but in common law countries, courts decide what statutes mean and courts enforce them. That alone gives them a significant impact on the shape of the economy and distributive justice. In addition, in common law countries, courts are themselves the authors of significant chunks of economic rules. Courts are the source of tort and contract rules which are a ubiquitous part of commercial law. Over all, courts are the source of important “forms of government regulation, the judicially fashioned common law and state regulatory practices.”

By interpreting state and federal statutes and constitutions, both state and federal courts contribute to the discussion of economic issues in their respective jurisdictions. Courts forbid or discourage some activities, embolden and legitimate others, and define the extremes that will be allowed or encouraged. Thus courts are integral to culture and politics as well as law.

Courts shape the markets in which businesses operate. Statutes define the permissible scope of cooperation by different business, but the Supreme Court has significantly broadened the scope of permissible behavior. It determined that inferences from parallel behavior are insufficient for allegations of conspiracy to set prices. By requiring direct evidence of conspiracy, rather than just an inference from behavior, the Court made it much harder to identify, litigate and prove violation of the antitrust laws. In turn, that gives business more scope for cooperative behavior. Eliminating or reducing the discipline of the market by such decisions means that business can take more from its customers. Similarly, the Court reversed the rule in effect since 1911, that it was “per se” illegal for manufacturers to set minimum prices its distributors could charge. That eliminated market discipline at another stage in the distribution of goods. And it gave the financial industry free reign to collaborate in initial public offerings by deciding that the securities laws supersede antitrust laws.

Another group of Roberts Court decisions shaped tort standards.

Liability for injury
Pre-emption

Bruesewitz v. Wyeth,15 liability for design defects of vaccines under state tort remedies for negligence were pre-empted by the National Childhood Vaccine Injury Act of 1986

Pliva v. Mensing,16 exempted makers of generic drugs (75% L nationwide), from state law for failing to warn

Punitive damages

Exxon Shipping Co. v. Baker,17 punitive damages too high for the Valdez oil spill in Prince William Sound, Alaska – restricted to no more than compensatory damages.

Aiding and abetting securities fraud

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.18 no liability for sham transactions because the sham partner said nothing to buyers of stock.

Janus Capital Group, Inc. v. First Derivative Traders,19 only the “maker” of the statement, “the person or entity with ultimate authority over the statement,” is responsible under Rule 10b-5.

Procedure:

Arbitration

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), contracts in violation of state laws must go to arbitrator.

AT&T Mobility LLC v. Concepcion,20 form waiver defeated state law barring the exclusion class actions in consumer contracts over small sums.

14 Penn Plaza LLC v. Pyett,21 union can waive employees’ right to sue under anti-discrimination statutes and force employees into union controlled arbitration

American Express Company v. Italian Colors Restaurant, 133 S. Ct. 2304, 2313 (2013) (Kagan, dissenting) barred a class action because the coerced contract required arbitration; as Kagan pointed out in dissent, nowhere is access to courts more necessary than in the antitrust context.

Proof

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), intentional acts of discrimination too different to be joined in a class action because the issue is the intent of each supervisor

Responsibility to workers

- Paycheck accrual – Ledbetter v. Goodyear Tire & Rubber Co.22
- Home health care aids – Long Island Care at Home, Ltd. v. Coke23


6 agency fee cases:

Agency fees – unions would have to prove the agency fee was necessary for labor peace and their ability to get benefits for the employees – The agency-fee provision did not satisfy the test in Knox, because, inter alia, features of the Illinois scheme undermined the argument that the agency fee played an important role in maintaining labor peace, and there was no showing that the cited benefits for PAs could not have been achieved if the union had been required to depend for funding on the dues paid by

**Agency fees** - Knox v. SEIU, Local 1000, 132 S. Ct. 2277 (U.S. 2012) no agency fee for political activities without prior notice and opt-in:

“The primary purpose” of permitting unions to collect fees from nonmembers, we have said, is “to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.” Davenport, 551 U.S., at 181, 127 S. Ct. 2372, 168 L. Ed. 2d 71. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections. … Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering “labor peace.” Hudson, 475 U.S., at 303, 106 S. Ct. 1066, 89 L. Ed. 2d 232. But it is an anomaly nevertheless.” Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2289-90 (2012). 5 (Alito) – 2 (Sotomayor + G concurred in the judgment – SCt went beyond submitted issues) – 2 (Breyer + Kagan, dissaent)

No payroll deduction required by 1st Amend. – Idaho had no obligation to aid the unions in their political activities, thus, only a rational basis had to be shown to justify the political payroll deduction ban. – *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 353 (U.S. 2009) 5 (Roberts) – 1 (Ginsburg, concur), 1 (Breyer, concur & dissent on whether unions are being treated differently), 1 (Stevens, dissenting because the law was aimed at unions) & 1 (Souter dissenting anti-union is a violation of 1st Amend.).


**Agency fees** – It does not violate the First Amendment for a State to require its public-sector unions to receive affirmative authorization from a nonmember before spending that nonmember’s agency fees for election-related purposes. Pp. 5-13.


6 other union cases:

no presumption in favor of vested *retiree benefits* in all collective bargaining agreements – M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 928 (U.S. 2015) – unanimous; 4 (Ginsburg) concurred to clarify that USCA might find an obligation shorn of the presumption

**Appointments clause** – Regarding appointments to the NLRB, the Court concluded that the recess at issue was only three days and too short to trigger the President’s recess-appointment power because the pro forma sessions counted as sessions, not as periods of recess. It set aside the order the the Board because of invalid appointments – NLRB v. Canning, 134 S. Ct. 2550, 2552 (U.S. 2014)

**Employer promise of neutrality is a bribe!** – “The question in this case is whether an employer violates §302(a) by making the following promises to a union that seeks to represent its employees: (1) that the employer will remain neutral in respect to the
union’s efforts to organize its employees, (2) that the union will be given access (for organizing purposes) to nonpublic areas of the employer’s premises, and (3) that the union will receive a list of employees’ names and contact information (also for organizing purposes). A further question (the other side of the same coin) is whether a union violates §302(b) by requesting that the employer perform its contractual obligations to fulfill these promises.” – 3 (Breyer + Sr & K) dissented from denial of cert. from 11 Cir. decision that employer promise of neutrality and union request it perform = violation of the no bribery provision – Unite Here Local 355 v. Mulhall, 134 S. Ct. 594, 594 (U.S. 2013)

Arbitration not for date when agreement to arbitrate signed ➔ union lost: Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287 (U.S. 2010)

Union can waive employees’ right to go to court – A provision in a collective-bargaining agreement that clearly and unmistakably required union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., was enforceable as a matter of federal law. – 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (U.S. 2009)

State money barred from assisting, promoting or deterring union organizing by CA state pre-empted by NLRA, Chamber of Commerce of the United States v. Brown, 554 U.S. 60 (U.S. 2008) 7 (Stevens) – 2 (Breyer + Ginsburg)

Whistle-blowers

Schindler Elevator Corp. v. United States ex rel. Kirk,24 denied share of what government recouped because he used FOIA to check on his allegations.

➔ Coase point: the relative share depends on the legal rules

The legal rules are largely set by courts

Whether statutes are enforceable
Whether they are violated
What the damages are

By Coase, the rules ➔ shares ➔ outside of tax rates, courts decide who gets how much

Another way to think about it – put yourselves in the position of counsel advising corporate clients.

• You can stack favorable terms in contracts that will protect you from any significant liability
• You can game the market with other companies
• You have lots of ways to avoid negotiating with unions or paying even minimum wages

I wrote in Chapter 9:

Markets are defined by law. Economists tell us that the benefits of a market economy depend on true competition, protections for participants, effective remedies for breach of contracts, reasonably available information, and a floor of requirements so that the product of the market is not more damaging than beneficial to the community, third parties, and the participants. Law can turn markets into engines of theft or human happiness.
If that challenge is correct, then the contrast between the doctrines of state action in the U.S. and the doctrine of the direct horizontal effect of the constitution and the underlying terms of the constitutions themselves all become relevant.

- Does the Constitution have anything to say?
  - state action in the U.S.
  - direct horizontal effect of the constitution

- What does the US Const. have to say?
  - All theories of interpretation depend on democracy
  - But the political scientists are telling us that democracy depends on a reasonable distribution of economic resources among the population
  - It is inconsistent to adopt a democratic theory of interpretation while insisting that the courts can otherwise act in democracy-threatening ways.


4 The doctrine traces back to the Civil Rights Cases, 109 U.S. 3 (1883).

interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.”); Karl E. Klare, Legal Culture and Transformative Constitutionalism, 14 S. Afr. J. On Hum. Rts. 146, 150 (1998).

6 See e.g., section supra What General Welfare Means, and see infra notes 261-265.


