

1992

Constitutionalia

Maurice Kelman

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>

 Part of the [Law Commons](#)

Recommended Citation

Kelman, Maurice, "Constitutionalia" (1992). *Constitutional Commentary*. 705.
<https://scholarship.law.umn.edu/concomm/705>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

CONSTITUTIONALIA

1. Four crimes are mentioned by name in the Constitution. What are they?
2. When did the Liberty Bell crack?
3. Two oil paintings hang side by side in the John Marshall Dining Room of the Supreme Court. Who are the subjects of the portraits?
4. John Marshall's first encounter as Chief Justice with the Constitution did not involve the document written in 1787 in Philadelphia but rather its naval namesake, the frigate U.S.S. Constitution ("Old Ironsides"). Name the case.
5. *Ware v. Hylton* (1796) was the first Supreme Court decision invalidating a state law, in that case for conflict with a U.S. treaty. Name the first case to strike down a state law as repugnant to the Constitution.
6. Who captained the boats Gibbons operated in derogation of Ogden's steamboat monopoly, giving rise to the historic case of *Gibbons v. Ogden*?
7. Can you name two cases where the Justices thought the constitutional issue so open-and-shut that they cut off oral argument?
8. Name the first case in which the Supreme Court directly reviewed the decision of a state trial court.
9. Identify the Justice who recused himself from a case but proceeded to publish an unofficial dissenting opinion.
10. Cite a case the Court considered so important that it permitted three lawyers on each side to take part in the oral argument.
11. Cite a famous case in which the Court's opinion writer endorsed the position he had taken as circuit justice in the court below.
12. The Court termed its three-paragraph decision "too plain for argument." 136 years later the case was overruled 9-0. Name that case.

13. *Myers v. United States* (1926), is the famous decision upholding the President's right to fire a Senate-confirmed executive branch official without obtaining the Senate's approval. Who was the President who appointed Mr. Myers as a postmaster, and who was the President who ousted him?
14. Mister Dooley once remarked: "Mr. Justice Brown gave the opinion of the Court, and only eight other justices disagreed with him." To what case was this sarcasm directed?
15. Name the Supreme Court case in which conservative and liberal politicians, the ACLU, the Mississippi Republican Party, the Libertarian Party, and the American Conservative Union were all on the same side.
16. The federal government petitioned for certiorari and sought summary reversal. The Court granted cert and proceeded unanimously to *affirm*. Name the case.
17. Until the last half of the nineteenth century, the U.S. Attorney General was allowed to have a part-time law practice. Can you cite some major Supreme Court cases that were argued by the Attorney General in his private capacity?
18. A former Confederate official successfully petitioned the Supreme Court to restore his right to practice law. He later served as Attorney General. Who was he?
19. Oliver Wendell Holmes's only recorded appearance as an attorney before the Supreme Court was in what case?
20. Can you name any constitutional cases argued to the Supreme Court by an ex-Justice appearing as a private lawyer?
21. Name the only rejected Supreme Court nominee who later appeared before the Court as a practicing attorney.
22. In a World War II case, Wendell Willkie argued against the federal government on behalf of a Communist Party member. Name the case.
23. Identify the fortunate Supreme Court litigant who was sued in a landmark civil case and prosecuted in an unrelated criminal case, both cases being decided on the same day and both going in his favor.
24. Cite a case in which all three of the lawyers who argued before the Supreme Court had the suffix "III" after their names.
25. To which member of the Supreme Court was Francis Scott Key, author of the Star-Spangled Banner, related by marriage?

26. Which Justice was also a physician?
27. Name the Supreme Court Justice who once killed a man in a duel.
28. Who was the former Justice who delivered a nationwide radio address in 1937 supporting the constitutionality of FDR's Court-packing proposal?
29. How many of the Court's 106 Justices attended Harvard Law School?
30. What President signed legislation into law knowing that a similar statute had been declared unconstitutional by the Supreme Court?
31. What President vetoed legislation as unconstitutional even though an identical law had previously been upheld by unanimous Supreme Court decision?
32. Cite a federal law that was enacted over the President's constitutional objections but was ultimately upheld by the Supreme Court.
33. Who wrote an opinion for the Court striking down a law which Congress had enacted at his behest?
34. Name the Supreme Court case in which Justice Holmes wrote: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." And in what Supreme Court case did Justice Cardozo say, "The criminal is to go free because the constable blundered"?
35. In what opinion were "mahomet" and "the Grand Lama" characterized as "those imposters"?
36. Who said: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States"?
37. Who said: "[W]e are a nation with a duty to survive; a nation whose Constitution contemplates war as well as peace?"
38. Who said: "It does not require a lawyer to interpret the provisions of the Bill of Rights. They are as clear as the Ten Commandments"?
39. Who described massage as "an operation which could hardly be carried on unless the person were divested of his clothing"?
40. Who said: "In due course, the EPA promulgated NAAQ's, approved SIP's, and adopted detailed regulations governing NSPS's"?

THE ANSWERS

1. Treason and bribery. See Art. II, sec. 4 (impeachment for “treason, bribery, or other high crimes and misdemeanors”), and Art. III, sec. 3 (spelling out proof requirements in treason prosecutions). In addition, counterfeiting is mentioned in Art. I, sec. 8, cl. 6, and piracy in Art. I, sec. 8, cl. 10. (The sale of liquor was, of course, criminalized by the eighteenth amendment but happily was removed from the Constitution by the twenty-first.)
2. When tolling in 1835 to mourn the death of John Marshall.
3. One painting is of James Madison. The other is of William Marbury.
4. *Talbot v. Seemen*, 5 U.S. (1 Cranch) 1 (1801), upholding recapture by the U.S.S. Constitution of a neutral vessel, the *Amelia*, previously seized by the French—the United States and France being “in a state of hostility.”
5. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), finding the Georgia legislature’s repeal of the “Yazoo” land grants violative of the Contract Clause.
6. Cornelius Vanderbilt, who went on to great wealth as a shipping and railroad magnate.
7. One is *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), with respect to the inapplicability of the Bill of Rights to the states (“The counsel for the defendants in error, Mr. Taney and Mr. Scott, were stopped by the court.”). Another is *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886), where Justice Harlan’s opinion for the Court is prefaced with this announcement by Chief Justice Waite: “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does.”
8. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). The defendants’ convictions in the Quarterly Session Court of Norfolk, Virginia, were unappealable to any higher state court and therefore were subject to Supreme Court review as the judgment of the highest state court having jurisdiction of the case.
9. Chief Justice Taney in *Bank of the United States v. United States*, 43 U.S. (2 How.) 711, 745 (1844). His dissent is published as an Appendix to Volume 43.

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The reporter's note says: "This case involving a constitutional question of great importance, and the sovereign rights of the United States and the State of Maryland; and the Government of the United States having directed their Attorney General to appear for the plaintiff in error, the Court dispensed with its general rules, permitting only two counsel to argue for each party."
11. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Justice Davis participated in the divided decision of the Circuit Court for the district of Indiana and then wrote the majority opinion for the Supreme Court.
12. *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), concerning the scope of federal admiralty jurisdiction. Overruled by *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071 (1991).
13. Woodrow Wilson appointed Myers in 1913, reappointed him for another four-year term in 1917, and fired him in 1920. Interestingly, the replacement appointed by Wilson, a Mr. Jones, was soon reappointed by President Harding.
14. *Downes v. Bidwell*, 182 U.S. 244 (1901). Justice Brown's opinion "announced the conclusion and judgment of the Court," with a separate concurring opinion by four Justices and a dissent by four others.
15. *Buckley v. Valeo*, 424 U.S. 1 (1976), challenging the constitutionality of the 1974 Federal Election Campaign Act.
16. *Block v. Neal*, 460 U.S. 289 (1983).
17. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (Edmund Randolph); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (William Wirt); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (William Wirt); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (William Wirt); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Roger Taney); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (Nathan Clifford).
18. Augustus H. Garland, President Cleveland's Attorney General from 1885 to 1889, won a 5-4 decision invalidating the "test oath" required of ex-Confederates. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).
19. *United States v. Ames*, 99 U.S. 35 (1879). Holmes appeared for the appellees with his partner, George Shattuck. They won.

20. Benjamin Curtis argued *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) and *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869). John A. Campbell argued the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), on behalf of the Butchers' Benevolent Association. Charles Evans Hughes, after resigning as associate justice and years before his return as Chief Justice, argued *Newberry v. United States*, 256 U.S. 232 (1921). Abe Fortas argued *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), though he died before the decision came down.
21. Robert Bork, denied confirmation to the Court in 1987, argued for petitioner in *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990).
22. *Schneiderman v. United States*, 320 U.S. 118 (1943), reversing Schneiderman's denaturalization and rejecting the government's theory that a Communist cannot honestly declare "attachment to the principles of the Constitution."
23. Rev. Fred Shuttlesworth was one of the libel defendants in *Abernathy, et al. v. Sullivan*, companion case to *New York Times v. Sullivan*, 376 U.S. 254, and also was the accused in *Shuttlesworth v. Birmingham*, 376 U.S. 339, all decided on March 9, 1964.
24. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). Arguing for the appellants were Philip H. Ward III and John D. Killian III. Appearing for the appellees was Henry W. Sawyer III.
25. Key was brother-in-law of Chief Justice Roger Taney.
26. Justice Samuel F. Miller. He earned his M.D. in 1838 from Transylvania University in Lexington, Kentucky, and practiced medicine before reading law and being admitted to the bar in 1847.
27. Brockholst Livingston, on the Court from 1806 to 1823, killed a duelist named James Jones in 1798.
28. Ex-Justice John H. Clarke, who had left the Court in 1922 to "work for America's entrance into the League of Nations."
29. Sixteen, including current Justices Scalia, Kennedy, and Souter.
30. President Franklin Roosevelt approved the Fair Labor Standards Act of 1938, which included a provision outlawing child labor. The Act was upheld in all aspects by *United States v. Darby*, 312 U.S. 100 (1941), overruling the infamous *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which had struck down a 1916 federal law against child labor.

31. President Andrew Jackson vetoed the rechartering of the Bank of the United States in 1832, notwithstanding the constitutional imprimatur placed on the Bank by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
32. The Webb-Kenyon Act of 1913, vetoed by President Taft as an improper transfer of federal authority to the states, but held constitutional in *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917).
33. Chief Justice Salmon P. Chase, in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), invalidated the Legal Tender Act he had shepherded through Congress as Lincoln's Treasury Secretary during the Civil War.
34. These are trick questions. Holmes was still on the Massachusetts court when he penned the above-quoted words. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). And Cardozo was speaking as a judge of the New York Court of Appeals in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926).
35. Another trick question. The passage is from a New York state court opinion by Chancellor Kent, which Justice Brewer quoted with approval in his opinion for the Court in *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).
36. Chief Justice Salmon Chase in *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).
37. Justice Sutherland in *United States v. Macintosh*, 283 U.S. 605, 625 (1931).
38. President Herbert Hoover, an engineer by training.
39. Justice Brown in *Dunlop v. United States*, 165 U.S. 486, 499 (1897).
40. Justice Stevens in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 846 (1984).

*Maurice Kelman**

* Professor of Law, Wayne State University.