

FEDERAL JURISDICTION
FALL 2009
PROFESSOR TARA GROVE

Assignments for the First Week

The assigned readings are from RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009) (hereafter "HART AND WECHSLER").

When you read the principal cases in HART AND WECHSLER, you should read both the text and the footnotes. However, when you read the assigned pages from the "Notes" in HART AND WECHSLER, you should focus on the text. You do not need to read all of the footnotes. If I would like you to read certain footnotes from the "Notes" section, I will specifically assign them.

For the first week of class, please prepare Assignments 1 and 2, as well as the two attached Problems. You should focus on Assignment 1 and Problem 1 for our first class on August 25.

Please note that, in the assignments, "CB" refers to the casebook HART AND WECHSLER.

Assignment 1:

Read: U.S. Const. art. III, art. VI, cl. 2.

(The Constitution is in your casebook beginning at CB ci.)

CB 283-87: *Sheldon v. Sill, Ex Parte McCardle*

CB 288-90, Note A(2): Mandatory Theories of Article III

CB 300-02, Note C(2): Constitutional Arguments

Read footnote 22.

Assignment 2:

CB 100-13: *Fairchild v. Hughes, Allen v. Wright*

Problems: Week 1

Problem 1

[These two problems are based on the “Pledge Protection Act,” which the U.S. House of Representatives passed on September 23, 2004 by a vote of 247-173, and again on July 19, 2006 by a vote of 260-167. The Senate, however, never approved the bill.]

Harriet Potter is a 10-year-old girl in public school in the state of California. The California Education Code requires that public schools begin each school day with “appropriate patriotic exercises” and provides that “the giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy” this requirement. To implement the California statute, the school district that Potter attends has promulgated a policy that states, in pertinent part: “Each elementary school class shall recite the Pledge of Allegiance to the Flag once each day.” Potter and her parents are atheists and object to the recitation of the Pledge (with its words “under God”), even though Potter, herself, can opt out of the daily recitation.

The Potter family (hereafter just called “Potter”) consults a lawyer, who believes they have a non-frivolous claim that requiring recitation of the Pledge (with the words “under God”) in public elementary schools violates Potter’s Establishment Clause rights. Potter decides to bring suit seeking 1) an order requiring that the school board desist from using the Pledge, at least in Potter’s classes, and 2) damages for constitutional harm suffered from having in the past been present during the official recitation.

The federal district court and the federal court of appeals rule against Potter on the merits. While Potter’s lawyer is preparing to file a petition for certiorari in the United States Supreme Court, Congress passes and the President signs into law a statute, codified at 28 U.S.C. § 1370A, which reads:

Notwithstanding any other provision of law, the Supreme Court shall not have jurisdiction to review, by writ of certiorari, appeal, or otherwise, any judgment adjudicating a claim pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance or its recitation.

Does the Supreme Court have the power to grant certiorari and review the decision in Potter’s case, notwithstanding this statute?

(The answer to this problem will depend importantly on how one reads *Ex parte McCardle*. Can Potter’s lawyer distinguish *McCardle*? Read carefully footnote *** at the very end of the *McCardle* opinion.)

Problem 2

Suppose that Potter has not yet brought the lawsuit (discussed above in Problem 1). Instead, before the family files their complaint, Congress enacts the following statute, 28 U.S.C. § 1370-A (entitled “The Pledge Protection Act of 2009”):

The original jurisdiction of the federal district courts, and the appellate jurisdiction of the Supreme Court, shall not extend to any claims pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance or its recitation.

Jane Kay Rowling, a concerned citizen and taxpayer in a different part of the state of California, was surprised by the passage of this Pledge Protection Act. She does not have any children in public schools in California, although she does frequently attend the local high school football games. But she has long been a member of the “Group to Abolish All References to ‘under God’ In and Around All Public Places and Buildings,” an organization that seeks to promote all constitutional principles, particularly the Establishment Clause. The group firmly believes that the recitation of the Pledge in public schools violates the Constitution. Ms. Rowling has heard about the *Potter* litigation, and is appalled at Congress for enacting a statute that might interfere with it. After consulting with her attorney, she decides to volunteer as a teacher’s aid at a nearby public elementary school, where the Pledge of Allegiance is recited (per school district policy) by the students on a daily basis. Ms. Rowling volunteers in the morning and, although she is not herself required to recite the Pledge, she has seen the students do so, and is infuriated by this infringement on their liberty.

Jane Rowling brings an action against the United States, challenging the constitutionality of the Pledge Protection Act, as a violation of the provisions of Article III conferring the “judicial Power” on the Supreme Court and the inferior federal courts. The local U.S. Attorney’s Office files a motion to dismiss, alleging that Ms. Rowling lacks Article III standing.

Consider the following issues:

1. Will the district court grant the motion to dismiss for lack of Article III standing? (Consider how this case compares to *Fairchild v. Hughes*. Also consider the “chain of causation” discussion in *Allen v. Wright*.)
2. If the district court denies the motion to dismiss, and allows the lawsuit to go forward, will Ms. Rowling prevail on the merits? (In this regard, consider the readings from Assignment 1, including *Sheldon v. Sill* and Justice Story’s commentary in *Martin v. Hunter’s Lessee*.)