

CASE COMMENT TRAINING

PREPARING FOR THE LAW JOURNALS PETITION

AGENDA

- What Is a Case Comment?
- The Case Comment Process & Strategies
- Using Authorities & Bluebooking in the Case Comment
- Maximizing Your Case Comment Score
- Last Thoughts & Strategies

Before we begin...

There are infinite ways to successfully approach the Case Comment portion of the petition. This training is meant to give you an idea of what the final product should look like, how it will be graded, and share some strategies past petitioners have used. The most important things to do are to make a plan, take breaks, find a process that works for you, and work hard.

WHAT IS THE CASE COMMENT?



THE COMMENT- AN OVERVIEW

- A Case Comment is **your analysis and opinion** on how a particular court ruled on a particular case.
- What you will receive: a source packet of about 200 pages
 - The first source in the packet will be the **lead case**. This will be the case on which you are commenting.
 - The remaining sources (probably about 30 or so) will be other materials that you will use in your Case Comment.
 - You **will not** receive a formal prompt. You'll analyze the lead case and source materials and come up with your own point of view.
 - This is a **CLOSED RESEARCH** exercise. The sources in the packet are the **ONLY** sources you are allowed to cite. Do not conduct **ANY** external research.

THE COMMENT- AN OVERVIEW

- Your Case Comment is limited to a MAX of 15 pages **total, including endnotes**.
 - You are not required to write 15 pages, but you should aim to write at least 10-12 for an effective Comment.
- Your Comment should be split relatively equally between text and endnotes. This is **NOT** a hard and fast rule, but you should pay attention to your balance.

THE COMMENT- AN OVERVIEW

Required Components

1. Title
2. Introduction
3. Part I - Factual & Legal Background
4. Part II - Case Description
5. Part III- Analysis and/or Solution
6. Conclusion

Other specifics: Times New Roman, size 12, double-spaced, one inch margins. Headers should contain **petition number** in upper right-hand corner

*****The comment MUST be formatted this way. Any deviation will result in a point reduction or possible disqualification.**

STRATEGIES FOR A SUCCESSFUL CASE COMMENT



HIGH-LEVEL PROCESS OF CASE COMMENT WRITING

- Start by reading the lead case VERY carefully. Take notes, highlight, etc.
 - Note whether you have any gut reactions or if anything strikes you about the case. Are there any lingering questions?
 - Make sure you identify the central holdings/big ideas, the reasoning and key facts leading to the holding, and any other interesting points.
- Begin reading other sources in the packet.
 - Keep track of how the sources impact the holding, analysis, or facts in the lead case. Jot down notes about the sources, including key passages that stand out
- Decide on a thesis once you've read the whole packet.
 - You may decide to re-read the lead case again just to check your understanding.
 - Pick a thesis and commit!
- Outline your Comment
- Write your Comment
- Leave plenty of time for editing!
 - It will be helpful to read the grading rubric as you are writing and editing to make sure you get the maximum score possible!

STRATEGIES FOR THE LEAD CASE

- Use those skills you've developed from reading cases all year to make sure you understand the lead case inside and out.
- This will be a source where it may be to your benefit to read the case several times throughout the process. Your understanding may change as you get more information from other sources in the packet.
- Use your gut! Make sure to remember your first impressions about the cases. These can be useful in forming a thesis later.

STRATEGIES FOR SOURCE MANAGEMENT

- Find a way to organize your sources.
 - Some people use color-coding; some use a spreadsheet; some use post-its or a note pad; some use physical piles of sources
 - An easy way to start could be to consider how the source relates to the lead case. Does it support it? Does it go against the holding?
- Take notes and/or highlight to ensure you know the key passages
- Some people found it helpful to create a Bluebook citation for each source as they read.

STRATEGIES FOR SELECTING A THESIS TO WRITE ABOUT

- There is NO right answer! You can take any perspective on the lead case, as long as you support it with the materials in the source packet.
- Last year, the top Case Comments all took different approaches. And it worked for each one.
- The Case Comment is about your *analysis, use of sources, and writing*.

SELECTING A THESIS - EXAMPLES

- The result was correct, but the court proposed no clear standard for guidance in the future; XYZ would be a workable standard.
- The result was incorrect; the court creates an exception to a constitutional provision that could swallow the rule.
- The result was correct, but it must be narrowly construed or it will have a chilling effect on remedial measures by the legislature.
- The result was incorrect; further, the court's standard is so complex that the outcome of future cases cannot be predicted; ABC would be a better standard.
- The result was correct, but the court never stated the real reason for its decision, which is X.
- The result was correct, but the court's reasoning obscured the proper inquiry.
- The result was incorrect; the court relied unconsciously on long repudiated constitutional tenets.
- The result was incorrect; the court failed to consider a significant issue which would have been dispositive.
- The result was correct; however, the decision appears to overrule *sub silentio* an important line of cases.
- The result was incorrect; it will result in an inefficient allocation of resources.
- The result was incorrect; the court misconstrued or misused precedent.

LET'S TAKE A LOOK AT THE THESES OF SOME OF LAST YEAR'S TOP CASE COMMENTS...

These four Case Comments were very highly rated last year. These Case Comments are posted as examples. Note- these are **not** perfect. No Comment is. But it will show you different ways that successful petitioners approached last year's lead case.

TRADING FORUM ANALYSIS FOR FLEXIBILITY: A RESPONSE TO THE FIRST
AMENDMENT FRAMEWORK USED IN *ARCHDIOCESE OF WASHINGTON V.*
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Introduction

In late 2015, the Washington Metropolitan Area Transit Authority (“WMATA”) adopted guidelines to prohibit issue-oriented advertisements on city buses including those that promote or oppose any religion.¹ Shortly thereafter, the Archdiocese of Washington (“Archdiocese”) sought to purchase space for its “Find the Perfect Gift” ad.² WMATA determined that the Archdiocese’s ad promoted a religion because it depicted a religious scene and was thus in violation of WMATA’s advertising policy.³ In response, the Archdiocese sought declaratory relief under the First Amendment and the Religious Freedom Restoration Act (“RFRA”).⁴ The Federal District Court for the District of Columbia held that WMATA’s guideline prohibiting the advertisement

THESIS: Court reached correct conclusion in lead case but should abandon public forum doctrine; proposes a balancing test.

Because the current forum analysis lacks clarity and leads to conflicting results particularly around religious speech, this Comment proposes that the *Archdiocese of Washington* court reached the correct conclusion, but that the Supreme Court should abandon the public forum doctrine. Additionally, this comment proposes that a balancing test, taking into account the interests of the speech weighed against the property’s uses, would be a better standard for determining the constitutionality of speech restrictions. Part I discusses how various courts have evaluated the constitutionality of limitations on speech especially in public transit advertising cases, as well as previous scholarship on this topic. Part II explores the court’s holdings and reasoning in *Archdiocese of Washington*. Finally, Part III compares the court’s holding to current precedent, examines challenges with the public forum doctrine, and proposes a balancing test to remedy the problem.

A CLOUDY VIEWPOINT: HOW *ARCHDIOCESE OF WASHINGTON V. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY* REVEALS FIRST AMENDMENT JURISPRUDENCE NEEDS AN OVERHAUL

Introduction

In 2015 the Washington Metropolitan Area Transit Authority (“WMATA”) updated previously lax commercial advertising guidelines to address concerns that the prior policy obstructed its primary purpose: “[T]o provide safe and reliable transportation services.”¹ Afterwards the local Catholic Archdiocese designed an outreach campaign to further its proselytizing efforts and sought to purchase advertising space on WMATA buses.² When WMATA rejected the advertisement³ under the newly adopted guidelines,⁴ the Archdiocese sued the transit authority alleging the new guidelines violated the First Amendment and the Religious Freedom Restoration Act.⁵ The district court ruled in WMATA’s favor and, on appeal, the

THESIS: Criticizes court in lead case for not creating a workable distinction between viewpoint discrimination and subject-matter regulation; calls on Supreme Court to clarify the issue.

While legal scholars criticize the public forum doctrine for many reasons,¹¹ such as pointing out the shifting record of forum categories¹² or the inconsistent placement of the legal burden,¹³ this comment focuses on the central flaw in the *Archdiocese v. WMATA* decision: the court’s cloudy discussion of religious viewpoint discrimination. Part I examines the modern and historical political background to the First Amendment. Part II reviews the court’s reasoning and holding. Part III examines the weaknesses of the court’s decision and argues the court mishandled legal precedent, failed to clearly articulate a working definition of viewpoint discrimination, and thus created a powerful device under which future courts may covertly censor disfavored speech. This comment concludes that *Archdiocese v. WMATA* confirms the need for the Supreme Court to clarify the legal distinction between impermissible religious viewpoint discrimination and permissible subject-matter regulations on religious speech.

IMPERFECT GIFTS: THE MISSED OPPORTUNITIES IN *ARCHDIOCESE OF WASHINGTON V. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY*

Introduction

In 2015, the Washington Metropolitan Area Transit Authority (“WMATA”) adopted guidelines declaring that it would no longer accept issue-oriented advertisements for display on its vehicles.¹ Ads that “promote or oppose any religion, religious practice, or belief” were prohibited by Guideline 12.² After WMATA declined to accept the Archdiocese’s Christmastime “Find the Perfect Gift” ad, the Archdiocese sued for declaratory relief that Guideline 12 was invalid under the First Amendment’s Free Speech and Free Exercise Clauses as well as the Religious Freedom Restoration Act (“RFRA”).³ The district court sided with WMATA and upheld the guideline.⁴ On appeal, the Archdiocese argued that the guideline singled out religious viewpoints for suppression⁵ while arbitrarily permitting some religious

THESIS: Court reached correct conclusion in lead case but missed an opportunity to clear up the uncertainty in the doctrine.

This Comment analyzes the *Archdiocese* decision by examining the missed opportunities in what *wasn't* said even though the court reached the correct judgment. Part I surveys the applicable law and doctrine surrounding two fundamental freedoms- speech and religion. Part II more deeply explores the reasoning and holding of *Archdiocese*. Part III analyzes the court’s decision in terms of missed opportunities, especially in light of the subsequent Third Circuit decision in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna*.¹³

JESUS IS SOMETIMES JUST ALRIGHT: PRESERVING FIRST AMENDMENT RIGHTS
BY CLARIFYING THE FORUM ANALYSIS OF *ARCHDIOCESE OF WASHINGTON V.*
*WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY*¹

Introduction

In *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, the Archdiocese of Washington brought action against the Washington Metropolitan Area Transit Authority (WMATA), alleging that WMATA’s rejection of the Archdiocese’s advertisement submission—on the grounds that it “promoted or opposed any religion”²—violated the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act.³ Finding that WMATA’s actions did not burden the Archdiocese’s right to the free exercise of religion, the D.C. District Court ruled for WMATA.⁴ The Archdiocese appealed the decision,⁵ which the D.C. Circuit Court of Appeals affirmed.⁶

Archdiocese of Washington addresses the issue of when a government restriction on

THESIS: Court reached correct conclusion in lead case but should more clearly define components within the forum doctrine.

This Comment considers the potential implications of the precedent set by *Archdiocese of Washington* and presents a solution for clarifying ill-defined components of the forum doctrine. Part I discusses how courts have applied the forum doctrine and explores relevant scholarship on issues pertaining to freedom of speech. Part II details the holding and reasoning of *Archdiocese of Washington*. Part III argues that the Supreme Court should clarify its position on the categories of property within the forum doctrine to provide guidance for future courts. While the *Archdiocese of Washington* court reached the correct conclusion, it misapplied the forum doctrine, the replication of which in future cases could serve to eliminate the designated or limited public forum and chill the uninhibited discourse of “public importance” the First Amendment protects.¹¹

STRATEGIES FOR WRITING

- Outline! Make an outline of your key arguments and where you envision using each source.
 - This is also a good time to make sure you are using a substantial number of sources! Check sources off your list as you add them to your outline.
- Write a first draft. Remember, you have 15 pages MAX. Going over will result in a deduction. This includes BOTH your prose AND endnotes.
- Leave plenty of time to edit. As you revise, check your Comment against the rubric to make sure you are scooping up as many points as possible!

USING AUTHORITIES & BLUEBOOKING IN THE CASE COMMENT



AUTHORITIES IN YOUR COMMENT

1. **Insert endnotes frequently.** Everything you say must be supported! A paragraph void of endnotes will be a red flag.
2. **Endnotes should be substantive.** Don't just constantly use *Id.* Use sentences, parentheticals, and cross-references.
3. **Cite a lot of the sources in the packet.** Graders want to see diversity in your sources—don't just cite to cases. Your argument will be strongest if you leverage different types of sources.
4. Only cite sources from the packet. If a packet source cites another source (like a law review article quoting a case that isn't in the packet), you **may not** cite that case directly. Instead, you **must** use cite to the law review article, and then use a “quoting. . .” parenthetical (Ex: BB.10.6.3).
5. **Don't be afraid to cite sources that are contrary to your opinion.** These sources are a perfect opportunity to use more sources while using signals such as *contra* and *but see*.
6. **Use a variety of Bluebook signals.** Graders will look for signals other than just see. Try and incorporate *accord* or *compare... with....* Signals can also be a great way to discuss differing viewpoints and adding sources that may not directly support your argument!!

BLUEBOOKING MECHANICS YOU MUST KNOW AND USE

BB 2 on typeface conventions. Journal writing is different from brief writing. It is important you know the differences illustrated in Rule 2.

- Every citation starts with a capital letter and ends with a period. Scan your endnotes!
- Signals are always italicized, unless they are used as a verb.
 - See, e.g., *Parker Drilling Co. v. Ferguson* . . .
 - For an analysis of risk allocation, see *Parker Drilling Co. v. Ferguson* . . .
- Case names in citations are NOT italicized unless it is a shortcite or grammatically part of a sentence. DO italicize case names when they are included in the above-the-line text.
 - *Loving v. Virginia*, 388 U.S. 1 (1967)
 - *Loving*, 388 U.S. at 3.
- Journal articles are like neapolitan ice cream: author's name in ordinary font, name or article in italics, and name of journal in large and small font.
 - David E. Bernstein, *When Justice Fails*, 65 VA. L. REV. 557, 563-72 (1979).
- Books use large and small caps.
 - RICHARD KUGLER, SIMPLE JUSTICE 25 (1990).

BLUEBOOKING MECHANICS YOU MUST KNOW AND USE

- **Six most important citation forms to know:** cases, constitutions, statutes, journal articles, books, web sources.
- **BB 10.9:** you can only use a shortform for a case if it has been cited within the five preceding endnotes.
 - 1. Loving v. Virginia, 388 U.S. 1 (1967)
 - 4. *Loving*, 388 U.S. at 3.
 - 10. Loving v. Virginia, 388 U.S. 1 (1967)
- **BB 4.1:** you CANNOT use *Id.* if there is more than one source in the previous citation.
- **BB 4.2:** know how to use *supra* and use it liberally with **live cross-references** in your endnote. (Note: internal cross-references are NOT allowed in the petition. You cannot cite to your own writing or endnotes.)
 - *Supras* CANNOT be used for cases or statutes
- **BB 5:** Quotes and omissions are important, because if your grader reads “...habeas is important,” they will lose their mind.
- **BB 6.1:** read this rule to understand why “S.D.N.Y” has no spaces, but “S. Ct.” does. Same with “F. Supp. 2d.” and “F.3d.”
- **BB 10.2.2:** remember to spell out “United States” when it is the entire name of the party in a case.

BLUEBOOKING MECHANICS YOU MUST KNOW AND USE

- **BB 12.10(c):** When discussing the U.S. code in the text above the line or in a substantive endnote below the line, use the word “section.” When citing, use the § symbol.
- **BB 3.2:** page numbers for everything—drop repetitious digits, but leave at least two.
 - 1065–69 is correct, but 1065–1069 or 1065–9 is not.
 - 23–25 is correct, but 23–4 is not.
- **BB 1.1:** Correct placement of endnote references
- En-dashes instead of hyphens should be used for page ranges.
- Parentheticals in endnotes generally begin with present participle
 - (holding that ...)
 - (arguing that ...)
- Correct placement of quotation marks.
 - “Katie”; is correct, but “Katie;” is not.

STRATEGIES DURING PETITION

- There is no “right” way to do the petition, but there are some strategies that many of our journal staff members have used successfully. We’ll review those here.
- Most importantly, remember to take breaks and make time for yourself! Petitioning can feel overwhelming and stressful, so be sure to do things to recharge.
- What follows is a non-exhaustive list of strategies petitioners have used that we have commonly heard worked well.

A SAMPLING OF STRATEGIES

- Read the lead case first, then the source packet, and then the lead case again before deciding on a thesis. Then... just pick it and move on to outlining!
- Use Bluebook Exercises as a “break” in between working on the Case Comment.
- Set aside your two weekends to focus exclusively on the petition; work minimally during the week. Focus on the Case Comment on the first weekend, and then decide how/when to approach Bluebook Exercises.
- Work on the Case Comment during the week and Bluebook Exercises on the weekend.
- Only work until 5 or 6 PM each day and spend every evening doing something more enjoyable than petitioning.
- Take a break whenever you hit a wall... Doing something to reset will help you be more productive and see things with a fresh set of eyes.
- Check and recheck the instructions as you edit your Comment, including formatting. Get those easy points!

MAXIMIZING YOUR CASE COMMENT SCORE



THE CASE COMMENT GRADING PROCESS

- Each Case Comment will be anonymously graded 5 times: once by each journal, and again by a different member of your top ranked journal.
- Grading is done based on a rubric, which will be included in your petition packet. Follow this closely to maximize your score!
- Once all five graders have submitted scores, the top and bottom score are dropped, leaving three scores. This will be your Case Comment score.
- Also note: there are no points allocated for punny titles, so don't stress over finding a clever title. You're welcome to, but don't worry if you don't come up with one. A simple, straightforward title works too.

THE CASE COMMENT GRADING RUBRIC

EXAMPLE* Petition Scoring Information

Score Range	Organization	Legal Analysis	Use of Authority	Bluebook/Mechanics	Writing Style
9-10	<ul style="list-style-type: none"> - Follows Note/Comment format perfectly. - Subsections and headings used well. - Introduction, background, and analysis have appropriate length and substance. - Clear road-mapping. - Always flows from section to section. 	<ul style="list-style-type: none"> - Author adopts an insightful position and comes to a logical conclusion. - Note/Comment remains focused. - Author sets up analysis in the background section and uses all of the background information. - Demonstrates thoughtful, creative analysis of sources of all viewpoints. 	<ul style="list-style-type: none"> - Frequent endnotes (every 1-2 sentences). - Detailed and helpful endnotes - Endnotes relate logically and effectively to the above-the-line statement. - Endnotes use a majority of BB signals. - Endnotes contain explanatory parenthetical sentences, whenever appropriate - Nearly all the petition packet sources are cited. 	<ul style="list-style-type: none"> - Few or no obvious BB mistakes. - Few or no obvious grammatical mistakes. - Few or no general errors. 	<ul style="list-style-type: none"> - Clearly written - Sentences all complete and of varying length . - Word choice consistent and interesting. - Writing is concise and focused. - Almost no passive voice.
7-8	<ul style="list-style-type: none"> - Mainly follows Note/Comment format. - Most subsections and headings used well. - Introduction, background, and analysis mostly have appropriate length and substance. - Generally clear road-mapping. - Usually flows from section to section. 	<ul style="list-style-type: none"> - Author adopts a position and comes to a related conclusion. - Note/Comment generally remains focused. - Author generally sets up analysis in the background section and uses most of the background information. - Demonstrates generally insightful analysis of multiple viewpoints. 	<ul style="list-style-type: none"> - Frequent endnotes (every 2 or 3 sentences). - Detailed and helpful endnotes. - Endnotes relate logically and effectively to the above-the-line statement. - Endnotes use many BB signals. - Endnotes often contain explanatory parenthetical sentences when appropriate. - A great majority of the petition packet sources are cited. 	<ul style="list-style-type: none"> - Some BB mistakes. - Some grammatical mistakes. - Some general errors. - Generally, noticeable number of errors. 	<ul style="list-style-type: none"> - Mostly clearly written. - Mostly simple sentences and some variety of sentence length. - Some interesting word choices. - Writing is fairly focused. - Very little passive voice.
5-6	<ul style="list-style-type: none"> - Note/Comment format generally followed, but there are noticeable deviations from the official format. 	<ul style="list-style-type: none"> - Author adopts an obvious position and comes to a somewhat related conclusion. 	<ul style="list-style-type: none"> - More than one endnote per paragraph. - Endnotes could be more detailed and helpful. 	<ul style="list-style-type: none"> - Frequent BB mistakes. - Frequent grammatical 	<ul style="list-style-type: none"> - Some unclear sentences, ideas. - Some run-on or fragmented

* This is an example of what the scoring rubric will look like for the 2020 Petition. You will be provided the final rubric in the petition packet.

EASILY ADDRESSED REASONS FOR POINT REDUCTIONS

- Top three reasons for point reductions:
 1. Source not in the packet.
 - a. Please don't do this. This is technically an Honor Code violation. More serious violations may result in disqualification.
 2. No petition number in the header.
 3. No page numbers.
- Other random samplings:
 - Title does not contain case name.
 - Over the page limit.
 - Endnotes are single-spaced and smaller than size 12 font.
 - Used internal cross-reference
 - Heading is wrong font.
 - Indents beginning paragraphs aren't the right size
- Takeaway: **PAY ATTENTION TO DETAILS—FORMATTING AND SUBSTANTIVE**

LAST THOUGHTS



LAST THOUGHTS...

- Remember to take time for yourself. You'll do better work that way.
- Don't stress (as much as possible). We know petitioning is stressful. We're hoping that by providing these trainings, you feel as prepared as possible going in. Control what you can control.
- Make a plan of attack and try to stick to it. Many past petitioners have said that they wish they set more structure for themselves upfront. You don't need to plan out every hour, but try to set deadlines for yourself for milestones!
- Do what works FOR YOU. You know how you work best. Get familiar with what you'll be asked to do, ask us questions, and make your plan.

LET'S TALK SOON!

You'll have plenty of chances to ask questions of people who went through petitioning last year, and they'll be happy to tell you about their experience. Just a heads up, we've shortened the petition quite a bit from last year, so their experiences will be helpful but may not be 100% indicative of this year's petition.

We'll talk more in-depth about petition strategies at the Petition Prep & Strategy Session before finals.

Finally, please reach out to lawpetitioning@umn.edu with any questions. If we can't answer your question, we'll direct you to someone who can.

THANK YOU AND GOOD LUCK!



APPENDIX: ANNOTATED CASE COMMENT EXAMPLE



Instructions say . . .	The petition then looks like this. . .
<p>A. Title. The title should identify broadly your thesis about the main case that you will discuss in your Comment. It should include the case name. The title should be at the top of your Comment, in all caps, and centered.</p>	<p style="text-align: center;">SIX YEARS IN LIMBO AT GUANTANAMO BAY: HOW <i>BOUMEDIENE V. BUSH</i>¹ MISSED THE OPPORTUNITY FOR REDEMPTION</p>
<p>B. Introduction</p> <p>1. First paragraph: A brief statement of the facts, the procedural posture, and the holding of the main case, in that order. Use endnotes to elaborate. Do not detail the holding yet. Save this for the case description.</p>	<p>Lakhdar Boumediene and five other men of Algerian origin were seized in Bosnia and Herzegovina and handed over to the United States forces six years ago.³ All were transferred to Guantanamo Bay Naval Base in Cuba and subsequently filed petitions for writs of habeas corpus.⁴ The United States Court of Appeals for the District of Columbia Circuit initially affirmed the district court's dismissal of their claims for lack of jurisdiction.⁵ But the Supreme Court reversed and remanded case back to the court of appeals, and the court of appeals remanded back to the district court.⁶ In the meantime, Congress responded with legislation stripping federal courts of jurisdiction to hear habeas petitions.⁷ The same appellate court heard detainees' consolidated appeals in <i>Boumediene v. Bush</i>.⁸ The court ruled that the Military Commissions Act of 2006, in eliminating jurisdiction over habeas petitions from detainees at Guantanamo Bay, does not violate the Suspension Clause,⁹ and thus federal courts have no jurisdiction over these cases.¹⁰</p>

An Example of how to use endnotes to elaborate:

Text above the line: “In the meantime, Congress responded with legislation stripping federal courts of jurisdiction to hear habeas petitions.⁷”

Text below the line:

⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Prior to the passage of the acts, Congress had granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241 (a), (c)(3) (2000) (amended 2005, 2006). After the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that the habeas statute extended to aliens at Guantanamo Bay Naval Base in Cuba, Congress responded with the Detainee Treatment Act of 2005. *Boumediene*, 476 F.3d at 985 (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (DTA)). The DTA amended 28 U.S.C. § 2241 to eliminate habeas corpus jurisdiction, and virtually any other form of judicial review, for aliens held in military custody at Guantanamo Bay. *Boumediene*, 476 F.3d at 985 (citing DTA § 1005(e)(1)). A year later, the Military Commissions Act (MCA) went further by eliminating habeas corpus jurisdiction (and, again, other forms of review) for any alien, wherever seized or held, who has "been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. at 2636; Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2060 n.122 (2007). In addition, section 7(b), 120 Stat. at 2636, specifies that the DTA's elimination of federal habeas jurisdiction applies to all post-9/11 cases, pending or otherwise. Fallon & Meltzer, *supra*, at 2060 n.122.

<p>2. Second paragraph: A description of the important issues raised in the main case and the reason why the case and those issues are important.</p> <p>3. Third paragraph: An outline of your Comment. First, state the goal of your Comment; second, tell the reader what you will do in each section of your Comment; and third, conclude with your thesis.</p> <p>Note: Use the device "this Comment" in the third paragraph and whenever you wish to address the reader to map out what you plan to do. After the third paragraph, however, you should keep such intrusions to a minimum.</p>	<p>The issues addressed by the <i>Boumediene</i> case extend beyond the obvious holding. This case raises questions of applicability of the United States Constitution to aliens, the relationship between citizenship and habeas rights, and the very nature of American sovereignty over Guantanamo Bay in Cuba. It also spotlights concerns about court's views on such constitutional tenets as the separation of powers between the executive, legislative, and judiciary branches of the government in the application of the Suspension Clause. James Madison drew attention to the importance of these canons, describing them as the "foundations of just government" and their structure as "the key to sustainability."¹¹</p> <p>This Comment's goal is to analyze <i>Boumediene</i> decision in terms of what it ignored. Part I examines the history of habeas corpus, the unique circumstances surrounding the inception of the Guantanamo Bay Naval Base, and introduces some of the precedential Supreme Court decisions. Part II details the court's holding in <i>Boumediene</i> and the reasoning behind it. Part III analyzes the shortcomings of the court's decision, and, in particular, proposes that the majority opinion in <i>Boumediene</i> misinterpreted legal precedent, ignored constitutional tenets, and overlooked overarching policy reasons that would necessitate a decision in favor of detainees. In conclusion, this Comment argues that the majority should have applied Kennedy-Harlan test to non-citizens-consistent with legal precedent and deep constitutional underpinnings-to prevent further human rights abuses.</p>
<p>Part I - Background The background section introduces the cases and principles that place the main case and your analysis in perspective.</p>	<p>Habeas corpus is a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal.¹² Habeas corpus is "a writ antecedent to statute . . . throwing its root deep into the genius of our common law."¹³ The writ, which appeared in English law several centuries ago,¹⁴ became "an integral part of our common law heritage" by the time the Colonies achieved independence, and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it."¹⁵</p>

1. Economy of Information. Your goal is only to introduce the information necessary for the reader to understand the main case and the basis for your argument about it. Do not actually discuss the details of the main case unless they are directly relevant to your analysis. Use broad statements of the law in the text, then support the [statement] with citations and parenthetical summaries of key cases and arguments in endnotes.

2. Introductions. Your other goal here is to introduce other cases and important journal articles that you will use. Do not discuss them in detail, but make the reader aware of where they fit in the overall framework of law and policy addressed by your Comment.

3. Relevance. Everything in the background section should relate directly to the analysis you will give in Section E, below. Omit or endnote collateral matters.

This Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus.¹⁶ United States adopted English common law and statutes enforcing common law¹⁷ "in substance and effect."¹⁸ And long before the United States acquired Guantanamo Bay as a spoil of war¹⁹ and established a Naval Base there, this statutory tradition blocked attempts to preclude habeas corpus by sending persons to remote destinations.²⁰

Although the Supreme Court recognized that the circumstances could exist when the government should not be required to produce people in response to habeas corpus petitions, the Court limited such situations to times of great crisis.²¹ As a result, the exercise of the Suspension Clause is an exceedingly rare event,²² because such was the intent of the Framers as expressed in the Constitution and interpreted by the Supreme Court.²³

For over two hundred years it has been the province and duty of the judicial department to say what the law is; the established law of this land is that the judiciary is the final interpreter of the Constitution, and the Constitution is the supreme law of the land.²⁴ Thus, a law repugnant to the constitution is void.²⁵ Of course, the Court also had to confront the question of the limits of that "land," i.e. under what circumstances, if ever, should the United States Constitution be applied beyond the recognized borders of our nation. The Supreme Court previously had rejected a categorical rule that the Constitution should never apply to the trial of U.S. citizens overseas.²⁶ But it also denied habeas petitions from enemy aliens held at overseas military bases after they were tried and convicted.²⁷

Further, the Supreme Court previously held that the habeas statute²⁸ confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."²⁹ Because the Court decided a question of statutory rights to habeas, it therefore did not have to explicitly decide whether the detainees had constitutional rights to habeas.³⁰

Example of broad statement above the line and support below the line.

Text above the line:

"And long before the United States acquired Guantanamo Bay as a spoil of war¹⁹ . . ."

Text below the line:

See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM. L. REV.* 2501, 2536 (2005). "Guantanamo has remained in U.S. hands continuously since Cuba's capture in the Spanish-American War of 1898. It became an American possession (along with the rest of Cuba) as a spoil of war, and was then immediately leased to the United States upon the granting of Cuban independence. The lease, with its clause providing for termination only by the will of both parties, was renewed as part of a treaty with Cuba in 1934." *Id.* at 2536-37. This lease is "no ordinary lease." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). Justice Kennedy went on to note that although "[i]n a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains 'ultimate sovereignty' over it." *Id.*; *see also* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T. S. No. 418. Further, the lease's "term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. Guantanamo Bay is in every practical respect a United States territory." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

Text above the line: "the habeas statute²⁸ . . ."

Text below the line:

28 U.S.C. § 2241. 28 U.S.C. §§ 2241 (a), (c)(3) grants federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." The statute traces its ancestry to the first grant of federal-court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are "in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

Part II: Case Description

Section. The case description follows the background section. This section should describe the holding and reasoning of the main case in detail.

First paragraph: Link the main case into the overall state of the law as you described it in your background section.

Next: Describe each holding in the main case and summarize the reasoning of the court. Support your statements with citations in endnotes.

Resist the urge to analyze or critique the court's holdings and arguments. You will do that in the next section.

Analysis

Part II: Case Description.

Instead, the court of appeals decided the question of constitutional right to habeas. In its holding, it vacated the district courts' decisions and dismissed the cases for lack of jurisdiction.³¹ Judge Randolph's opinion (joined by Judge Sentelle) reasoned, inter alia, that *Eisentrager*³² established that habeas jurisdiction need not extend to aliens held outside the sovereign territorial jurisdiction of the United States.³³ Brusquely dismissing arguments that emphasize the special status of Guantanamo Bay and maintain that aliens detained there possess fundamental constitutional rights, the court held that the detainees possess no constitutional rights that could be the basis for contesting their custody.³⁴

Judge Rogers's dissent rejected both the reasoning of the court and the conclusion.³⁵ But it paid little attention to the special status of Guantanamo, and appeared not to dispute the majority's conclusion that the detainees there lack even fundamental constitutional rights. It maintained instead that the MCA violates the Suspension Clause by withdrawing the preexisting statutory jurisdiction to conduct habeas inquiries that would have lain within the scope of the writ in 1789.³⁶

Skipped

Conclusion. The conclusion is a very brief two-part summary of your comment. The first part should outline the problem posed in the main case. The second part should state and defend your analysis. After the reader skims your introduction and your conclusion, she or he should be able to understand the issues raised in the main case, the court's holding, and your analysis.

Conclusion

By a 2-1 split decision in *Boumediene v. Bush* the United States Court of Appeals for the District of Columbia Circuit foreclosed detainees' claims to constitutional rights. The court held that federal courts have no jurisdiction in habeas corpus cases arising out of Guantanamo detentions.⁹⁷ In support of its decision to defer to the power of the executive branch, the majority opinion twisted the precedent and disregarded the underlying philosophy of the Constitution to prioritize liberty over security.⁹⁸

This selective reading of the precedent⁹⁹ by the appellate court and dredging up old decisions and dissents blurs the lines between separate branches of government: the judiciary stops being a check on the executive and legislative.¹⁰⁰ The court smothered these concerns raised by the vocal minority opinion by Judge Rogers. And it also chose not to employ the Kennedy-Harlan test¹⁰¹ suggested by the Supreme Court in evaluating if the constitutional rights exist under these particular circumstances.

The appellate court's analysis further wilts in light of both global and local policy concerns. Keeping people in detention without trial is not a "small sacrifice for the sake of national security,"¹⁰² but a sacrifice of American values and foundations of our society.¹⁰³ The media coverage of civil rights abuses in these cases further inflames anti-American attitudes.¹⁰⁴

The court of appeals missed the opportunity to address these issues. The court was so preoccupied with finding a case precisely mirroring the circumstances of this detention, that it overlooked the forest for the trees. If our executive branch acts in an unprecedented manner, then perhaps the judiciary should act as well, and not simply defer to the political powers. The court missed the opportunity to redeem the actions of the United States not only in the eyes of men detained without charges for six years, but also in the eyes of the whole world watching.¹⁰⁵

Pro-tip: copy the Comment instructions into your Word template. Use them as placeholders.

Background Sections in Low-scoring petition (left) v. High-scoring petition (right)

As you read these examples, can you identify the problems with the petition on the left?

The Court has yet to settle on a consistent theory in determining whether Establishment Clause is violated.¹² There are three tests. The three-prong Lemon test, focusing on the hairsplitting facts of each case.¹³ The relaxed Lemon theory, or the endorsement theory, asks whether the 1) government has a religious purpose, and 2) whether such action has a religious effect.¹⁴ The coerce theory, under which the establishment clause is violated only when the government acts and coerces people to take a certain view of religion.¹⁵

Until 2005, the endorsement theory focuses on whether a reasonable observer will conclude the government in endorsing a religion. However, in *Van Orden* and *McCreary County*, the Court modified the endorsement theory, and focuses on whether the government intends to endorse a religion.¹⁶ A commentator criticized that the Court "imprudently shifted" from a "display-focused analysis and toward an actor-focused analysis," creating a recipe for "further confusion and uncertainty."¹⁷ Indeed, the court reached opposite results with plurality opinions in *Van Orden* and *McCreary Country*, both involved display of Tenth Amendment.¹⁸ The Ninth court adjusted its approached accordingly.¹⁹ The test leaves questions such as whose motives are relevant and what should be the applicable time frame unanswered.²⁰ Also, if violations are to be found, current precedents give little guidance on how such violation should be remedied.²¹ These unresolved questions become the core of the *Buono IV*.

Have you been able to spot problems with this section?

A. THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment to the U.S. Constitution states that "Congress¹⁹ shall make no law respecting an establishment of religion . . ." ²⁰ It was ratified in 1790²¹ and continues to bear the indelible impression of its chief proponents, James Madison²² and Thomas Jefferson,²³ whose views on religious freedom and church-state separation have been of monumental importance to the Supreme Court in defining the clause's meaning. Thus, the starting point for the Court's current Establishment Clause jurisprudence may be formally traced back to 1947, when the Court first ruled in *Everson v. Board of Educ* estab
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separation between Church and State."²⁴ In recent years, however, the Court has split on what the purpose of the Establishment Clause is-and what Madison and Jefferson have to teach about it. Under one view, the clause's purpose is to prevent the kind of destructive social division that threatens to occur whenever government supports religious belief.²⁵ Under the other, the clause's purpose is only to prevent government from favoring any one religion above all others, thus leaving the government free to support religious belief in general.²⁶ And both views have served to affect the Court's creation, application, and rejection of constitutional tests for deciding when the government has crossed the line drawn by the Establishment Clause.²⁷

B. THE SUPREME COURT: TESTING FOR ENDORSEMENT

Despite its division as to the purpose of the Establishment Clause, the Court has never been shy in its attempts to provide

This background section on the left lacks internal structure: for starters, it does not explain what the Establishment Clause is. It then states that there are three tests, but makes it very difficult to identify what are those tests, how they developed or how they are applied today.

It mentions random case names, but does not explain what those cases are or which court decided them, Circuit or US Supreme. It provides no explanation how these cases fit in the overall framework of law" as instructed. What does "Ninth Circuit adjusted its approach accordingly" mean?

It uses obscure references such as "a commentator." Who is this commentator and why do we care what the anonymous commentator had to say? Was it a Supreme Court justice? Or a poster on yahoo message boards?

Because it lacks details, the section as a whole seems anemic. It is much shorter than the better-developed (and more organized!) background section on the right.

Also note the lack of adequate footnotes. The petition on the left used 9 footnotes to support and develop the background section, the one on the right used 25.

What little Bluebooking appears here, is applied incorrectly: the case names are inconsistently italicized and the author used lower case court to refer to the US Supreme Court.

effective standards for identifying violations of the clause.²⁸ It would not be until 1971, however, that the Court would finally provide its most definitive test for establishment in *Lemon v. Kurtzman*.²⁹ Under this test, government activity was unconstitutional if it either (1) lacked a secular purpose, (2) had a primary effect advancing or inhibiting religion, or (3) fostered an excessive government entanglement with religion.³⁰ Consequently, the "*Lemon* test" has become the Court's "paramount guiding framework"³¹ for handling an ever-expanding catalog of establishment cases.³² At the same time, the Court has quickly discovered the test's limitations in producing consistent,³³ if not agreeable,³⁴ results—a reality made most evident by the Court's decision in recent years to collapse "*Lemon's* first two prongs into the single query [of] whether a 'challenged governmental practice either has the purpose or effect of 'endorsing' religion" ³⁵ And as the chorus of voices on the Court denigrating *Lemon* grows ever louder,³⁶ just what the Court plans on doing to resolve a rising litany of conflicting lower court holdings regarding the display of religious symbols on public property³⁷ remains an open question.³⁸

C. GOVERNMENT LAND SALES AS A REMEDY TO ENDORSEMENT

But while the Court has continued to vacillate on the issue of when public displays of religious symbols "endorse" religion, federal and local authorities alike have tried to preclude it completely by cutting it off at its apparent source: government ownership of the land on which these symbols rest.³⁹ Hence, by transferring this land to private owners who also desire the symbol's display, these authorities maintain that they have effectively eliminated any possibility of "endorsement"—at least so long as the display of religious symbols on private land by private actors is protected under the First Amendment.⁴⁰ And the Seventh Circuit largely confirmed this view in a series of

decisions starting in 2000⁴¹ that have since become the main authority on this question.⁴² Indeed, as the circuit has explained, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."⁴³ Yet, the Ninth Circuit refused to adopt this presumption in *Buono IV*, thus producing a legal split that will likely have profound ramifications for the future of the Establishment Clause.⁴⁴