

## Laws 2501:

- Should it be “Law, State, and Constitution?”
- I would word it as “State, Constitution, and Law.”
- We give a certain of our freedoms to allow the government to provide us with security.
- *Anarcho-capitalism* - We are born free and we are allowed to dispose of our body as we please.
- *Anarcho-syndicalism* - The only way to safeguard human dignity is for us to be self-managing. No owners, no capitalists, no mediating structures no oppressors.
- Both of these views reject the state. These views presupposes a nice nature of the human being. These views think that humans will always respect each other. They won't disobey each other. They won't infringe on the others' rights.
- Homogeneity - this idea is problematic (this will be discussed in later readings).
- The idea of liberal constitutional regime is to prevent stupid social political decisions. It is to prevent rash, ill-advised political decisions.

## Thomas Hobbes:

- Initially, he wanted to scare the average person off. He is trying to make you believe that the state is the best possible solution.
- 3 principles of causes of quarrels - (1) competition - invade for gain; (2) diffidence - invade for safety. Defending oneself; (3) glory - invade for reputation.
- Hobbes says there is no “mine” and “yours” in the state of nature. The state will only enforce what the rules are.
- State of nature is a state where there is no sovereign. Nobody to enforce laws. State of nature is just the absence of the sovereign. This state of nature is also defined by the mindset (3 principle causes of quarrel).
- Can you think of a contemporary example of a state of nature? Hurricane Katrina. Remember there was no order there. There was robbing, raping, etc at that time.
- Hobbes uses the “state of nature” to scare us off.
- Let's assume Hobbes convinced us. In a state of war, there is no peace; there is no industry; people starve. He says that a dictatorial regime is better than an absence of a state of nature.
- What are the power of the sovereign? Absolute power. Sovereign doesn't share the power with anyone. Sovereign passes laws, raises armies, conducts foreign policies, is the head of the judicial branch. Basically, this sovereign is everything in the society.
- How does this sovereign come about though? (1)
- Everyone in society forms a relationship with the sovereign. Every individual in society forms a relationship with the sovereign and gives him the power to provide them with a certain sense of security. This would have worked in a simple society. But right now, this is a complex society. Now, we think of the government as an institution.
- But this presumes that the sovereign is a person. Imagine if the sovereign was dead. It's still the office of the sovereign that will order the human society.

## John Locke:

- Starts from the state of nature. But there is a difference from Thomas Hobbes. Locke says that humans are innate good, while Hobbes said that humans are innately bad.
- State of nature is a foundational building block. But this state of nature is not aggressive. Why? Because we are not bad (as Hobbes says we are). Even though we are well meaning, we still disagree on the nature of right and justice. Who do we tend to trust about what is right and wrong? There is property, there is justice, there is natural laws. But if we are not ill-disposed of others, why do we need a state? We need a state of nature - even though we are capable of understanding right and wrong - we enter a conflict because we think we are right. We never enter a conflict thinking that the other person is right.
- We are not necessarily a bad bad person. So that's why, we need an umpire. We need an impartial party that will help settle the problems.
- But how do we get a state? Hobbes says that there are no dissenters. Everyone consents to a state. There is no such thing as majority vote. Everyone agrees to what the sovereign says.
- For Locke, situation is slightly different. Individuals contract amongst themselves to constitute a political community, create a decision-making body, and decide that the mode of decision-making will be majority vote. Laws will be passed for the common good. Legislature should operate according to majority rule.
- One of the problems with Locke's social contract is about *tacit consent*. The consent we give to a political society, does it need to be explicit? You don't really need to sign this contract. You don't need to explicitly sign this contract. In virtue of receiving protection from the government, you have tacitly consented.
- We shouldn't have (1) *retroactive laws*. They should be (2) public; they should be (3) general.

## Jean Rousseau:

- Hobbes and Locke were not particularly influential to the modern society. When it comes to the impact of the social contract, popular sovereignty, Rousseau was probably the most important thinker in the world of conceptual theory.
- What did local Canadian politicians demand in the early 19th century? They didn't have (1) representation in the government, and (2) they didn't have much responsibility. Canadians wanted representation into their own government.
- Don't think of the political process has one man looking down to rule over the commonwealth. We don't empower one person/or numerous persons, to hold power over us.
- It's easy for us to (1) justify equality, and (2) it is also easy for us to allow the majority to rule. I am a part of a larger political body.
- People cannot pre-commit themselves. If they did, it would be the same as alienating themselves from their own rights. But can people institute a system where powers are

divided (separated)? Locke wanted separation of powers (legislature, executive, judiciary). But Rousseau is NOT in favor of the power separation. To separate power in government would be horrible (he uses a horrible description of Japan throwing a child up in the sky, chopping the baby to pieces, and once the baby falls to the earth, it turns whole).

- If you involve people in such a diverse setting, question is, who is “the people?” To invoke “the people” where the identity of the people is not disputed, then it’s fine - the will of the majority will succeed. But what happens when there is an issue with identifying “the people?” You cannot invoke the will of the majority.
- Sovereign doesn’t share power, doesn’t alienate part of its population, is completely sovereign (won’t violate the rights of the people though - unlike what Hobbes said), because ultimately everyone shares the power. Rousseau, like Hobbes, believes in majority decision making. But unlike Hobbes, he says that not every majority is legitimate. Not every majority vote should be counted as the will of the majority. He talks about 2 will - (1) general will - common interest, & (2) will of all - private interest.
- Those who participate in democratic decision making, shouldn’t do so in their own self-interest. You are not there to pursue your own self-interest. You are there to think about what is in the best interest of everyone else. Your mindset as decision makers should be such that you always have the common good in your deliberations. How should I vote to accomplish the common good of everybody? Rousseau thought that we should be isolated from one another. We shouldn’t be talking to each other too much so that our decisions don’t become influenced by other people.
- These thinkers were completely against interest based politics.

#### Application of These Theories:

- Reference Re Secession of Quebec (1998)
  - Basically, when it comes to major political issues, these things do come in. They are not invoked on a daily basis. These are theories that are invoked on very serious political matters.
- Preamble to the US Constitution (1787)
- Preamble to the German Basic Law (1949)
- Constitution of Ireland (1937)
- Preamble to the French Constitution (1958)
- Preamble to the Constitution of Nigeria (1999)
- Constitution BNA Act (1867)
- What is a preamble? It is the document that precedes the constitution. You cannot see it. These are principles that make up the constitution.

January 29th

Federalism:

- Preoccupation was how to establish a political system that is capable of governing a large state.
- This is different from a social contract - Hobbes, Locke, and Rousseau.
- We are not really concerned with the size of the polity. The size of the polity is actually very very small - according to Rousseau. His account of popular sovereignty can ONLY work in a small state. His writings were mostly based on 18th Century Geneva - town where he resided.
- What do federalists have to say about small states?
- We have a problem with democracy - now what? Most stable way to govern a large state is a monarchy. That's what Montesque said. And everyone - at that time - read Montesque. Why though? Why a monarchy? A decision-making capability of a monarchy - at that time - was considered to be superior than a democracy. So the idea that everyone can commit to the political arena had to wait until the federalists. Montesque said there are two functions of a federalism: (1) preserve democracy, and (2) make that work in a larger orbit.
- Montesque - pre-eminent political thinker of that time. They borrowed the idea of a *confederation* from Montesque. Why? Because remember he was the biggest political thinker at that time - so they needed to incorporate what Montesque said about how to make federalism work.
- Madison says that in order to stop internal rebellions, we need to unite so that our police forces, military forces would be united to quell the rebellion.
- Why do individual states unite? (1) quelling domestic rebellion, and (2) protection from external threats. And another reason why they unite is (3) because they wanted to evade the situation that plagued Europe in 17th and 18th Century - where peace depended on a very delicate string of power. As in, at that time, it was about who to establish a political connection with to stay in power and who not to.
- Federalists No. 9 - (1) Reasons for federalism - (a) quelling domestic rebellion, and (b) protection from foreign threats.
- Their jurisdiction is entrenched in the constitution. They are the kings and can act freely within their jurisdictional matters. However, they cannot act ultra vires their powers.

#### Federalist No. 10:

- Introduces the concept of a faction.
- *Faction* - A group of people that are united by some account of common interest or some form of passion.
- Is this faction only a minority or can it be a majority as well? Factions can be both minority and majority groups. Madison was really allergic to "special interest" in society. But these "factions" are indeed "special interest" groups.
- Factions are natural though. There are many different people who work different jobs (bankers, police officers, day laborers, military officials) in society who form different factions because they have different interests.

- Factions are (a) natural, and (b) bad. If we allow these factions to become powerful, then they can threaten our political power. So how can we deal with this problem? Is it even possible to deal with factional power? Well, one way is to bring a tyrannical regime and completely quash the factions. But they were democrats so they didn't want to do this. So what can you do - when you're a democratic state - to stop these factions? You can either (1) address the causes, or (2) address the effects. AND if it's a minority faction - then you can have a majority vote.
  1. You can have a *Bill of Rights*.
    - But we still haven't answered how we can solve the problems of the *factions*. If the faction is a minority - they can't win because the majority vote will protect the common good against the minority interests. But what if the factions is against the majority? Well, the majority of the people is the "voice" of the people. But this is skeptical in this scenario. They don't think majority is the voice of the people. So what's the solution to a majority faction? An oppressive coalition is more difficult to formulate in a larger community. In a larger community, you will need MORE people to unite to oppress the minority. While in a smaller community you will still need a majority, the number in the majority will differ from a smaller community to a larger community.
  - They opted for something called a *republic*. They said a *republic* was different from a *democracy*. But today - democracy and republic is the SAME thing. But at that time - for their context - republic was different from a democracy.
  - *Republic* - larger than a democracy.
  - What kind of *democracy* has to be in place in order for us to be safe from stupidities? Have a *representative democracy* - You are solving 2 problems by implementing a representative democracy (1) elect representative and he goes to the parliament and represents you, and (2) gentlemen who are going to "cooly" reflect on what their constituents want - as in what is in the best interest of the people.
  - Both *Federal No. 9* and *Federalist No. 10* told us that a larger republic was better than a democracy.

Federal No. 39:

- What did *federalism* truly achieve?
- *You don't need to spend too much time on this for the midterm except for next bullet.*
- Tries to solve the problems of who we are - (1) are we one body with a single body, or (2) are we one body with two head, or (3) are we two bodies with two heads?
- Individual states "have their hands on the breaks." As in, if the federal government transgresses the power of the different states, then the different states say that we do not accept what you - the federal government - is saying and we introduce our own form of legislation because you transgressed on our powers. Who has the power to interpret whether or not the federal government transgressed on component state's powers? It's the *sovereign* who has this power to interpret.

- The federal government exists only in virtue of the different states. As in, the federal government wouldn't exist if the component states didn't exist.

#### *McCulloch v. Maryland:*

- FACTS - Federal government was trying to open up a bank in Baltimore. But the federal government doesn't have the constitutional right to charter a bank.
- QUESTION - Does the constitution of the United States of America allow the federal government (Congress) to charter a bank?
- HELD - The court allowed the federal government to charter a bank. It interpreted the Constitution in a broad way. It used the *necessary and proper clause* (NOT ON MIDTERM).
- Between 1776 - 1787 - the US didn't have their own source of income. The Congress was a meeting place of ambassadors. Each individual state had one vote. Very fragile constitutional construction.
- The body that adopted the Constitution in 1776 didn't have the right to transgress into other states's power.
- The states were single organs of the federal government. Any legislation needed unanimous approval of the states's approval before it can be passed.
- You can dismember an individual state - but you can't dismember the government as a whole.

#### General Class Discussion:

- Canada is a multinational state. Why do we have federalism in a multinational state?
- Multinational federation is a federal response for managing diverging interests.
- Multinational states are more prone for seeing the character of the state as partnership. United States is a mono-national state. As in, they speak one language even if they have many different races in the country. This theory was known as *The Compact Theory* in the United States in the 19th Century.
- Why would you have a federalism in a mono-national country? Sometimes it's just constitutional - such as Germany in 1949 post World War II. But what are some other reasons?
- Can federalism be imagined as a *lab*? What kind of a lab is it? It's a lab of "trial and error." They used individual states as testing grounds for policies that might be slightly controversial. If it's successful in that state - then they will apply it widely throughout the entire federation. Federal system decreases the cost of policy experimentation.
- Federation
  - Source of authority - constitution
  - Representation - central institutions represent "the people" of entire federation.
  - Lawmaking - Both the federal and state level employ law making power. Federal legislation operates directly 'on' citizens.

- International legal personality of the federation - Yes. Though the constituent units can conclude some international agreements.
- Dissolution - Impossible, or only through a constitutional procedure.
- Advantage - More efficient.
- Confederation
  - Source of authority - treaty
  - Representation - Central institutions represent only the states that have pooled their sovereignty.
  - Lawmaking - Federal legislation only binds member states.
  - International legal personality of the federation - No. The constituent states only have the legal personality.
  - Dissolution - Unilateral exit possible. Confederation is voluntary.
  - Advantage - Accommodation better for regional differences.

#### Unitary State:

- All 3 dimensions - (1) legislative, (2) executive, and (3) judiciary - are incorporated in the unitary state in the political and legal structure.

#### Union State:

- Different from *unitary state*.
- No constitutional guarantee - the independent authority of the constituent nations and their legal and political systems.
- The legislative and executive authority devolved is greater in depth and scope than we would expect under the merely 'local.'
- In practice the reversal or modification of constituent parts' authority almost impossible without their consent.
- The integrity of the Union state depends upon the negotiated settlement between the parts continuing to be both functional for the whole and satisfactory to the various parts.

February 5th

#### Federalism:

- Federalism goes hand in hand with a written constitution. This is a BIG feature of federalism.
- The divisions of power is written in the constitution as well. Every division of power knows their boundaries of power.
- *Demos* - the population of a designated area.
- The upper chamber of the government is the manifestations of all of the constituent powers.

- What is an additional feature of the federal system? (1) bicameral - represents the interests and individuality of member states. Represents their political, juridical equality.
- How do we change the constitution of the federal state? Can the constitution be changed without some input of the member states? The goal of a federal state is to allow these small member states the right to come to the government to represent their constituents so that if the federal government does enforce a new law - it won't infringe on member states' rights.
- We live in liberal democratic states. Liberal democratic states' basic concern is the "individual."
- Will Kymlicka - He makes a distinction between (i) national minorities, and (ii) immigrants. If you're a national minority (gay, lesbians, Quebecois), you are to receive more constitutional rights. If you are an immigrant, the level of institutional protection is A LOT less than than national minorities. 2 reasons why this must be done -
  1. *Normative/moral reasons* - something in our ethics prescribes us to do so.
  2. *Prudential reasons* - it's common sense. If you want to keep peace, if you want to make the country manageable, then you better go to some steps of political accommodation for different groups of people in one region.
- Every person's culture is necessary.
- Even though you may want to argue that states are neutral - everyone is equal, everyone has the right to the protection under the Bill of Rights - all countries claim that, actually they are hardly ever neutral.
- In order for the government to function properly in a state that is mixed with different cultures, the government needs to seem neutral.
- *Multinational Federalism* - The minorities - in this form of government - is protected in the constitution. Minorities here would be protected under the constitution so that the government won't be able to legislate to discriminate against them.
- The federal structure of our country also facilitates democratic participation by distributing power to the government to both (i) mono-national federalism, and (ii) multi-national federalism. This is the most often heard justification for federalism.
- The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture.

#### Canadian Senate:

- If you go to the Constitution of Canada of 1867, what idea would you have of the role of the Senate? What is the role of the Senate in the legislation of laws? A legislation MUST be passed both in the (i) House of Commons, and (b) the Senate in order for the law to be enforceable.

- Does the Senate have the power to legitimately interfere with the will of the House of Commons? As in, can the Senate veto a Bill from the House of Commons? How often has the Senate vetoed Bills coming from the House of Commons? It's role is questionable. It's useful for fact finding. But in terms of legislative involvement, it's very very problematic. Does the Senate represent the provinces? No. Even though the Prime Minister may select/appoint Senators, Senators might still not fully reflect the views of the Prime Minister.
- What's one of the reasons it's difficult to change the composition of the Canadian Senate? Because if you mess with the composition of the Senate, then you are changing the role of the Senate according to the Constitution Act, 1867. Quebec won't approve of this.
- *Now if you had to change the role of the upper chamber - Senate in Canada - in a Federal system? Should the Senate be equal to the House of Commons? Should the laws be passed through both the (i) lower chamber - House of Commons, and (ii) upper chamber - Senate, in order for the law to be enforceable?*
- *If both chambers are equal - it's called a symmetrical bicameral system.*
- *If both chambers are NOT equal - it's called a asymmetrical bicameral system.*
- If both of these bodies are equal, you have the possibility of a stalemate in the legislative process. What happens when the two chambers can't agree? That's precisely the problem. If both chambers are equally powerful, then if they don't agree on a law, the law will never be passed because the two chambers don't agree on the power.
- Triple E Senate - (1) Equal, (2) Elected, and (3) Effective - We are going to elect the representative of each state because it's a proper representation of the constituent states.
  - Which gives more power to a member state? (i) elected officials, or (ii) appointed officials? The *elected officials* are more powerful. Why? Because then these elected officials are NOT indebted to anyone else except the people that voted him into office. The elected officials are not indebted to the elites of the society for anything. Whereas the appointed officials will be indebted to the elites because the elites (Prime Minister, lobby groups) are the ones that put him into power.

#### Consociational Democracy in Iraq:

- Federal regime where major groups share political power. President - Kurd, Prime Minister - Shiite Muslim, Vice Prime Minister - Sunni Muslim - powers here are distributed.
- This is risky because it can lead to fighting. Why? Because the powers of the country are already divided from the very beginning.
- Features of consociational democracy -
  1. *Grand coalition* governments that include representatives of all major linguistic and religious groups
  2. *Segmental autonomy* for these groups:
    - (a) Federal arrangements in which state and linguistic boundaries largely coincide, thus providing a high degree of linguistic autonomy, as in Switzerland, Belgium, and Czechoslovakia;

(b) The right of religious and linguistic minorities to establish and administer their own autonomous schools, fully supported by public funds, as in Belgium and the Netherlands; and

(c) Separate “personal laws” – concerning marriage, divorce, custody and adoption of children, and inheritance – for religious minorities, as in Lebanon and Cyprus

3. *Proportionality* in political representation and civil service appointments, and

4. *A minority veto* with regard to vital minority rights and autonomy.

- *Liberal Consociationalism* - Rewards any political identity that emerges in democratic elections regardless of ethnicity or other religious groups.
- *Corporate Consociationalism* - A corporate - predetermined - consociation accommodates groups according to attributing criteria - (i) ethnicity, or (ii) religion - on the assumption that group identities are fixed and that groups are both internally homogeneous and externally bounded. The problems with this is that, (i) it privileges certain groups over others, and (ii) requires constant rebalancing of power.

February 12th

Rousseau:

- Modern forerunning of the idea of popular sovereignty.

Separation of Powers:

- Montesque thought that separation of powers derives its origin from England.
- “It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”
- *Magna Carta* - a charter of liberty and political rights obtained from King John of England by his rebellious barons at Runnymede in 1215, which came to be seen as the seminal document of English constitutional practice.
- What ended up as the “division of powers” in the United States, is what is now known as the “Presidential system.” How do we separate the powers of the US government? (1) Legislative, (2) Executive, and (3) Judiciary. Crucial point - Madison says - there is no democracy where the legislative and the executive power is embedded on the same person. Separation of powers was considered to be a crucial feature of what we now call a free society.
- American idea of separation of powers is that each branch - legislative, executive, judiciary - should have a minimal influence on each other branch. It shouldn't be completely separated. This minimal influence leads to *checks and balances*.

- Dependency on the people is the greatest form of checks and balances. Remember, the powers of the government is heavily dependent upon the people. If people don't approve of the government's power, then this government won't be in power 4 years later.
- Greed is the factor that civilizes people. People don't want to wage wars. Why? Because it's not socially very beneficial to everyone. Instead, they became greedy ONLY to further their economies - hence, trade started.
- According to Madison, what was the most dangerous branch of government - legislative, executive, or judiciary? Legislative. Why? They are a huge group and they are there together in the government as an assembly. Hence, their power together makes them arrogant. Legislative powers are, (1) less susceptible of clear limitations, (2) possibility to mask their encroachments through uncomplicated measures - they can hide their encroachments through their legislation; and (3) they have the "power of the purse." This purse gives them the ability to patronage. As in, they can blackmail others into giving in to their demands.
- The executive branch's power is carefully limited. Even the judiciary. Both of these governments are generally required to articulate their reasons. Whereas, the legislative can hide their intentions.
- In the Presidential system, each branch of government has independent political power. The president is elected by the people. The legislatures is ALSO elected by the people. Can the US Congress oust the US President? No. Why not? Because the President was elected BY THE PEOPLE. They cannot remove him.
- Features of the US Presidential System
  1. Direct election of the President (or direct-like)
  2. President - neither dismissible or appoint-able by a parliamentary vote.
  3. President directs the executive.
- The Senate can deny appointments the President wants. As in, if the President wants to appoint someone as a Senator, the Senate might disagree and it will not allow it.
- One thing that the President cannot do is he CANNOT introduce legislation. The President HAS to do with a friendly Senator or Congressman.
- What is the weakness of the Presidential form of government? (1) President is not the leader in the constitution. He cannot threaten a party in case there is a rebellion. He cannot just hold a public referendum to see if the public like the President's policies or the Congress's policies. (2) The congress is there for 2 years. Which means, the President could lose his majority within 2 years - and after 2 more years, is the Presidential election again. The President has a chance to lose his party's majority in the House of Congress.
- There are 2 parts to the executive - (1) dignified part - represent the unity of the nation.
- If you look at Canada, you will see that the coalition government becomes the cabinet system of government.
- The existing parliament should exist for the rest of their tenure.
- There are variances of parliamentary regimes.
- *King-Byng Affair* - In 1926, Mackenzie King requested the Governor General - Lord Byng - for the dissolution of the parliament. Lord Byng agreed.

- Should the Governor General be allowed to exercise his judgment? As in, should the Governor General have so much power that he can exercise his power according to his judgment? Such as in 1926 dissolving the parliament? Is the Governor General actually just good for nothing? Should they have some independent political function?
- The Presidential system of government comes from a parliamentary form of government.
- Most important remedy is to have a strong leader who would act as an arbiter between the political parties and the government.
- Authoritarian system suffers from the problems it unleashes at first. As in, it comes into form by saying that it will bring about numerous changes. These changes do come in but they are then the very changes that haunt the authoritarian regime.
- *Semi-Presidential System* - If there both a prime minister and a president, it is the president who assumes power. The prime minister is just an underling. The President controls the military - this gives him tremendous power.
- In a semi-presidential system, the head of state can dissolve the parliament. This gives the head of state tremendous power. But in a parliamentary system, the head of state CANNOT dissolve the parliament.
- In a parliamentary system, a counter signature is required to dissolve the parliament. The president signs. And then the prime minister MUST also sign the paper to dissolve the parliament. This is called *counter signature*.

|                                | Presidential system | Parliamentary system   | Semi-presidential system   |
|--------------------------------|---------------------|--|--|
| Character of the executive     | unitary             | dual   | dual   |
| Role of the president          | effective           | ceremonial   | effective  |
| Mode of election               | direct              | Can be both direct and indirect  | direct   |
| Position of the Prime Minister | n/a                 | Independent of the President;<br><i>President cannot dissolve the parliament without the consent of the PM</i> | Appointed by the President:<br>President <u>can</u> dissolve the government unilaterally (subject to conditions) |

|  |             |           |             |
|--|-------------|-----------|-------------|
| Relationship of the President with the Legislature | independent | Dependent | Independent |
|--|-------------|-----------|-------------|

February 26th

#### The Judiciary:

- Some may say that it's unconstitutional for the judiciary to allow to intervene in government action.
- Federalist 78 - "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them..."
  - You will find that the idea of judicial review - was already - in 1787 - pretty entrenched in the founding fathers of the United States.
- But in many constitutions in the world - like Canada - there is nothing in the constitution that will say that "The Supreme Court has the authority to review any legislation if it thinks it violates the constitution."

#### *Marbury v Madison (1803):*

- It is an iconic case and this is the case that establishes that judicial review follows from the idea of a written constitution.

- FACTS - On his last day in office, President John Adams named forty-two justices of the peace and sixteen new circuit court justices for the District of Columbia under the Organic Act. The Organic Act was an attempt by the Federalists to take control of the federal judiciary before Thomas Jefferson took office.

The commissions were signed by President Adams and sealed by acting Secretary of State John Marshall (who later became Chief Justice of the Supreme Court and author of this opinion), but they were not delivered before the expiration of Adams's term as president. Thomas Jefferson refused to honor the commissions, claiming that they were invalid because they had not been delivered by the end of Adams's term. William Marbury (P) was an intended recipient of an appointment as justice of the peace. Marbury applied directly to the Supreme Court of the United States for a writ of mandamus to compel Jefferson's Secretary of State, James Madison (D), to deliver the commissions. The Judiciary Act of 1789 had granted the Supreme Court original jurisdiction to issue writs of mandamus "...to any courts appointed, or persons holding office, under the authority of the United States."
- REMEDY - Order of mandamus asking James Madison to deliver that piece of paper.
- ISSUES - (1) Does Marbury have a right to the commission? (2) Does the law grant Marbury a remedy? (3) Does the Supreme Court have original jurisdiction to issue writs of mandamus? (4) Can Congress expand the scope of the Supreme Court's original jurisdiction beyond what is specified in Article III of the Constitution? (5) Does the Supreme Court have the authority to review acts of Congress and determine whether they are unconstitutional and therefore void?
- The THIRD ISSUE is the most important - Does the Supreme Court have the authority to issue writs of mandamus?
- The relevant law - "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." — U.S. Constitution, Article III, Section 2, Clause 2.
- The relevant law - The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts [...] and writs of mandamus [...] to any courts appointed, or persons holding office, under the authority of the United States. — Judiciary Act, 1789.
- Why aren't new laws given more importance than the Constitution? There are 3 points on this matter

(1) "This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The Government of the United States is of the latter description. " (the Constitution entrenches the separation of powers)

(ii) “The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?” (the separation of powers is made meaningful only if entrenched in a written constitution)

(iv) The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. (in order for a written constitution to be meaningful in protecting the separation of powers, it must be superior, paramount law)

- It is the province and the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.
- So what’s happening is that, this is saying that the Constitution is separating powers is necessary.
- Does it follow from this that the courts are the mechanism for constitutional interpretation?
- Do you think that it’s legitimate that the judiciary should interpret the constitution - which means do you support judicial review?
- Should we be more scared of the (i) people, or (ii) the judges?

#### European Constitutional Review:

- There is one court in Europe that deals with the constitution - it’s called the *Constitutional Court*.
- In North America - it’s the *doctrine of precedence* that guides court rulings. Whatever the higher courts decide - that decision (the ratio decidendi) becomes binding on all lower courts.
- In France - it was promised that there would be 75% tax on persons who earn more than €1 million. The European Constitutional Court says this was unconstitutional. Why? Because it creates inequality among households.

#### Structures of Constitutional Review:

- Generalized v specialized
- Dispersed v concentrated
- Concrete v abstract

- When your rights (i) are violated, and (ii) you have exhausted all measures of remedy - this is called individual constitutional complaint.
- Why would you want to empower the minority? Because you're empowering the minority to keep everyone happy. But at the same time - you're not saying that whatever the minority believes is correct.

March 5th

Canada:

- S 52 (1) - "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
- Until 1949, the highest judicial authority was the Judicial Committee of the Privy Council.
- SCC did have 9 judges then still - 3 from Ontario, 3 from Quebec, 2 from the four Western provinces, and 1 from the Atlantic provinces.
- SCC judges are appointed by the Governor General on the advice of the Federal Cabinet.
- The Supreme Court of Canada's role is entrenched in the constitution.
- The appellate jurisdiction of the Supreme Court (as opposed to the United States Supreme Court) deals with ALL branches of the law and NOT just criminal law. Therefore, it acts as a powerful unifying factor in the Canadian legal system.
- All lower courts are bound by the decisions of the Supreme Court of Canada. The Supreme Court sets precedence and it's binding authority on all lower courts.
- *Reference jurisdiction* - Not traditionally a judicial function.
  - Lacks the adversarial and concrete character of a genuine controversy.
  - It is a function generally undertaken by the executive branch.
- JCPC Reference Appeal (1912) - "The answers are only advisory..."
- However, in practice, the reference opinions are treated in the same way as other judicial opinions.
- Constitutional convention has altered the character of the binding authority.

Supreme Court Act - Reference Jurisdiction:

- S 53 - (a) the interpretation of the Constitution Acts; (b) the constitutionality or interpretation of any federal or provincial legislation; (c) the appellate jurisdiction educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, or not the particular power in question has been or is proposed to be exercised.

Notwithstanding Clause:

- S 33 (1) - “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.”
- What does the federal government do when the provincial courts are changing the definition of the common law definition of marriage? What were the questions the federal government asked the Supreme Court?
  1. Is the proposal to change the definition of marriage intra vires the parliament’s power? Courts answered in the affirmative. S 91 (26) didn’t infringe on the provincial government’s power according to the definition it would have had in 1867. They used the “living tree” doctrine. You can also call this the “teleological” approach.
  2. Is it consistent with the *Charter*?
  3. Does it violate religious freedom pursuant to s 2 (a) of the *Charter*?
  4. Is the opposite sex requirement for marriage for civil purposes required under common law consistent with the *Charter*? As in, does the common law definition of marriage discriminate same-sex couples?
- Christopher Bruner - The court should interpret the notwithstanding clause.
- The notwithstanding clause is not something that is habitually used in Canada. The legislation has its own interpretation of what a right means and the Supreme Court of Canada has its own interpretation of what a right means.
- Should the legislature use the notwithstanding clause?