

Bill of Rights in Action



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TURNING POINTS IN PRESIDENTIAL CAMPAIGN ADVERTISING

Presidential campaign advertising began almost as soon as the United States was founded. While methods of political advertising have undergone major turning points over time, the goal has always been the same: Make your candidate look good and make your opponent look bad.

Early Campaign Advertising

The Founding Fathers at the Constitutional Convention in 1787 assumed the election of the president would be a quiet affair. This was certainly the case when the voters (only white male property owners) and the Electoral College elected George Washington to his two terms as the first president of the United States. Washington did not believe in political parties. He also established the tradition that presidential candidates would not campaign or personally speak for their own election but leave that for supporters to do.

However, by the time Washington decided not to run for a third term, groups with strong political differences had begun to form around certain men like John Adams and Thomas Jefferson. When these two men faced off in the presidential election of 1796, campaign advertising also began.

In that election, advertising took the form of partisan (one-sided) newspapers, posters, and printed handbills distributed to voters. This advertising was often as extreme (and as negative!) as modern-day political attack ads. Jefferson's supporters attacked Adams for wanting to be a king. Adams's allies accused Jefferson of being an atheist, radical thinker, and enemy of the Constitution. Although many made speeches for and against each man, neither candidate himself campaigned in public.

Adams won in 1796, but the campaigning became even more vicious when they ran against each other again in 1800. One pro-Adams newspaper declared that



Library of Congress

This photograph of Abraham Lincoln was taken before he delivered a speech in 1860 at Cooper Union in New York City where he stated his opposition to the spread of slavery into U.S. territories. Lincoln then became the Republican presidential nominee, and the photo became part of his campaign.

if Jefferson was elected, "murder, robbery, rape, adultery and incest will be openly taught and practiced." Jefferson won anyway.

By the time Andrew Jackson won his first term in 1828, political advertising had taken other forms, including parades with images of "Old Hickory," and "booming rallies" with generous supplies of whiskey. More importantly, Jackson's supporters created America's first modern political organization, the Democratic Party, to raise money and persuade voters to join the party.

In 1840, the Whig Party's William Henry Harrison was the first presidential candidate to campaign personally for his own election. Slogans began to be popular. Harrison's was "Tippecanoe and Tyler Too," a reference to his 1811 military victory against the

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This and Some Future Issues of *Bill of Rights in Action* Will Only Be Available Electronically!

Starting in fall 2020, we plan to publish two issues of the quarterly *Bill of Rights in Action* in electronic format only and two issues in print and electronic format. To receive notification of when the electronic edition is available for download, sign up at www.crf-usa.org/bill-of-rights-in-action.

**SPECIAL
NOTICE**



The T.V. ad "Peace, little girl" (aka "Daisy") only aired once on nighttime television in 1964 but had enormous impact on the election. Today, one presidential T.V. ad can air hundreds and even thousands of times.

Shawnee Chief Tecumseh at the Battle of Tippecanoe (in present-day Indiana), and to his vice-presidential running mate John Tyler.

During the 1860 presidential campaign, the opponents of Republican Abraham Lincoln laughed that he was "the ugliest man in the Union." To counter these insults, Lincoln enlisted the help of photographer Mathew Brady. At that time, photography was still a new technology. Brady retouched his photograph of Lincoln to make Lincoln's collar higher (to hide Lincoln's long neck) and to make him look more statesmanlike. Lincoln made heavy use of the photograph in posters, and popular magazines published it, too. Lincoln partially credited Brady for his 1860 victory.

By the early 1900s, political parties found other innovative ways to attract voters, including many that they still use today. Woodrow Wilson was the first presidential candidate to use the mail for campaign advertising. And as railroads reached into even remote places of the United States, candidates launched "whistle stop tours" to make speeches across the country.

The Radio Turning Point

By the 1920s, presidential candidates could speak on the radio to millions of voters at one time. At first, the candidates paid radio stations to broadcast their long speeches. But soon, candidates shortened their promotions to one-minute political ads. By the 1932 election, the campaigns of Herbert Hoover and Franklin D. Roosevelt spent \$5 million on radio ads.

Television Turning Points

A revolutionary turning point in paid presidential advertising happened in the 1950s with the use of television in national politics. Short TV political ads, called "spots," became the dominant and most expensive form of campaign advertising, and they still are.

The first paid TV presidential advertisements was a series of 40 spots broadcast in 1952 by Republican

Dwight Eisenhower's campaign against Democrat Adlai Stevenson. In each 20-second spot, Eisenhower responded to a question from a voter. The producers added biographical material on "The General" or "Ike," as he was called then, in the series of the campaign called "Eisenhower Answers America."

Another TV first happened during the 1960 presidential contest when Republican Richard Nixon, Eisenhower's vice president, and John F. Kennedy, a Massachusetts Democratic U.S. senator faced off in the first-ever televised debate. In their first of four debates, Nixon looked like he needed a shave and appeared nervous as sweat dripped from his upper lip to his chin. Young, confident Kennedy, on the other hand, wore TV makeup and looked relaxed in front of the camera.

A poll after that first debate revealed that those who watched it on TV thought Kennedy had won; those who listened on radio thought Nixon had won. Media pundits concluded that, on TV, how candidates looked and acted was more important than what they said.

Democrat Lyndon Johnson's 1964 "Daisy" campaign ad caused political shockwaves when it aired. Johnson was running against Arizona Senator Barry Goldwater, a conservative Republican who had suggested the U.S. fight the Vietnam War with low-yield "tactical" nuclear weapons that would destroy forests that gave cover to Vietnamese supply trails. The spot never mentioned Goldwater's name, but clearly referred to his nuclear-weapons remarks: It began with the image of a little girl counting petals on a daisy and ended with a nuclear blast. This spot had a devastating emotional impact.

This TV spot was so controversial that the Johnson campaign aired it only once. But widespread TV news coverage of it effectively labeled Goldwater as "trigger happy" and weakened his campaign.

Though Richard Nixon had lost against John Kennedy in 1960 he ran again for president in 1968 and won against Minnesota Democratic U.S. Senator Hubert Humphrey. This time, the Nixon campaign pioneered a series of live TV forums, in which local reporters and residents asked Nixon questions. Well-prepared for TV by then, he handled himself well, confidently relying on his extensive knowledge of American and foreign policy. Called "The Nixon Answer," this was an early version of the televised "town halls" used widely today.

The PAC Turning Point

In the 1980s, a new phenomenon hit presidential campaign advertising on TV. Political action committees, or "PACs," not officially connected to any candidates or party, began to air TV spots. In many cases, these spots unfairly criticized the opponent of the candidate whom the PAC preferred.

In the 1988 presidential campaign, a PAC that favored Republican George H.W. Bush, Reagan's vice

president, financed the “Revolving Door” spot. This ad criticized Democrat Michael Dukakis, the governor of Massachusetts, for a state prison furlough program that allowed temporary short-term parole of prisoners.

The ad showed actors playing convicts going in and out of prison through a revolving gate. It gave the false impression that Governor Dukakis furloughed 268 first-degree murderers who then escaped and committed other horrendous crimes. In fact, during a ten-year period, four convicts escaped from the furlough program, and only one committed a serious crime. But the ad’s message was that Dukakis was soft on crime.

During the 2004 campaign between President George W. Bush and U.S. Senator John Kerry, Swift Boat Veterans for Truth, another PAC, accused Kerry of lying about his Vietnam War record. Kerry was a Navy commander of small-armed boats called swift boats. He won a number of medals for his combat experience on Vietnamese rivers but later became a critic of the war. The PAC-funded TV ads, known as the “Swift Boat” spots, alleged that Kerry lied to receive his medals. After the 2004 election, which Kerry lost, exhaustive fact-checking proved that he had earned the medals, and none of the charges in the spots were true.

The Social Media Turning Points

Paid advertising on social media took off in the 2008 presidential election between Democrat Barack Obama and Republican John McCain. Video ads online became longer and featured entire speeches, live town hall meetings, and biographies. They were also much less expensive to show on the internet than as commercials on TV.

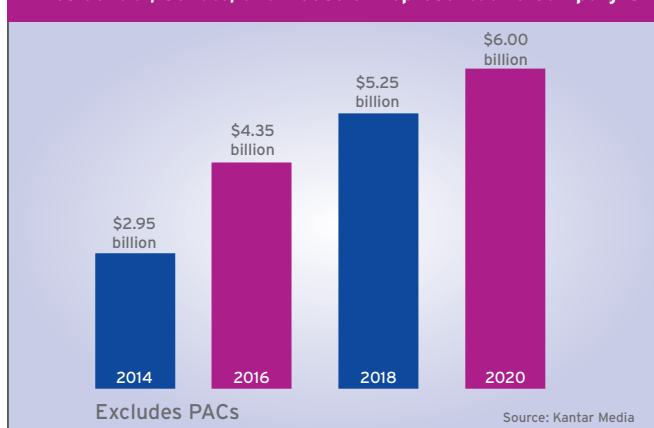
Campaigns encouraged young people to click on videos that had both political and entertainment content, like Obama’s “Yes, We Can,” shown on YouTube. This innovative video used entertainers to put Obama’s words to song. Viewed millions of times online, the campaign used it to promote voter registration among young people and to raise money.

Campaigns made use of Facebook’s multimillion users to forward links to paid ads. Twitter, limited at the time to only 140 characters in any tweet, enabled candidates to bypass the traditional media and communicate directly with followers. However, since anyone using social media can post comments and videos about a candidate, campaigns discovered they no longer had complete control of their messages and agenda.

Turning Points in the 2016 Election Campaign

Donald Trump had a background in marketing and entertainment, helping him to master Twitter as a new way to campaign when running for president in 2016. He carried on daily conversations with growing numbers of supporters at virtually no cost. He frequently made claims backed by no evidence at all, such as saying that supporters of his Democratic opponent Hillary Clinton had firebombed one of his campaign offices. He dismissed fact-checking of his tweets by the press as “fake news.”

U.S. Political Campaign Ad Spending 2014-2020
Presidential, Senate, and House of Representative Campaigns



Trump also took campaign rallies to a new level. His rally speeches highlighted the plight of factory workers whose jobs had gone to foreign countries. He blamed the trade agreements of previous presidents, as well as undocumented-immigrant workers, for taking the jobs that remained in the United States. His rallies swelled with enthusiastic supporters. They loved his “America First” approach, attacks on the media, and slogan: “Make America Great Again.”

Social media also enabled some troubling advertising during the 2016 election campaign. Russian operatives with ties to the Russian government in Moscow posed online as Americans to create thousands of accounts on Facebook and other social media. They then created online groups related to various political causes. They posted messages and paid for ads that included disinformation (falsehoods) about Hillary Clinton; support for Donald Trump; and the stoking of antagonism over immigration, race, and religion. The Russians’ goal seemed to be to provoke political and social conflict among U.S. voters.

After the election, special investigations by the U.S. Justice Department and U.S. Senate found evidence of Russian interference in the 2016 election, mainly through social media platforms. For example, Twitter identified over 3,800 accounts linked to the Russian operatives. Facebook estimated that 126 million Americans might have viewed posts by the Russian operatives between January 2015 and August 2017. But in a congressional hearing, Facebook’s general counsel (attorney) testified that only about 11 percent of the Russians’ ads were related to the election. He also testified that only 1 in 23,000 stories in Facebook’s News Feed were the work of suspected Russian accounts. That is 0.004 percent of News Feed stories. As former CIA director Michael Hayden noted in 2018, the impact of Russian social-media activity is “not just unknown, it’s unknowable.”

Should Campaign Advertising Be Regulated?

Most scholars have concluded that campaign advertising generally is good for democratic elections. Positive ads provide information, although biased, about the candidate and his or her views on election issues.

Even negative ads that contrast the “right” views of one candidate versus the “wrong” views of an opponent might be valuable when candidates provide competing ads. Voters say they dislike negative political ads but tend to remember them more than positive ones. The impact of negative ads on voter decisions and turnout varies from little to significant in different elections.

But what about negative TV spots and social media posts that include disinformation, rumors, conspiracy theories, racist or sexist remarks, personal attacks, and outright lies? Any political advertising by foreign countries is already illegal, and U.S. government efforts are underway in the 2020 election to stop them. But should any campaign advertising by American PACs be regulated?

As early as 1927, Congress prohibited government censorship of political broadcasts on radio. In 1934, Congress created the Federal Communications Commission (FCC) to regulate radio and later television broadcasts. To protect Americans as consumers, the FCC made falsehoods in commercial TV ads unlawful. But the First Amendment’s freedom of speech allows lies in political ads to remain legal, as long as the lies are not defamatory, or untrue statements that harm someone’s reputation. And ever since a Supreme Court case in 1964, it is more difficult to prove defamation against a public figure, such as a political candidate, than it is to prove it against a private person, like most of us. Over time, Congress has left it up to television and social media companies to provide their own guidelines for unacceptable content.

After the 2016 election, Republicans complained that social media companies were unfairly censoring their political advertising. Democrats were dissatisfied that the companies were not enforcing their guidelines enough against advertising full of disinformation and lies.

In 2019, Twitter responded to the criticism about social media handling of political advertising by banning it entirely. Political campaigns, parties, and independent groups could no longer buy ad space that referred to a candidate, political party, government official, election, proposed law, government regulation, or a court deci-

sion. However, the ban did not stop false tweets by individual users. Early in 2020, Twitter implemented a new policy of fact-checking tweets. President Trump has an estimated 80 million Twitter followers. Recently, Twitter added fact-check links to a few of his tweets but did not remove the tweets. Twitter also labels or restricts tweets that are designed to interfere with election processes or to suppress votes.

Facebook has two billion users worldwide. As a private company, it can censor whatever it wants. But it has chosen not to censor political ads. In 2020, however, Facebook’s policy was not to allow new political ads on its platform a week before the election. After Twitter’s announcement of its fact-checking policy, Facebook’s chief executive Mark Zuckerberg declared that his company would not become the decider of truth or ban ads containing outright lies. While many civil-liberties advocates agreed with him, others charged that Facebook profited by allowing the spread of disinformation that misleads voters. Nonetheless, Facebook’s 2020 policy was to remove or attach labels to posts that intentionally misinform voters about lawful voting methods.

Google, the company that owns YouTube, bans ads that make obviously false claims. Some social media companies ban political ads aimed at specific groups or require disclosure of who is funding the ads. However, opponents of those policies argue it should be up to lawmakers in Congress, not private companies, to regulate the content of social media political advertising.

WRITING & DISCUSSION

1. What do you think was the most important turning point in presidential campaign advertising? Why?
2. Current U.S. law allows the government to ban lies in commercial advertising but not in political advertising. Do you agree with this policy? Why or why not?
3. Who do you think should ban or regulate political advertising on social media companies like Twitter: Congress, or no one? Why?

ACTIVITY: Twitter vs. Facebook

Which has the better policy for political advertising?

1. Divide the class in two. Using evidence from the article, one side prepares arguments for Twitter’s policy on political ads and against Facebook’s policy; the other side does the same for Facebook and against Twitter. Students can do this in one class session or as homework.
2. Once students have prepared, in the next class session hold a debate between the pro-Twitter group and the pro-Facebook group on the following debate question:

Should social media companies ban political ads?

3. Flip a coin to see which side will present first. The students from one side and then the other will take turns, one student speaking at a time and each speaking from 30 seconds up to one minute. The teacher moderates the debate.
4. Once all students have had an opportunity to speak, students discuss if there might be a middle ground, based on what they have heard in the debate.

WORKPLACE EQUALITY FOR LGBT PEOPLE: *BOSTOCK v. CLAYTON COUNTY*



The “Protect LGBTQ Workers Rally” in front of the United States Supreme Court on the morning of October 8, 2019, when oral arguments were heard in the case of *Bostock v. Clayton County*.

What happens when an employee at a company casually mentions he is part of a gay persons’ softball league? Or when a long-time employee reveals to her employer that she is transgender? These employees did not expect to be fired for these actions. But that is what happened to two of the plaintiffs (people suing) in the case of *Bostock v. Clayton County*, for which the Supreme Court of the United States issued its landmark decision on June 15, 2020.

Landmark cases like *Bostock* are cases with history-changing significance. They usually change the way the government treats people by expanding a constitutional protection of individual rights. One example is *Loving v. Virginia* (1967), a case in which the Supreme Court held (decided) that state laws banning interracial marriage were unconstitutional. Another is *Roe v. Wade*, a 1973 case that restricted the government’s power to interfere with a woman’s right to privacy in choosing whether to have an abortion. And landmark cases also include the 2008 case of *District of Columbia v. Heller* that affirmed an individual’s fundamental right to own firearms for lawful purposes, like home defense, under the Second Amendment.

Bostock was not the first case to recognize the rights of lesbian, gay, bisexual, and transgender (LGBT) people. In two other landmark decisions, the U.S. Supreme Court expanded constitutional protections for LGBT people: *Lawrence v. Texas* in 2003 (protecting the right to privacy of same-sex couples equal to that of other couples) and *Obergefell v. Hodges* in 2015 (protecting the fundamental right of same-sex

couples to marry). In both these cases, the court showed increasing willingness to affirm the civil rights of gay and lesbian people.

Federal government policies related to the employment rights of LGBT people have not always shown a similar willingness. Congress has yet to pass a law banning hiring and employment discrimination based on sexual orientation (covering lesbian, gay, or bisexual people) and gender identity (covering transgender people). But presidents have used executive orders from time to time in this area. President Bill Clinton issued an executive order to protect federal employees’ rights based on sexual orientation. And President Barack Obama similarly issued an order against discrimination in hiring based on gender identity.

State laws have also been inconsistent. The state of Pennsylvania banned sexual-orientation workplace discrimination in public sector (government) jobs in 1975. Since then, 21 states and three territories (Washington, D.C., Guam, and Puerto Rico) outlaw employment discrimination based on gender identity and sexual orientation. And that means discrimination in both the public and private sectors. Pennsylvania and Michigan currently have outlawed such discrimination through their governors’ executive orders. But more than half of U.S. states have no such protections written into law.

Facts of the Cases

Into this patchwork of laws and policies, three cases arose from people fired from their jobs simply for

expressing themselves as members of the LGBT community. These three firings became lawsuits that eventually became the case we know as *Bostock v. Clayton County*.

In one case, Gerald Bostock was a child welfare advocate who worked for the juvenile courts in Clayton County, Georgia. [The case, of course, gets its name from the parties involved: the one suing (plaintiff) and the one being sued (defendant).] He began working in this job in 2003. Ten years later, he joined a gay softball league and promoted it at work. Soon after, he was fired. The reason his employer gave was conduct “unbecoming” of a county employee.

In another case, a man named Donald Zarda was a skydiving instructor. In 2010, he told a female customer that he was gay in order to make her more comfortable being strapped close to him during instruction. Soon after, he was fired. The company argued that Zarda was fired for inappropriately touching the customer. Zarda maintained (and the federal court agreed) that it was discrimination because he said he was gay.

In a third case, Aimee Stephens worked at a funeral home in Michigan. When she was hired, she presented herself as a man, which was what she had done her whole life. But throughout her adulthood, Stephens privately identified as a woman. After working for the funeral home for two years, she sought clinical help for depression. A counselor advised her to begin living as a woman, and Stephens then came out to her wife and family as transgender.

Stephens also informed her employer that she would begin living and working as a woman. Stephens’s employer believed that the Bible teaches that sex — male or female — is unchangeable. The employer fired Stephens, telling her “this is not going to work out.”

Bostock, Zarda, and Stephens all filed lawsuits against their employers under Title VII of the Civil Rights Act of 1964. Title VII prohibits hiring, firing, and other treatment of employees based on “race, color, religion, sex, or national origin.” To bring a legal action against an employer under Title VII, the employee first files a complaint with the Equal Employment Opportunity Commission (EEOC). Title VII created the EEOC to handle employment discrimination cases. If either side appeals the EEOC’s decision, the case goes to federal court, and potentially up to the U.S. Supreme Court.



L to R: Gerald Bostock and Aimee Stephens, both of whom were fired from their jobs after they told their employers that they were either gay (Bostock) or transgender (Stephens).

Sexual orientation and gender identity are not listed in Title VII along with race, color, religion, sex, and national origin. The question for the EEOC, the federal district courts, and ultimately the Supreme Court in these three cases was whether “sex” would cover discrimination based on sexual orientation and gender identity.

The three plaintiffs’ cases made their way to federal appeals courts.

In Gerald Bostock’s case, the court held that Title VII did not prohibit Clayton County from firing him for being gay. In Donald Zarda’s case, however, a different court held that sexual orientation is protected under Title VII. And in Aimee Stephens’s case, yet another court held that Title VII does protect workers from gender-identity discrimination.

When different federal appeals courts disagree with each other on the same legal question, there is a good chance that the U.S. Supreme Court will decide to hear the case. This is especially true on questions of great social or economic importance nationwide.

The Supreme Court decided to hear the cases. The court heard oral arguments for all three cases together on the same day, October 8, 2019.

The Decision

The single question the Supreme Court had to answer was this: Does Title VII’s employment protection based on sex also cover sexual orientation (for Bostock and Zarda) and gender identity (for Stephens)?

In a 6-3 decision, the Supreme Court answered the question yes. Writing for the majority, Justice Neil Gorsuch said:

Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.

Gorsuch was joined by Chief Justice of the United States John Roberts, as well as Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.

In his reasoning, Justice Gorsuch outlined the role of the court in these cases. Unlike many other landmark cases, the court here was not applying part of the U.S. Constitution or its amendments. Instead,

Gorsuch explained that the court was interpreting a statute (a law written by legislators). The court was, in other words, exercising its constitutional power of *judicial review*: the task of the court not to make law but to say what the law is.

An important part of *statutory interpretation* is for the court to define terms in the statute. The part of Title VII of the Civil Rights Act (CRA) at issue stated that it is “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . because of such individual’s race, color, religion, sex, or national origin.”

Here, Gorsuch sought to define terms according to their “ordinary public meaning” in 1964, the year the CRA was passed. Gorsuch first defined the term *sex* as a word referring only to “biological distinctions between male and female.”

Then he turned to the phrase *because of* in the CRA. Gorsuch argued that “because of” is traditionally defined — in legal terms — as *but-for* causation. In other words, a but-for cause is one that changes the outcome of an event. And events can have multiple but-for causes, like a car accident in which one car runs a red light while the other makes an unsafe left turn. But for *either* of those causes, the accident would not have happened.

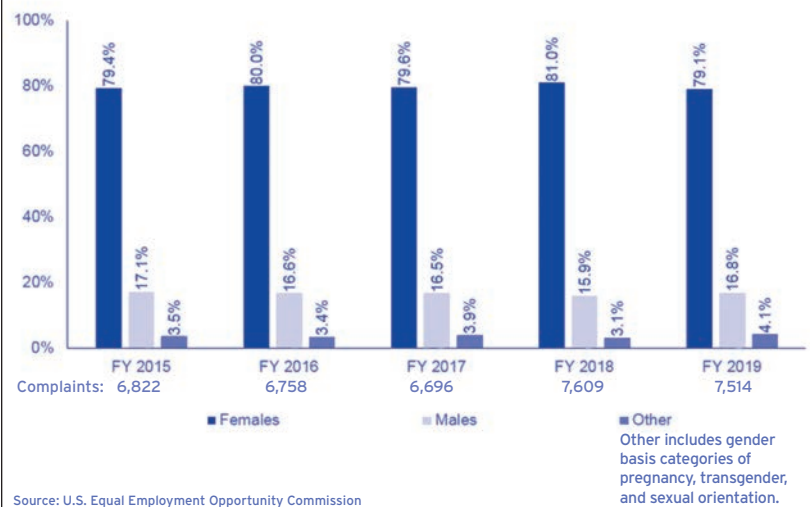
Gorsuch also noted that the term *individual* in the CRA shows that the law was not meant to apply to groups. In other words, each case of alleged employment discrimination is judged for how an employer treats an individual employee, regardless of how the employer generally treats a class of persons, such as LGBT persons.

With the key terms defined, Gorsuch applied them to the cases before the court. It is the sex of each of the three employees, he said, that was a but-for cause for the employers firing them. It does not matter that there may be other but-for causes, such as an employer’s open homophobia (hostility to gay men and lesbians) or transphobia (hostility to transgender people), which are not covered in the plain language of the CRA.

In fact, an employee’s homosexuality or transgender status is irrelevant to the majority’s decision. “That’s because,” wrote Gorsuch, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” If Gerald Bostock, for example, had been biologically female, then Bostock’s attraction to men would not have seemed “unbecoming” (offensive) to Bostock’s employer.

The situation is similar with a transgender employee. Gorsuch gave the example of an employer who fires someone like Aimee Stephens who now

Sexual Harassment Complaints Filed With the U.S. Equal Employment Opportunity Commission by Gender of Filer - Fiscal Year 2015 to 2019



identifies as female but identified as male at birth. That same employer then keeps another employee who has identified as female since birth. The employer would then be firing the employee who changed identifications precisely because of that employee’s sex identified at birth. And that “individual employee’s sex” would play “an unmistakable and impermissible role” in the firing.

Some of the most controversial issues in society surrounding transgender identities have dealt with transgender people using gendered public bathrooms and school locker rooms or participating in gender-specific sports. But the majority opinion limited the reach of the *Bostock* case. “Under Title VII, too,” wrote Gorsuch, “we do not purport to address bathrooms, locker rooms, or anything else of the kind.” The case only relates to employment discrimination.

Dissenting Opinions

Justice Samuel Alito wrote a hotly worded dissent, joined by Justice Clarence Thomas. Alito called it a “radical decision” and rejected the way Gorsuch applied the word “sex” from the CRA. He argued that if Congress had meant for the term *sex* to cover any category of people other than male and female, it would have said so:

[T]he question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not.

Alito cited numerous attempts by Congress over the years to amend the CRA to add “sexual orientation,” as well as “gender identity,” to the list of protected classes (along with race, color, religion, etc.). All these attempts have failed, either because both houses of Congress did not pass them, or because they never made it out of a congressional committee for a vote.



The majority opinion in the *Bostock* case was written by Associate Justice Neil M. Gorsuch.

“Today, many Americans know individuals who are gay, lesbian, or transgender,” wrote Alito, “and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is.”

In a separate dissent, Justice Brett Kavanaugh argued that the underlying issue is separation of powers in the Constitution. “We are judges” wrote Kavanaugh, “not members of Congress.” And it is Congress’s power to amend Title VII, if it chooses, and not the Supreme Court’s.

A Battle Won

Justice Gorsuch was Republican President Donald Trump’s nominee to replace Justice Antonin Scalia who died in 2016. Justice Scalia is still known as one of the leading thinkers in the legal philosophy of *textualism*. A textualist interprets a law according to the meaning of the law’s text at the time the law was written.

Textualism is almost always associated with more socially conservative viewpoints, and Justice Gorsuch is a textualist. So many conservatives and liberals alike were surprised by Gorsuch’s opinion. In the *Bostock* case he used a textualist approach to reach the majority’s decision, even though the dissenters thought he was too literal in looking at the term *sex* from the CRA.

For the three employees, however, as well as for millions of LGBT people across the country and their allies, the majority’s decision got the law right. Tragically, only one of the three employees survived to see the decision made. Donald Zarda died in 2014 while BASE jumping (leaping from a great height with a parachute). Aimee Stephens died of kidney failure in May 2020, just a month before the decision was handed down.

Gerald Bostock was the survivor. “I can’t say loud enough,” Bostock said in an interview, “how proud I am that I was able to stand by Aimee Stephens and the Zarda family during this battle in our fight for equality.”

WRITING & DISCUSSION

1. Describe how the three cases arrived at the Supreme Court.
2. The three employees in this case were known for satisfactory or even outstanding work performances. They did their jobs well. Would it have made any difference in the case if they had been unsatisfactory workers? Why or why not?
3. Legal experts for the Service Employees International Union wrote this response to the case: “But yesterday’s ruling was not only a victory for LGBTQ workers. *Bostock* was also a victory for heterosexual cisgender* women who . . . work in traditionally male-dominated fields.” Why do you think they made this argument? [*cisgender (*adjective*): relating to a person whose gender identity matches their sex at birth.]

ACTIVITY: Assessing the Case

After the *Bostock v. Clayton County* decision, many people on the political right and left, expressed their agreement or disagreement with the decision. In a small group or online breakout room, discuss each of the two opinions below. Decide as a group which description of the *Bostock* case your group thinks is more accurate. Use evidence from the article in your decision and choose a spokesperson to report back to the whole class.

1. The Court has now rewritten [Title VII of the Civil Rights Act of 1964] itself. (*The Wall Street Journal* Editorial Board, June 15, 2020.)
2. The opinion in *Bostock v. Clayton County* fulfills the best promises of textualism. (Sarah Rice, assistant attorney general for the state of Maryland, June 15, 2020.)



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twitter.com/crfusa



linkedin.com/company



pinterest.com/crfusa



youtube.com/crf2crf

HEIAN JAPAN AND THE TALE OF GENJI



Wikimedia Commons

This portrait of *The Tale of Genji* author Murasaki Shikibu was painted by Tosa Mitsuoki in the 17th century, several centuries after Murasaki Shikibu lived and wrote.

Written by a noblewoman of the imperial court of Japan in the 11th century of the Common Era (CE), *Genji Monogatari* or *The Tale of Genji*, as it is more commonly known in English, was the first novel in world literature. The author Murasaki Shikibu (Lady Murasaki) wrote it over the course of several years. It is widely thought to have been completed by 1020 CE. Therefore, it predates Sir Thomas Malory's *Le Morte d'Arthur*, often considered the first novel, which was not published until 1485 CE.

The Tale of Genji is set during the Heian (pronounced HAY-un) period (794-1185 CE) of Japanese history. The period gets its name because Heian-kyo became the capital city of Japan. Today, the city is known as Kyoto. The novel describes the life and loves of its title character Genji as he maneuvers through the complex social and political hierarchies of the Japanese imperial court during the late classical period.

Heian Power and Government

As was the custom for many centuries, all the emperors of Japan belonged to the large Yamato clan (large, extended family group). It is world history's longest running single dynasty. However, by the time that *The Tale of Genji* was written, the emperors of Japan were largely ceremonial. They had no real power. Instead, the court nobles of the Fujiwara family clan served as regents, advising the emperor and other high-ranking government officials.

The Fujiwara clan maintained its power through complex intermarriages with the Yamato clan. Fujiwara

noblewomen of the court were educated and highly literate in order to be found interesting to the emperor. This way, they could win the emperor's affection and further secure the Fujiwara family's court position. It was into this world that Lady Murasaki was born, educated, and married.

Heian Culture and Literature

The Heian period of Japan is often considered the golden age of classical Japan. The imperial court of the prior Nara period (710-794 CE) adopted many aspects of Chinese culture and written language. During the Heian period, distinctly Japanese cultural developments flourished.

Official government documents remained written in scholarly Chinese characters. Literature — including historical diaries, tales, poetry, and *The Tale of Genji* — was written in Japanese. And women wrote many of these Japanese texts. In a few cases, men wrote them using women's pen names.

The Heian period was also marked by a flourishing in the visual arts of hand scrolls, paintings, and extremely intricate clothing. Detailed descriptions of these are found throughout Lady Murasaki's novel.

Genji's Tale: A Synopsis

The tale traces the political and romantic adventures of Genji, the second son of the Japanese emperor at the time. In telling his tale, Lady Murasaki provides a window into Heian Japan's courtly life and culture. The

story's detailed prose and poetry is complex in style and offers Lady Murasaki's own commentary on political life and the role of stories in history.

Genji himself is based on a non-royal member of the court from the Minamoto clan, both in name and adventures. The Minamoto clan was one of the main rivals of the Fujiwara clan, of whom Lady Murasaki was a member.

The Tale of Genji is centered around the son of the emperor and his favorite, yet ill-fated, concubine (a woman in a polygamous society who lives with a man, but who has a lower status than the man's wives). A fortune-teller predicts that Genji will rise to great power. However, when Genji's mother dies, he is only three years old, and there is no one to advance his opportunities for a higher status position within the imperial court.

As Genji's mother was favored by the emperor, so is Genji himself a favorite. This draws the negative attention of the emperor's first wife, Lady Kokiden. Her son is the crown prince of Japan, the male heir to the throne.

When Genji's mother dies, the emperor is distraught and eventually marries a consort, Fujitsubo. Fujitsubo looks very much like Genji's late mother. Years later, Genji is smitten by her and eventually has an affair with her along with numerous other women at court. His amorous ways cause a scandal and Genji is eventually forced to leave the Heian court. Genji's father, the emperor, dies. The emperor's son from Lady Kokiden ascends to the throne.

While away, Genji marries and has a family. Eventually the crown prince abdicates, and the son of Fujitsubo is made emperor. While the crown prince claims this son as his own, he is actually the son of Fujitsubo and Genji from the affair they had before he left the capital in disgrace.

The Japanese Emperor



Japanese Emperor Naruhito and Empress Masako wave to supporters gathered for Naruhito's enthronement at the Imperial Palace in Tokyo in 2019.

The government of Japan today is a constitutional monarchy. There is a government with three branches: legislative, executive, and judicial. There is also an emperor who has an important ceremonial role but no real executive power. For example, the emperor is the head of the Shinto religion in Japan. The emperor in *The Tale of Genji* and today's emperor are part of a single dynasty, believed to be descended from Amaterasu, the sun goddess in the Shinto religion. Therefore, the emperor is considered divine but not the same as a god. In 1946, after the end of World War II and Japan's defeat, the United States ordered the emperor to renounce his divinity. But he did not renounce his descent from Amaterasu. The imperial family of Japan is the oldest single dynasty still in existence in the world.

When the new emperor learns of his true father, he has Genji return to the capital and elevates Genji's status. Genji's power and influence steadily grow in court, and Genji occupies most of his time in this section of the tale with the causes that will advance his children and grandchildren at court.

Genji and the Heian Court

The Heian Court described in *The Tale of Genji* was one obsessed with appearances and protocols. For promotions within the ranks of the imperial court, oftentimes beauty and popularity outweighed competence. Genji himself was greatly admired for his irresistible beauty. The admiration some felt for Genji caused jealousy in others, as in the case of

Lady Kokiden, and that admiration ironically contributed to Genji's hardships and difficulties advancing in the court.

In this excerpt from Chapter 7 ("Beneath the Autumn Leaves"), Genji is 19-years old and gives a dance performance at the imperial court. He has already had a shaky reputation at the court and was previously banished. Here, he has been invited back for the Autumn Festival where he received a mixed welcome from many courtiers. His performance at the festival would prove a turning point in his career:

On the day of the excursion the emperor was attended by his whole court, the princes and the rest. The crown prince too was present. Music came from boats rowed out over the lake, and there was an infinite variety of Chinese and Korean dancing. Reed and string and drum echoed through the grounds. Because Genji's good looks had on the evening of the rehearsal filled him with foreboding [remembering the fortune-teller's prophecy about Genji], the emperor ordered sutras [Buddhist scriptures] read in several temples. Most of

the court understood and sympathized, but Kokiden thought it all rather ridiculous. The most renowned virtuosos from the high and middle court ranks were chosen for the flutists' circle. The director of the Chinese dances and the director of the Korean dances were both guards officers [highly respected positions within the Heian court] who held seats on the council of state. The dancers had for weeks been in monastic seclusion studying each motion under the direction of the most revered masters of the art.

The chrysanthemums in Genji's cap . . . gave new beauty to his form and his motions . . . Then his dance was over, and a chill as if from another world passed over the assembly. Even unlettered menials . . . were moved to tears. . . . Genji was that evening promoted to the First Order of the Third Rank

The Downfall of the Heian Period

As the Heian period continued, the arts flourished. But the nobles of the court, including the once politically shrewd Fujiwara family, became increasingly isolated from the rest of Japanese life outside of the capital city.

In order to maintain control over the emperor, a tradition developed in which sponsors within the Fujiwara family chose the next emperor from the Yamato clan, rather than the emperor succeeding simply by birthright. Further weakening their positions, Yamato emperors

were often chosen as children and then forced to abdicate in early adulthood, giving up their thrones in favor of younger successors. This tradition not only weakened the emperor but encouraged deep rivalries within the larger Fujiwara clan for control of government.

Other rival families took advantage of these weaknesses. Two separate families from outside the capital city, the Taira and the Minamoto, especially exploited the weaknesses. A civil war broke out, and eventually the Taira clan and later the Minamoto clan overtook the Fujiwara clan. This ended the classical era in Japan and ushered in the medieval period, which was characterized by military rule of the shogun and samurai that most people associate with Japan prior to the modern era.

WRITING & DISCUSSION

1. How did women wield power within Heian culture? How did the story of *The Tale of Genji* itself reflect that role of women in classical Japan? Use evidence from the article in your answer.
2. What are examples of Chinese and Korean influence on Heian culture? Use evidence from the article in your answer.
3. Describe the effect of Genji's dance on different people within the Heian court. Why do you think Lady Murasaki's illustrated Genji's dance in such detail?

Tales of the Heike



Literature continued to be important in Japan after the ending of the Heian period. There are many tales of the samurai class and their quest for power. One of the most famous is *The Tale of the Heike* about the civil war between the Taira and Minamoto families. The above image shows six panels of a battle scene from the *The Tale of the Heike* painted in the 18th century.

ACTIVITY: Lady Murasaki's View on History

In the excerpt below from Chapter 25, Genji responds to an accusation that he is a liar by the young woman Tamakazura. He explains the value of fiction in contrast to “true” history. This passage is widely considered by scholars to be the voice of Genji speaking for the author Lady Murasaki herself, advocating for fiction, especially fiction written by women. Genji is 36 years old in this excerpt, and Tamakazura is 22.

1. Working with a partner, read the excerpt and discuss these questions: Speaking through Genji's voice in this excerpt, what is Lady Murasaki's central claim about the nature of fiction and history? What reasons does she give? Jot down notes from your discussion.

The rains of early summer continued without a break, even gloomier than in most years. The ladies . . . amused themselves with illustrated romances [fictional tales about the past]. . . .

Tamakazura was the most avid reader of all. She quite lost herself in pictures and stories and would spend whole days with them. Several of her young women were [also] well informed in literary matters. She came upon all sorts of interesting and shocking incidents (she could not be sure whether they were true or not), but she found little that resembled her own unfortunate career. . . .

Genji could not help noticing the clutter of pictures and manuscripts. “What a nuisance this all is,” he said one day. “Women seem to have been born to be cheerfully deceived. They know perfectly well that in all these old stories there is scarcely a shred of truth, and yet they are captured and made sport of by the whole range of trivialities [unimportant matters] and go on scribbling them down, quite unaware that in these warm rains their hair is all dank and knotted.”

[. . .]

She pushed away her inkstone. “I can see that that would be the view of someone much given to lying himself. For my part, I am convinced of their truthfulness.”

He laughed. “I have been rude and unfair to your romances, haven't I. They have set down and preserved happenings from the age of the gods to our own. The Chronicles of Japan [or the history of Japan] and the rest are a mere fragment of the whole truth. It is your romances that fill in the details.”

[...]

“Writers in other countries approach the matter differently. Old stories in our own [country] are different from new. There are differences in the degree of seriousness. But to dismiss them as lies is itself to depart from the truth. Even in the writ which the Buddha drew from his noble heart are parables, devices for pointing obliquely at the truth. . . . If one takes the generous view, then nothing is empty and useless.”

2. Using your notes on the excerpt and your understanding of the article above, write a paragraph answering the following questions: **Do you agree with Genji (Murasaki) that fictional tales about the past “fill in the details” about the past? Why or why not? In what ways did *The Tale of Genji* attempt to do this?** Use evidence from the article above to support your answer.

Source for excerpts used in this article and activity: Seidensticker, Edward G., translator. *The Tale of Genji*. By Murasaki Shikibu, Tokyo, Charles E. Tuttle, 1978, <https://web.archive.org/web/20170306033600/http://ota.ahds.ac.uk/headers/2245.xml>. Distributed by the University of Oxford under a CC BY-NC-SA 3.0 license.

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Standards Addressed

Turning Points in Presidential Campaign Advertising

National U.S. History Standard 8: Understands the institutions and practices of government created during the Revolution and how these elements were revised between 1787 and 1815 to create the foundation of the American political system based on the U.S. Constitution and the Bill of Rights. **Middle School Benchmark 4:** Understands the development and impact of the American party system (e.g., the election of 1800). **High School Benchmark 6:** Understands the factors that led to the development of the two-party system (e.g., the emergence of an organized opposition party led by Thomas Jefferson).

National U.S. History Standard 27: Understands how the Cold War and conflicts in Korea and Vietnam influenced domestic and international politics. **Middle School Benchmark 3:** Understands political and social characteristics of the Vietnam War (e.g., shifts of public opinion about the war). **High School Benchmark 3:** Understands the social issues that resulted from U.S. involvement in the Vietnam War (e.g., why the Vietnam War contributed to a generational conflict).

National Civics Standard 20: Understands the roles of political parties, campaigns, elections, and associations and groups in American politics. **High School Benchmark 6:** Understands the significance of campaigns and elections in the American political system and knows current criticisms of campaigns and proposals for their reform.

California State HSS Standard 8.3: Students understand the foundation of the American political system and the ways in which citizens participate in it. (6) Describe the basic law-making process and how the Constitution provides numerous opportunities for citizens to participate in the political process and to monitor and influence government (e.g., function of elections, political parties, interest groups).

California State HSS Standard 12.6: Students evaluate issues regarding campaigns for national, state, and local elective offices. (3) Evaluate the roles of polls, campaign advertising, and the controversies over campaign funding.

California HSS Framework (2016), Chapter 12, Grade Eight: “The conflicts between two views of how the newly independent country should move forward, articulated most vocally and explicitly by the ideological adversaries Alexander Hamilton and Thomas Jefferson, resulted in the emergence of a two-party system . . .” (p. 244).

California HSS Framework (2016), Chapter 16, Grade Eleven: Another way to address the question How did the Cold War affect ordinary Americans? is to have students consider how Cold War spending and ideology shaped people’s daily lives. . . .” (p. 411).

Common Core State Standards: SL 6-8/11-12.1, SL 6-8/11-12.3, RH 6-8/11-12.1, RH 6-8/11-12.2, RH 6-8/11-12.3, RH 6-8/11-12.4, RH 6-8/11-12.10, WHST 6-8/11-12.1, WHST 6-8/11-12.2, WHST 6-8/11-12.9, WHST 6-8/11-12.10

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National Civics Standard 18: Understands the role and importance of law in the American constitutional system and issues regarding the judicial protection of individual rights. **High School Benchmark 1:** Understands how the rule of law makes possible a system of ordered liberty that protects

the basic rights of citizens. **High School Benchmark 5:** Understands how the individual’s rights to life, liberty, and property are protected by the trial and appellate levels of the judicial process and by the principal varieties of law (e.g., constitutional, criminal, and civil law).

National U.S. History Standard 31: Understands economic, social, and cultural developments in the contemporary United States. **High School Benchmark 5:** Understands major contemporary social issues and the groups involved (e.g., the emergence of the Gay Liberation Movement and civil rights of gay Americans).

California State HSS Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (4) Explain the controversies that have resulted over changing interpretations of civil rights

California HSS Framework (2016), Chapter 16, Grade Eleven: “Students also examine the emergence of a movement for LGBT rights, starting in the 1950s” (p.421).

California HSS Framework (2016), Chapter 17, Grade Twelve: “Subsequent Court cases addressed the rights of . . . the lesbian, gay, bisexual, and transgender community” (p. 445).

Common Core State Standards: SL 11-12.1, SL 11-12.3, RH 11-12.1, RH 11-12.2, RH 11-12.3, RH 11-12.4, RH 11-12.10, WHST 11-12.1, WHST 11-12.2, WHST 11-12.9, WHST 11-12.10

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National World History Standard 19: Understands the maturation of an interregional system of communication, trade, and cultural exchange during a period of Chinese economic power and Islamic expansion. **Middle School Benchmark 2:** Understands different elements of Japanese feudal society (e.g., how the economic and social status of women and peasants changed in feudal Japanese society; how art and aesthetic values were cherished in the warrior culture in Japan and what this art reveals about Japanese values). **High School Benchmark 7:** Understands different social classes and gender roles in Japanese society (e.g., the role of social class, area, time, and age in determining women’s experiences).

California HSS Standard 7.5: Students analyze the geographic, political, economic, religious, and social structures of the civilizations of Medieval Japan. (5) Study the ninth and tenth centuries’ golden age of literature, art, and drama and its lasting effects on culture today, including Murasaki Shikibu’s *Tale of Genji*.

Common Core State Standards: SL.7.1, SL.7.3, RH.6-8.1, RH.6-8.2, RH.6-8.10, WHST.6-8.10, SL.9-10.1, SL.9-10.3, RH.9-10.1, RH.9-10.2, RH.9-10.10, WHST.9-10.10.

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People v. Matsumoto

A Murder Trial (featuring a pretrial argument on the Fourth Amendment) Grades 6-12

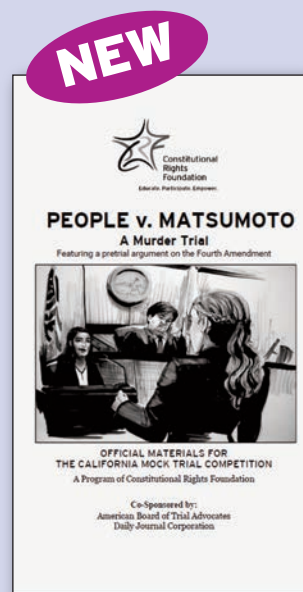
People v. Matsumoto is the trial of Bailey Matsumoto, the founder of a technology start-up that develops autonomous (self-driving) trucks. Bailey is charged with the murder of Bailey's spouse, Taylor Matsumoto.

The prosecution alleges that after Taylor's son Michael died in a tragic accident using one of Bailey's malfunctioning autonomous scooters, Taylor founded an organization called Parents Against Autonomous Driving (PAAD). Taylor's involvement in PAAD began to financially impact Bailey's business and Bailey's and Taylor's relationship rapidly deteriorated. Just days before Taylor was set to testify in support of a bill titled National Moratorium on Autonomous Technologies, Taylor was found dead, face down in Taylor's bathtub. The prosecution claims that Bailey murdered Taylor with premeditation in order to prevent Taylor from testifying and to stop PAAD from succeeding.

The defense argues that Taylor's death was not a murder but was instead an unfortunate accident. The defense argues that when Taylor arrived home the night before Taylor's body was found, Taylor was drunk and highly impaired from alcohol. Taylor proceeded to drink even more that evening and accidentally slipped on spilled champagne, hit Taylor's head on the bathtub trough, and drowned.

The pretrial issue involves the Fourth Amendment protection against unreasonable searches and seizures.

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People v. Meadows

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The high-interest case involves a high school basketball game that got out of hand. A coach is arrested for aggravated assault against a referee. The two had a history of antagonizing one another with texting and posting pictures on the Internet.

The case of *People v. Meadows* is both an exciting mock trial and an informative lesson on the important right to privacy, perhaps one of the most debated rights in American society. Students engage in a criminal trial simulation and learn the fundamentals of due process, proof beyond a reasonable doubt, and the jury system.

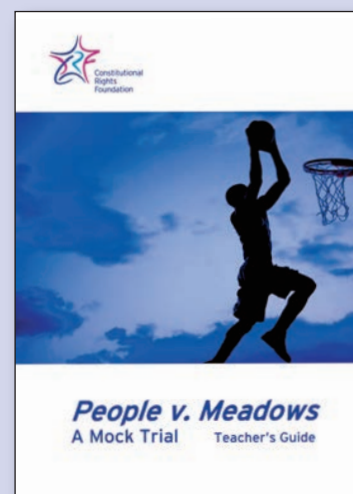
The *People v. Meadows* Teacher's Guide includes:

- A student handbook with instructions for jury selection, opening and closing arguments, direct and cross-examination of witnesses, and jury deliberation.
- Role descriptions for prosecutors, defense attorneys, judges, witnesses, and jurors.
- A complete mock trial with case facts, witness statements, and detailed teacher instructions for conducting the trial in almost any size classroom.
- "To Be Let Alone: Our Right to Privacy": A complete lesson plan with a reading and interactive discussion activity about what is and is not private on the Internet.

#10735CBR *People v. Meadows*, Student Handbook, 48 pp. : \$5.95

#10734CBR *People v. Meadows*, Teacher's Guide, 62 pp. : \$19.95

#10736CBR *People v. Meadows*, Student Handbook (Set of 10) : \$29.95



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CONSTITUTIONAL RIGHTS FOUNDATION NAMES AMANDA SUSSKIND PRESIDENT

Nationally Recognized Social Justice Leader Takes the Helm

Following a comprehensive and rigorous search, the Constitutional Rights Foundation (CRF) has named Amanda Susskind to be its President. Susskind assumed the position August 31, 2020.

"Amanda's years of civic engagement and experience in education on issues of social justice and equity make her the ideal steward of an organization designed to educate students, primarily in underserved areas, about what citizenship means, to empower them to be active participants in this democracy, and to amplify their voices in being thoughtful agents of change. We couldn't be more excited to have Amanda lead us in this challenging, demanding, and critical time of our country," states Kimberly Dunne, CRF's Board Chair.

Susskind joins CRF following nearly two decades as the Los Angeles Regional Director of the Anti-Defamation League where she oversaw a broad civil rights agenda encompassing anti-bias education and bullying prevention, Holocaust education, hate crime training for law enforcement, and constitutional rights such as free speech, separation of church and state, and equal protection.

Among her significant accomplishments were assembling civil rights and religious groups to promote ADL's Declaration of Los Angeles calling upon lawmakers to denounce xenophobia in the immigration debate and creating LA For Good, a coalition of

community leaders standing together to fight hate and create a more unified Los Angeles. She significantly increased foundation and corporate giving with co-branding partnerships and engagement opportunities.

Prior to ADL, Susskind served as a public and environmental law attorney. She is the recipient of numerous honors and the author of several publications. She is a graduate of Stanford University and Hastings College of the Law.

"Right now there cannot be a more important moment for CRF's mission and programs, designed to teach youth about their responsibilities in a democracy and to empower them to participate in and improve the communities around them. Amanda is uniquely positioned to lead CRF during this critical time in our democracy to educate generations of students to become informed, engaged, and active citizens," stated Peter Morrison, Chair, CRF Search Committee.

Susskind succeeds Marshall Croddy who was a major contributor at CRF for over 40 years serving as President since 2013.

"I am humbled to follow in Marshall's footsteps and honored to continue his legacy of dedication to creating the next generation of active and responsible citizens," said Susskind.



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SPECIAL NOTICE

Some Future Issues of *Bill of Rights in Action* Will Only Be Available Electronically!

We will publish two issues of the quarterly *Bill of Rights in Action* in electronic format only and two issues in print and electronic format. To receive notification of when the electronic edition is available for download, sign up at www.crf-usa.org/bill-of-rights-in-action.