Phil 324: Law and Morality

Module 5 Reading Guide

## **Plessy v. Ferguson (1896)**

## Opinion of the Court

1. What does the case turn on?
2. What did the petitioner, Mr. Homer Plessy, do?
3. What are the grounds of Mr. Plessy’s challenge to the constitutionality of the Louisiana statute?
4. Skim the discussion of the 13th Amendment under “1.” Here, the Court expresses its confusion (!) that the plaintiff would even think racial segregation implicates slavery because “[t]hat [the Louisiana statute] does not conflict with the Thirteenth Amendment . . . is too clear for argument.”
5. We will focus on the 14th Amendment challenge for our purposes. The Court recites the relevant part of the 14th Amendment immediately following the “2” heading.
6. **What does the Court think is and is not the object of the 14th Amendment? Pay attention to the distinction between political and social equality that the Court appeals to. What is this distinction supposed to mean? Why does the Court find it relevant?**
7. Note the Court’s claim that racial segregation “do[es] not necessarily imply the inferiority of either race to the other.” *Brown* will revisit this.
8. The Court cites the school segregation in D.C. as an example of constitutionally permissible segregation!
9. The next paragraph elaborates on the distinction between political and social equality.
10. **What question, according to the Court, is the case reduced to? What standard of review is the Court applying (recall our discussion in Module 1, but note that *Plessy* predates the three-tier division)? How does the Court analyze the constitutionality of the statute under this standard of review?**
11. Which two reasons does the Court appeal to in response to the argument that racial segregation implies inferiority? (Why do the justices say they need to “imagine” how white people would react?)

## Justice Harlan’s Dissent

1. Among all the provisions of the Louisiana statute, which appears particularly troubling to Justice Harlan?
2. What does Justice Harlan think the Constitution prohibits when it comes to civil rights?
3. What, according to Harlan, are the implications of the Reconstruction Amendments (the 13th, 14th, and 15th Amendments)?
4. **How does Harlan respond to the objection that the Louisiana statute does not discriminate against Black people because it also prohibits a white person from taking a seat in a coach assigned to Black people? (We will meet this equal application objection again and again in our future readings.)**
5. Harlan then gives us a list of many of the absurd implications of the Court’s ruling.
6. Harlan questions why the majority would even consider the question of whether the statute is reasonable because a statute’s legal validity has nothing to do with “the policy or expediency of legislation.” Does Harlan understand “reasonable” in the same way the majority does?
7. Note Harlan takes the Constitution to be “color-blind” and to prohibit second-class citizenship at the same time. What gives?
8. Harlan predicts that the Court’s decision today will end up as infamous as *Dred Scott*.
9. **What does Harlan think is the “real meaning” of the Louisiana statute?**
10. **What is Harlan’s allusion to “the Chinese race” supposed to show?**
11. Does Harlan think racial segregation would still be legally impermissible if Black citizens had equal rights?
12. Skim the rest of Harlan’s dissent.

## **Brown v. Board of Education (1954)**

1. What are these consolidated cases about? What constitutional question do they implicate?
2. You might have noticed something unusual about these cases: Most of them were decided by three-judge panels of federal *district* courts, and they were appealed to the U.S. Supreme Court *directly*, skipping the intermediate courts of appeals. (And, no, these were not emergency petitions on the Court’s shadow docket.) This is very different from how cases are heard today: federal district courts rarely convene three-judge panels, and there are hardly any direct appeals to the U.S. Supreme Court.

In 1910, Congress passed a law requiring that constitutional challenges to state statutes be heard by three-judge district courts (as opposed to one district court judge), with direct and mandatory review by the U.S. Supreme Court. The law was a direct attempt to curb the Court’s decision in *Ex Parte Young* (1908), which we introduced at the start of the course. In 1937, Congress extended these provisions to federal statutes.

In 1976, the Court succeeded in lobbying Congress to almost completely abolish mandatory appeals as part of a reform to covert the Court’s appellate jurisdiction to the overwhelmingly discretionary certiorari system that we are familiar with today. Nowadays, only a very small number of cases, most commonly redistricting cases, are still heard by three-judge district courts, with direct and as-of-right appeals to the U.S. Supreme Court.

1. What does the Court take *Plessy* to have established?
2. What do the plaintiffs contend? (Think about: what do the plaintiffs mean when they say segregated public schools cannot be *made* equal?)
3. The Court then discusses two reasons why it thinks the legislative history of the 14th Amendment is not conclusive as to what the framers intended the amendment to do with respect to public education.
4. The Court goes on to differentiate this case from prior precedents. Most importantly, the Court observes, the segregated schools in the current case are equal in terms of “tangible factors” like facilities, teachers, and curricula, satisfying the requirements of “separate but equal.” Still, the plaintiffs contend that the segregated schools are unequal *despite* being equal in those tangible aspects, which, the Court interprets, amounts to a direct challenge to the “separate but equal” doctrine. That’s what the Court means when it says “[w]e must look instead to the effect of segregation itself,” rather than factors merely associated with segregation (facilities, teachers, etc.), “on public education.”
5. Why does the Court specifically make a point about the significance of education?
6. What is the question presented? And what is the Court’s answer?
7. **What is the Court’s justification for its answer?**
8. Among the psychological studies the Court cites in support of its answer is Kenneth and Mamie Clark’s famous doll study, which you can learn more about here: <https://www.youtube.com/watch?v=a7sX1cn5aO4>.
9. Please skim the rest of the opinion. The Court notes that it will consider the question of implementation separately. In *Brown II*, the Court would announce that *Brown I* was to be implemented “with all deliberate speed.”

## **Smith v. United States (1993)**

## Opinion of the Court

1. The Court’s opinion starts on p. 225.
2. What is the question that the Court decides today?
3. Skim Section I. Note the facts of the case, the enhanced sentence Mr. Smith would receive if the Court were to rule against him, and his argument. (Note also that the Court granted cert because there was a circuit split on the underlying legal issue.)
4. Pp. 227–28: Note that the language of the statute is super broad—it encompasses not only the “use[]” but also the “carri[ng]” of a firearm in the relevant situation. However, Mr. Smith was indicted specifically for *using*, not carrying, a firearm.
5. Pp. 228–29: How does the Court come to the conclusion that Mr. Smith did *use* a firearm within the meaning of the statute?
6. Pp. 229­–31: What are the Court’s responses to Mr. Smith’s and the dissent’s objections?
7. Skip the rest of the majority opinion.

## Justice Scalia’s Dissent

1. Both the majority and the dissent seem to agree that the troubling phrase should be interpreted according to its “ordinary” meaning, but they disagree on just what that meaning is.
2. Pp. 242–43: What does Justice Scalia take the ordinary meaning of “use” to be? What is his objection to the majority’s reading?
3. Skip the rest of the dissent.

## **Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws”**

## The Science of Statutory Interpretation

1. We start on p. 14. Please skim this section, where Justice Scalia sets the stage for his theory of statutory (and constitutional) interpretation.

## Intent of the Legislature

1. What “basic question” does Scalia begin with?
2. What is the difference between subjective and “objectified” intent?
3. **What are the reasons, according to Scalia, for preferring objectified intent to subjective intent?**

## Church of the Holy Trinity

1. Scalia uses his disagreement with the Court’s ruling in *Holy Trinity* to motivate an argument against objectified intent. What is this argument?
2. Skip the discussion of Calabresi and Eskridge.
3. **Why does Scalia think *Holy Trinity* was wrongly decided?**

## Textualism

1. **Scalia then uses *Smith* to illustrate the difference between his (proper) textualism and strict constructionism (which he calls “a degraded form of textualism”). How would a strict constructionist interpret the phrase “uses a firearm”? How about a proper textualist?**
2. Skip the rest of the section.

## Interpreting Constitutional Texts

1. We start again on p. 37. Scalia now extends his theory to constitutional interpretation.
2. What is different about constitutional interpretation according to Scalia?
3. Notice how, immediately after quoting Chief Justice Marshall at length, Scalia takes care to explain what he takes the quote to mean. This is an excellent example of reader-friendly writing. Just giving someone else’s words does not guarantee readers will understand them the same way you do (indeed, they often will not!). Try to do what Justice Scalia does here in your own writing.
4. How does the 1st Amendment example illustrate Marshall’s point and the difference between Scalia’s textualism and strict constructionism?
5. For Scalia, there is important continuity between statutory and constitutional interpretation.
6. Why does Scalia, as a good textualist, read *The Federalist Papers* when he tries to interpret the Constitution?
7. Note the two essential features of Scalia’s blend of textualism and originalism: it is not strict construction, but *reasonable* construction; and it does not look for current meaning, but the *original* meaning of the text.
8. What is this “Great Divide”?
9. **What is “The Living Constitution”? Why does Scalia think The Living Constitution is problematic?**
10. Skip the rest of the section.

## Flexibility and Liberality of The Living Constitution

1. What is the pragmatic argument for The Living Constitution? What is Scalia’s objection?
2. Why does Scalia think The Living Constitution offers less rather than more flexibility? (Scalia seems to think the relevant flexibility is “flexibility in government,” not flexibility for the individual?)
3. How does the claim that “devotees of The Living Constitution do not seek to facilitate social change but to prevent it” follow from what Scalia just said?
4. What does Scalia think was (part of?) the reason why the Founders enacted the Bill of Rights?
5. Why does Scalia talk about the “purposes” (intention?) of the 6th Amendment if all he cares about is the original meaning of the text?
6. Why does Scalia think allowing juvenile victims of sexual abuse not to confront their abuser face-to-face is a reduction, not increase, in liberty?

## Lack of a Guiding Principle for Evolution

1. Skim this section, but note what Scalia says about the death penalty, women’s right to vote, and the selection and confirmation of judges.

## **Ronald Dworkin, “Comment”**

1. Dworkin’s comments start on p. 115.
2. What is this “careless” objection? Why is it careless? Why bring it up at all?
3. **What is the distinction that Dworkin thinks Scalia fails to appreciate? Try to give your own example.**
4. Why, according to Dworkin, must Scalia subscribe to semantic intention?
5. How does Dworkin use *Brown* to illustrate the difference between expectation originalism and semantic originalism? Which kind of originalist does Dworkin take Scalia to be?
6. **What are the two semantic originalist readings of “cruel and unusual punishments”?**
7. What is the mink example supposed to illustrate?
8. How does Dworkin turn this discussion into an argument that what Scalia says is not internally logically consistent?
9. **What is Dworkin’s understanding of The Living Constitution?**
10. Skip Dworkin’s discussion of the 1st Amendment.
11. What is Dworkin’s objection to Scalia’s reading of the Equal Protection Clause?
12. How does Dworkin respond to Scalia’s worry about the politicization of the courts and the suffering of individual rights?

## **Antonin Scalia, “Response”**

1. Scalia’s response to Dworkin starts on p. 144.
2. How does Scalia respond to Dworkin’s distinction between semantic originalism and expectation originalism?
3. **What is Scalia’s reading of “cruel and unusual punishments”? How is it different from Dworkin’s reading?**
4. How does Scalia respond to Dworkin’s mink example? (Does he just seem to miss the point of the example entirely?)
5. Skip the discussion of the “evolutionary meaning of the Bill of Rights.”
6. Skim Scalia’s response to Dworkin’s criticism of his reading of the 1st Amendment.
7. What is Scalia’s response to Dworkin’s criticism of his reading of the Equal Protection Clause?
8. What is going on in the last paragraph? (The book was the published version of the Tanner Lecture that Scalia gave in 1995. Did he really think women, racial minorities, or for that matter “homosexual[s]” were not disfavored by the majority?)