Basic American Documents

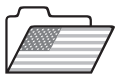
Series Editor Andrzej Mania

Basic Cases in U.S. Constitutional Law

Rights and Liberties

Paweł Laidler

Jagiellonian University Press



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Foreword

I would like to introduce to you *Basic Documents in American Studies,* which is a series of volumes of documents and commentaries thematically related to the USA. Scholars of the Jagiellonian University were invited to take part in this project, especially those working at the Institute for American Studies and Polish Diaspora and the Institute of Political Science and International Relations. The authors of these volumes have conducted thorough research in their particular fields, and have gained a wealth of experience thanks to lectures held first at the Center for American Studies and later within the scope of BA, MA and Ph.D. programs in American Studies at the Institute of American Studies and Polish Diaspora. Over ten years of research and university lectures devoted to various aspects of American foreign and internal policy, economy, society, political thought, history, political and legal system, broadly understood culture (i.e. literature, film and theater) have resulted in the preparation of this collection. We are convinced that it will become a basis for further thorough research in the field of American Studies.

It should be stressed that the main concept of this series is grounded in a European, or maybe it would be better to say, non-American, understanding of the term "American Studies." In this way**,** research of an interdisciplinary character is directed towards the most important and fundamental features of American society, culture, legal and political system, internal and foreign policy**,** etc. Its aim is to present possibly the broadest and most comprehensive picture of America**,** and to understand this country with its dominating position in the world. It is natural that the majority of scholars and students, sometimes unintentionally, seek similarities and differences of American achievements when compared to their own culture and experience. The situation of scholars and students conducting their research in the field of American Studies in the USA is different. They are a part of the civilization under study and thus direct their research towards very specified and detailed issues. It should be mentioned, however, that both groups concentrate on specific features of the civilization they analyze, thus complementing their achievements within the scope of American Studies. I believe that for both of these groups the series which is here presented will be useful.

Andrzej Mania
Chair of the American Studies

Chapter One

Due Process of Law

Introduction to Volume Two

Constitutional law refers to the interpretation of the U.S. Constitution – the basic document and fundamental law of the country. It concerns such vital issues as the political and legal system of the United States, social relations, the relationship between the federal and state governments, and relations among the states, as well as within the federal government. It determines the rights and freedoms of the individuals establishing the main legal principles governing the country (rule of law, democracy, federalism, supremacy of the Constitution, separation of powers, and checks and balances system). The U.S. Constitution, being a brief document consisting of general rules and principles, some of which have proven unclear and vague, has required further interpretation as to the scope of its particular clauses and provisions. Such an interpretation has come from the Supreme Court of the United States, the highest judicial body at the federal and state level, the members of which (called Justices) have gained the power to review the actions of other branches of government (federal and state) with respect to the Constitution. This power, called judicial review, allows the Justices to shape the meaning of many different constitutional principles, norms, and provisions concerning both the separation of powers and the individual rights issues. Therefore, the history of the U.S. constitutional law seems to be the history of the Supreme Court's decisions in cases that have determined a contemporary scope of the understanding of the highest law of the land. Depending on the various attitudes of the Justices, constitutional law is about expansions and limitations on the powers of the federal branch (the executive, the legislative, and the judiciary), the states (in relation to the federal government), and the people (their rights and freedoms). The different attitudes have influenced the U.S. political and legal system so much that even contemporary definitions of constitutional clauses and provisions are not final. The former U.S. President Woodrow Wilson once called the Supreme Court's

work ‘a constitutional convention in continuous session.’ Let us look at how this session has appeared throughout American history.

*

Basic Cases in U.S. Constitutional Law is a book devoted to the presentation of the most important U.S. Supreme Court decisions which have formed the scope of contemporary American constitutional law: its main issues and principles. The book is divided into two volumes relating to the separation of powers issue (volume one) and individual rights and liberties (volume two). The present volume concerns the cases referring to various aspects of the due process of law clause of the Fifth and Fourteenth Amendments to the Constitution (explained below), such as: freedom of speech and of the press, freedom of religion, right to privacy, equal protection of law and rights of the accused in criminal trials. The scope of constitutional protection of all of these issues had to be determined by particular cases decided by the Supreme Court. The current volume focuses on precedents that shaped the historical and contemporary meaning of fundamental rights and liberties of U.S. citizens.

The first chapter serves as an introduction to the interpretation of the due process of law clause. Its meaning has changed throughout U.S. history, depending on the attitude towards the scope of protection of some rights and freedoms of individuals by the judiciary. The clause is mentioned twice in the Constitution, in the Fifth Amendment binding the federal government, and in the Fourteenth Amendment applying to the states. However, the proper application of the guarantee to state governments has been determined by the Court since the 1920s, when it began broadening the meaning of particular rights and liberties stemming from the Bill of Rights. As a result, the Justices conducted an interpretation which led to doctrinal division of due process of law into substantive due process and procedural due process. Without an understanding of the reasons for such an interpretation one cannot wholly understand the essence of all of the decisions analyzed in the subsequent chapters of this volume.

The second chapter presents the opinions of the U.S. Supreme Court concerning the constitutional protection of various forms of speech which were defined by the Justices in the 20th century. Among ten precedents there are the most fundamental cases concerning the admissibility of speech with regard to national security issues, the role of the press, as well as the scope of fighting words, obscenity and commercial speech. Readers may find various doctrines created by the Court in order to achieve the proper level of constitutional protection of freedom of speech, from the historical clear and present danger test and bad tendency test to the contemporary imminent lawless action test. Chapter Three concerns the Court’s decisions that have formed the constitutional limitations to the freedom of religion. Six cases were chosen out of hundreds which referred to the free exercise clause and free establishment clause of the First Amendment. These cases not only constituted the scope of citizens’ liberty in the expression of values and faith, but also shaped the boundaries posed on federal and state governments’ legislation regarding religious issues. In the fourth chapter the controversial and problematic interpretation of the right to privacy is reviewed. By analyzing particular provisions of the Constitution with the Ninth Amendment at the top, the Supreme Court acknowledged the right of

Americans to privacy by defining the government's influence over such issues as marriage relations, abortion, the use of contraceptives, sexual orientation and the right to die. All of the six cases presented in this chapter confront delicate issues which have become the basis of social and political discussion in the United States, dividing the society into more conservative or liberal on the said matters. The next, fifth, chapter focuses on the very important guarantee of equal protection of law established by the Fourteenth Amendment to the Constitution. As this amendment was mainly addressed to improve social relations between the races in the United States, racial discrimination is the major issue analyzed in this chapter. Starting with a few infamous decisions made by the Supreme Court, with precedents equalizing social groups, to decisions aimed at repairing historical inequalities, readers may follow the changing attitude of the Justices towards racial issues which corresponds with changing social relations of the country. Finally, Chapter Six refers to the most important precedents concerning the rights of the accused in criminal trials. In order to afford a just and fair verdict, law enforcement institutions as well as the courts have to apply proper standards set out by the Court since the 1960s. Among the seven cases presented in the chapter, there are disputes concerning the right to jury trial, the right to counsel, and the scope of search and seizure procedures conducted by the police. All of the opinions presented in the above-mentioned chapters are arranged in chronological order, so that the reader may trace the changes of U.S. constitutional law according to their occurrence in history.

The word 'basic' in the title of the book is used to stress that the chosen cases are the most important ones among the numerous Supreme Court decisions of the 218 years of its history. However, these are not *all* of the important decisions made by the Justices – it is impossible to create a volume of merely forty cases that would consist of the fundamental decisions. There are a few landmark decisions without which such a compilation would lack professionalism and value, and these have been introduced in the volume. The other cases belong to a broader group of the Supreme Court's decisions that have shaped U.S. constitutional law, only a few of which could form a part of this volume, and, according to the author, are indispensable and more precious than others. The interest in the topic is so considerable among scholars that books exploring American constitutional law may very often be found on the bookshelves of libraries and bookstores. Each compilation of cases varies, however, in the way the legal issues are presented: some books analyze all Supreme Court cases relating to a particular topic, some concentrate only on fundamental issues, while others raise detailed questions concerning historical and contemporary problems of the U.S. Constitution. In this dimension, *Basic Cases in U.S. Constitutional Law* focuses on a few landmark decisions enriched by some other verdicts that seem important and significant to the matter under discussion.

The presentation of entire opinions in which the Supreme Court Justices presented their verdict would probably not be impossible, but definitely unnecessary. Most of the Justices of the Supreme Court have written detailed and complicated opinions after careful reasoning, which consist of many arguments involving historical references and comparisons, or logical assumptions and deductions. It has often resulted in lengthy opinions, thus the decisions included in this volume are only the most important parts (excerpts) of majority opinions that relate directly to the particular topic of the chapter. Each case is preceded by a short introduction concerning its historical and factual back-

ground, as well as political, social, and economic context, which should provide students analyzing Supreme Court decisions with a better understanding of the processes that govern judicial reasoning.

All excerpts have been prepared based on the original text of every opinion which was extracted from the Findlaw website (www.findlaw.com). The author additionally consulted other valuable Internet databases, such as The Oyez Project (www.oyez.org) and Westlaw (www.westlaw.com), as well as various books on U.S. constitutional law, which are listed at the end of Volume in the 'Further Readings' section. The presentation of each case begins with its full name (party v. party) and a symbol determining the source where the full opinion for the case may be found (respectively: the number of the volume, the source – the United States Reports where the Supreme Court's decisions are collected, the first page of the opinion in the volume, and the year the court reached the decision). Due to the fact that the Justices of the Supreme Court wrote their decisions in various forms, all of the texts have been unified in order to achieve an easy-reading standard. All of the footnotes have been omitted.

Due Process of Law – Basic Information

Due process of law belongs to the most important, but also the most difficult issues concerning U.S. constitutional law. Its understanding opens the possibility of deeper analysis of the meaning and scope of particular guarantees established in the broadest American catalogue of rights and liberties, i.e. the Bill of Rights. The first ten amendments to the Constitution were enacted in 1791, thus enriching the main document with fundamental rights and freedoms of individuals referring to such issues as:

- freedom of speech, of the press, of association, of assembly, and of religion (First Amendment);
- right to bear arms (Second Amendment);
- freedom from unreasonable searches and seizures (Fourth Amendment);
- due process of law, right to grand jury, liberty from double jeopardy, freedom from self-incrimination (Fifth Amendment);
- right to speedy and public trial, right to an attorney, right to trial jury in criminal cases (Sixth Amendment);
- right to civil trial based on common law principles, right to jury in civil cases (Seventh Amendment);
- freedom from cruel and unusual punishments, liberty from imposition of excessive bails (Eighth Amendment);
- rights retained by the people (Ninth Amendment).

As one can observe that the due process of law clause was established in the Fifth Amendment to the Constitution, in the wording: *No person shall be . . . deprived of life, liberty, and property, without due process of law*, although it was not interpreted in detail by the Supreme Court in the 19th century. In general the provision meant that the government could not deprive anybody of life, liberty or property, unless it had done so in accordance with the protection of basic rights and freedoms of individuals. The only crucial precedent to the understanding of the 19th century scope of due process of law clause was the decision in *Barron v. Mayor and City Council of Baltimore* (1833), in which Chief Justice John Marshall, speaking for the majority, established a rule that the guarantees of the Bill of Rights applied only to the federal government. Therefore, the states were not bound by the necessity of protection of fundamental rights and freedoms of the individuals as prescribed in the first ten amendments.

When in 1868 the Fourteenth Amendment was ratified it referred mainly to the issues of racial equality, by establishing the equal protection of law clause. However, in part, the new amendment copied the content of the Fifth Amendment's due process of law clause by stating that: *No state shall deprive any person of life, liberty, and property, without due process of law*. The only difference between the two clauses was the addressee, which in the case of the Fourteenth Amendment became the state, not the fed-

eral government. It was not until the 1920s, however, that the Supreme Court established a doctrine of selective interpretation of the due process clause of the Fourteenth Amendment. The process of broadening the guarantees of the Bill of Rights on the states began, with the Court's interpretation of particular rights and liberties written in the first ten amendments to the Constitution. The Justices acknowledged the real role of the Fourteenth Amendment, which was the application of the Bill of Rights guarantees on the states. However, thanks to the doctrine of selective interpretation not every right or freedom applied to the states. As determined by the Court in *Palko v. Connecticut* (1937), the protection of only these guarantees was extended to the states, which could be named fundamental for the American legal system. As a result, U.S. citizens became protected by the Constitution in every case of federal and state governments' intrusion into their fundamental rights and freedoms. Today this means protection of more than ninety percent of guarantees provided in the supreme law of the land – only three of these guarantees were not made applicable to the states, i.e. the right to bear arms, right to grand jury, and right to jury trial in civil cases.

Thanks to the interpretation of the Fifth and Fourteenth Amendments, the Supreme Court established the due process of law doctrine which led to division of the clause into two types of due process: procedural and substantive. Procedural due process means that the government (federal or state) cannot deprive the people of life, liberty, or property without providing for their fundamental guarantees in civil and criminal procedure. In other words, only those court verdicts are considered fair and just which do not violate procedural guarantees located in the Constitution. On the other hand, the substantive due process of law focuses on the essence of particular law, not its procedure. The government (federal or state) cannot deprive the people of life, liberty, or property by creation of an unreasonable law which can be challenged by them. As a result the government is bound by the Constitution to establish only such legal provisions the purposes of which are reasonable to the legal, political and social ends of the state. If someone claims that his/her rights have been violated by an existing legal norm, the courts are responsible to determine whether the law is constitutional on the basis of its substance. A good example of a judicial check of the reasonableness of a law is the Supreme Court's opinion in *Lochner v. New York* (1905).

In general, procedural due process concerns such issues, among others, as the right to an attorney, freedom from self-incrimination, right to a jury trial and liberty from unreasonable searches and seizures, whereas the substantive due process refers to such guarantees among others, as freedom of speech, freedom of religion and the right to privacy. To fully understand the proper scope of due process of law and the ability of the courts to undertake judicial review of governmental legislation one should read the famous Footnote Four to the Court's decision in *United States v. Carolene Products Co.* (1938).

Barron v. Mayor and City Council of Baltimore – 32 U.S. 243 (1833)

Among many various cases decided by the Marshall Court only a few have concerned the rights of individuals protected by particular amendments and clauses of the Bill of Rights. Most of the issues confronted by the early 19th-century Supreme Court regarded the division of federal powers among three branches of government as well as among the federal government and the states. However, in 1833 the due process of law for the first time became crucial for the Justices in the case *Barron v. Baltimore*, where they had to answer the question whether the government had a right to take private property for public use without just compensation. John Barron was the owner of part of a wharf in the city of Baltimore and he earned money from the wharf's operation. After some structural changes in the harbor resulting from the city's activities, Barron began to lose his profits and so he sued the city council to receive just compensation.

Apart from adjudicating in the factual dispute, the Court used the case to decide on the scope of the Fifth Amendment and the formal meaning of the Bill of Rights. The issue which required unification concerned the proper jurisdiction of the rights and freedoms guaranteed by the first ten amendments to the Constitution (especially the due process of law clause). Speaking for the Court, Chief Justice John Marshall stated that the Bill of Rights guarantees should only be applied to the federal government and therefore the states are not bound by the restrictions stemming from constitutional amendments. This meant that the limitations on the governments of the states would have to be derived from the common law or such parts of the Constitution which were directly addressed to them. This view remained as the basis of U.S. constitutional law until the beginning of the 20th century, when the interpretation of the Fourteenth Amendment led to a new, expanded meaning of the due process of law clause.

The Majority Opinion (Chief Justice John Marshall):

> The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it unless it be shown to come within the provisions of the 25th section of the Judiciary Act. The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.
>
> The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote

their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments, as well as against that which might be attempted by their General Government. It support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court. The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the General Government. Some of them use language applicable only to Congress, others are expressed in general terms. The third clause, for example, declares, that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general, yet the demonstration is complete that it applies solely to the Government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares, that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on State legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the tenth proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the General Government, or in which the people of all the States feel an interest. A State is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the General Government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found generally to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government and on those of the State; if, in every inhibition intended to

act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed. We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their Constitutions, had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented State, and the required improvements could have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister States could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government – not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Western Shore of the State of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this Court that there is no repugnancy between the several acts of the General Assembly of Maryland given in evidence by the defendants at the trial of this cause in the court of that State and the Constitution of the United States; whereupon it is ordered and adjudged by this court that this writ of error be, and the same is hereby, dismissed for the want of jurisdiction.

Lochner v. New York – 198 U.S. 45 (1905)

Starting in the 1880s the Supreme Court has confronted various issues of federal-state relations, establishing the so-called dual federalism approach in most of the disputes. This meant approving most of the states' rights against the rights of the federal government by broad interpretation of the Tenth Amendment to the Constitution. Such an approach was inconsistent with the former attitude of the Court, especially characteristic in the times of John Marshall (1801–1835), when the Justices limited many powers of local governments for the benefit of the central government. One of the most interesting cases from the dual-federalism era was *Lochner v. New York* decided by the Supreme Court in 1905. The dispute did not, however, directly concern the federal-state issues, but the relations between the state and individuals who wanted to enjoy their basic liberties and freedoms. According to the New York law, bakers' hours of labor could not exceed ten hours per day and sixty hours per week. Joseph Lochner was an owner of a bakery who signed a contract with his employee determining longer hours of labor, thus violating the state law.

The Supreme Court on appeal had to decide on the scope of the right to free contract of individuals versus the right of the government to control local employment. Despite many former decisions upholding state laws, this time the Justices limited the government's ability to affect private relations between the employer and employee. They declared the New York law unconstitutional as it was an unreasonable and unnecessary interference with individuals' liberty of contract protected by the Constitution. On one hand the *Lochner* precedent began a new era of the Court's adjudication aiming at less influence of the government on labor issues, and on the other it has been considered one of the first moments in constitutional history when the due process of law issues became the background of the Justices' decision.

The Majority Opinion (Justice Rufus Peckham):

> The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day, and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of

hours which shall constitute a legal day's work, but an absolute prohibition upon the employer's permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employes concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas; In re Kemmler; Crowley v. Christensen; In re Converse.*

The State therefore has power to prevent the individual from making certain kinds of contracts, and, in regard to them, the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail – the right of the individual to labor for such time as he may choose or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings to eight hours per day "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employes in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved:

"The law in question is confined to the protection of that class of people engaged in labor in underground mines and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

. . . The latest case decided by this court involving the police power is that of *Jacobson v. Massachusetts*, decided at this term. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for ought that appears, was himself in perfect health and a fit subject for vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." That case is also far from covering the one now before the court.

. . . It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext – become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

. . . The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail – the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate,

before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

. . . We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy* and *Jacobson v. Massachusetts.*

. . . It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men *sui juris*) in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees. Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed, and the case remanded to the County Court for further proceedings not inconsistent with this opinion. Reversed.

Palko v. Connecticut – 302 U.S. 319 (1937)

Despite the fact that *Palko v. Connecticut* raises an important question about the meaning and scope of the double jeopardy clause, it has been most often cited as the milestone decision in which the Supreme Court undertook the interpretation of the Fourteenth Amendment regarding the due process of law clause. Departing from principles shaped in *Barron v. Baltimore* (see above) and *the Slaughterhouse Cases* (see below) that were binding throughout the 19th century, the Court decided to expand the scope of the due process clause. The *Palko* case is famous for its approach to the process of interpretation of the Fourteenth Amendment, called "selective interpretation," by which only those guarantees of the Bill of Rights apply to the states which are determined by the Supreme Court as fundamental to the U.S. legal system.

Frank Palko was accused of committing first-degree murder. However, he was sentenced to life imprisonment after being convicted of second-degree murder. Based on appeal of the state, the case was brought once more to the court and this time Palko was found guilty on the account of first-degree murder, which resulted in capital punishment.

Appealing to the highest judicial authority in the country, Frank Palko was convinced that his second conviction violated the guarantee of double jeopardy of the Fifth and Fourteenth Amendments. The majority of the Justices decided that the double jeopardy guarantee should not be considered as fundamental to the essence of American justice and therefore does not bind the states. This decision was overruled more than thirty years later in *Benton v. Maryland*, 395 U.S. 784 (1969). However, the ordered liberty theory created in the *Palko* case has been used several times since then to affirm the fundamentality of particular rights and liberties.

The Majority Opinion (Justice Benjamin Cardozo):

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter, the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State v. Palko*. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case, he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and, in so doing, to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection, the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction, adhering to a decision announced in 1894, *State v. Lee*. The case is here upon appeal (28 U.S.C. § 344).

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago, a like argument was made to this court in *Dreyer v. Illinois*, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner v. United States*, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government, and not upon defendant's motion. See: *Trono v. United States*. All this may be assumed for the purpose of the case at hand, though the dissenting opinions show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment if it was all in the same case. Even more plainly, right-minded men could reasonably believe that, in espousing that conclusion, they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, *Snyder v. Massachusetts*, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that, in appellant's view, the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to information at the instance of a public officer. *Hurtado v. California*; *Gaines v. Washington*. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey*. See: *Snyder v. Massachusetts*; *Brown v. Mississippi*. The Sixth Amendment calls for a jury trial in criminal cases, and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*; *Maxwell v. Dow*; *New York Central R. Co. v. White*; *Wagner Electric Mfg. Co. v. Lyndon*. As to the Fourth Amendment, one should refer to *Weeks v. United States*, and, as to other provisions of the Sixth, to *West v. Louisiana*.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon*; *Herndon v. Lowry*; or the like freedom of the press, *Grosjean v. American Press Co.*; *Near v. Minnesota ex rel. Olson*; or the free exercise of religion, *Hamilton v. Regents*; see: *Grosjean v. American Press Co.*; *Pierce v. Society of Sisters*; or the right of peaceable assembly, without which speech would be unduly trammeled, *De Jonge v. Oregon*; *Herndon v. Lowry*; or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*. In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is

not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*; *Brown v. Mississippi*; *Hebert v. Louisiana*. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*. This too might be lost, and justice still be done. Indeed, today, as in the past, there are students of our penal system who look upon the immunity as a mischief, rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These, in their origin, were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed. *Twining v. New Jersey*. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations, a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that, even in the field of substantive rights and duties, the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. See: *Near v. Minnesota ex rel. Olson*; *De Jonge v. Oregon.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*; *Blackmer v. United States*. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*; *Mooney v. Holohan*. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama*. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that, in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry, and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert v. Louisiana.* The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us, and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch*; *State v. Lee*. This is not cruelty at all, nor even vexation in any immoderate

degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v. Carabetta*, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment. . . The judgment is affirmed.

United States v. Carolene Products Co. – 304 U.S. 144 (1938)

During the 1930s the presidential administration tried to implement various laws under the politics of the New Deal thus reacting to the Great Depression that touched the American economy. However, until 1937 many congressional acts were found unconstitutional and void by the Supreme Court (based on interpretation of the commerce clause), which led to an open conflict between the Justices and President Franklin D. Roosevelt. The conflict triggered nationwide discussion about the role of the judiciary and possible reforms in the Court. The President proposed an amendment to the Constitution which would enlarge the number of Justices from nine to fifteen. However, before the proposal became serious enough to influence the Court's adjudication, the tribunal changed its opinion about the New Deal legislation, which resulted in upholding presidential initiatives (*West Coast Hotel v. Parrish*, 300 U.S. 379, 1937). *United States v. Carolene Products* is one of the cases which concerned New Deal reforms, i.e. federal law that prohibited so-called 'filled milk' from being used in interstate commerce. According to the above-mentioned reasoning, and relying on legislative findings that this milk was harmful to public health, the Court decided to uphold the constitutionality of the law, thus enlarging federal jurisdiction over interstate commerce.

The main reason why the case is presented in the volume is not the majority opinion, but footnote four to the opinion, which is famous. It determined the role of the judiciary in adjudicating cases regarding economic regulations and introduced a new standard of judicial review towards legislation concerning minorities. It gave way to judicial review of numerous governmental actions infringing on the rights and freedoms of individuals, especially in the respect of the Bill of Rights guarantees and the due process of law clause of the Fourteenth Amendment. Furthermore, it has been the most often cited footnote to a Court opinion in its history.

Footnote Four to The Majority Opinion (Justice Harlan Fiske Stone):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See: *Stromberg v. California*; *Lovell v. Griffin*.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see: *Nixon v. Herndon*; *Nixon v. Condon*; on restraints upon the dissemination of information, see: *Near v. Minnesota ex rel. Olson; Grosjean v. American Press Co.*; *Lovell v. Griffin*; on interferences with political organizations, see: *Stromberg v. California*; *Fiske v. Kansas*; *Whitney v. California*; *Herndon v. Lowry*, and see: *Holmes, J., in Gitlow v. New York*; as to prohibition of peaceable assembly, see: *De Jonge v. Oregon*.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, or national, *Meyer v. Nebraska*; *Bartels v. Iowa*; *Farrington v. Tokushige*, or racial minorities, *Nixon v. Herndon; Nixon v. Condon*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Chapter Two

Freedom of Speech and of the Press

Introduction

Freedom of speech belongs to one of the most important rights of individuals guaranteed by a democratic government. Many Supreme Court Justices have determined it as the most fundamental and indispensable condition of existence of any other forms of liberty. It was established in the First Amendment to the Constitution, thus opening the catalogue of important values protected by the supreme law of the land. It states that *Congress shall make no law . . . abridging the freedom of speech and of the press*. Until the 1920s the provisions of the Bill of Rights were binding only to the federal government and there was hardly any case concerning the scope of the First Amendment's liberty. However, since then the Court has not only broadened the meaning of freedom of speech applying in it to the states, but has also acknowledged various forms of speech which have needed closer analysis in order to define the scope of their constitutional protection. It has led to numerous cases in which the Justices have had to interpret the First Amendment in accordance with the due process of law of the Fourteenth Amendment. As a result, contemporary constitutional law textbooks consisting of more than 1,500 pages devote almost one-fourth of their content to the precedents concerning freedom of speech!

Despite its great value for society and individuals, freedom of speech has never been considered an absolute liberty. Like every kind of freedom, it has had many limitations imposed upon it. Examples of this can be found throughout the 20th century due to decisions issued by the U.S. Supreme Court which reflected various moments in American history, such as the world wars, the Cold War Era or the development of electronic media. In effect, some kinds of speech and publication are considered to be outside the First Amendment's protection, whilst others receive a reduced level of protection. In other words, there is no speech that would be wholly protected by the Constitution, which can be observed while analyzing the opinions of the Supreme Court in cases introduced in the present chapter.

Although freedom of speech became applicable to the states in 1925, in *Gitlow v. New York*, there were earlier disputes in which the Court confronted the scope of the First Amendment's protection regarding expression. Particularly *Schenck v. United States* (1919) was a case where the Justices had to determine the scope of speech which, according to the U.S. government, threatened national security issues. In order to define whether such speech should enjoy any form of constitutional protection, the Court established the 'clear and present danger' test which became the basis for future similar cases. According to this test which was later modified in *Whitney v. California* (1927), the speech constituting real and immediate danger to the government's operations or the national security lacks protection by the supreme law of the land. The clear and present danger test was changed in 1969 when the Justices in *Brandenburg v. Ohio* established the 'imminent lawless action' test which determined constitutionality by analyzing a speaker's intent, speeches' imminence and the probability of its negative effects.

A different group of cases regarding the freedom of speech concerns various types of expression, some of which have enjoyed constitutional protection, whereas others have not. Among these cases are disputes referring to: fighting words (*Chaplinsky v. New Hampshire*, 1942), obscenity (*Roth v. United States*, 1957), commercial speech (*Bigelow v. Virginia*, 1975), and symbolic speech (*Texas v. Johnson*, 1989). As the First Amendment introduces freedom of speech and of the press, it is important to acknowledge that there has been a whole line of Supreme Court adjudications referring to the liberties of American media. Two of these cases are presented in the volume: *Near v. Minnesota* (1931), enforcing the protection of freedom of the press by the state governments, and the landmark dispute *New York Times v. Sullivan* (1964), confronting the issue of libel against public figures.

Schenck v. United States – 249 U.S. 47 (1919)

When World War I broke out in 1914, the United States declared neutrality and the problem of army mobilization did not exist. However, after several naval incidents which caused the deaths of American citizens, the U.S. government decided to join the war operations in Europe. Such a decision meant proclamation of a draft which began on June 5, 1917 and led to registration of over … soldiers. There were, however, people and organizations that opposed American participation in the war. One of them, Charles Schenck, Secretary of the Socialist Party of the United States, printed and distributed leaflets negating the necessity of the draft. Despite the fact that most of the leaflets exhorted opposing the draft, they suggested only peaceful protesting against the legislation imposing draft regulations. According to the then-existing law, the *Espionage Act*, it was illegal to hamper recruitment and military draft, and therefore Schenck was accused of violating the federal law.

Writing for the majority, Justice Oliver Wendell Holmes introduced the so-called 'clear and present danger' test which influenced subsequent adjudication in the freedom of speech cases. The doctrine regarded the law limiting certain types of speech constitutional if the speech created a real and immediate danger to the values of the nation and the state (national security). Furthermore, the Justices pointed out a significant difference between protection of basic freedoms of citizens during times of peace and times of war. *Schenck v. United States* thus became one of the first important cases concerning the rights of individuals protected by the First Amendment to the Constitution and certainly one of the cases which allowed the government to limit expression which was inconsistent with the policy of the U.S. government. The 'clear and present danger' test was used numerous times between 1919 and 1969, when it was reshaped by the Court's decision in *Brandenburg v. Ohio* (see below).

The Majority Opinion (Justice Oliver Wendell Holmes):

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, by causing and attempting to cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony, Schenck said he was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer, there was evidence that she was a member of the Executive Board, and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence

that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York; Weeks v. United States*. The search warrant did not issue against the defendant, but against the Socialist headquarters at 1326 Arch Street, and it would seem that the documents technically were not even in the defendants' possession. See: *Johnson v. United States*. Notwithstanding some protest in argument, the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*.

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on: "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*. We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co*. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in § 4, punishes conspiracies to obstruct, as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*. Indeed, that case might be said to

dispose of the present contention if the precedent covers all *media concludendi*. But, as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, of course, does not affect the present indictment, and would not even if the former act had been repealed. Judgments affirmed.

Gitlow v. New York – 268 U.S. 652 (1925)

Fear of spreading communist and socialist doctrine among U.S. citizens became one of the aftermaths of World War I. The American government established new rules and regulations against anything or anyone that could be related to the communist threat, called in the 1920s the *Red Scare*. On one hand, U.S. Attorney General A. Mitchell Palmer initiated a large-scale hunt for radicals and communists called the Palmer Raids. On the other, particular laws, such as the *Espionage Act* of 1917 or the *Sedition Act* of 1918 broadened the meaning of crimes against the government by forbidding the conveying of information or false statements that interfered with American reason of state, or the use of hostile language with regard to U.S. national symbols (flag, army, government). The nationwide panic, backed by significant decisions of the state authorities, led to limitation of freedom of speech, of the press and of association. Shortly after the imposition of the *Red Scare*, many citizens were charged with offensive and hostile speech, thus violating federal and state laws. One of them was Benjamin Gitlow, a socialist activist, who was responsible for distributing leaflets encouraging the establishment of a socialist state by different measures, such as strikes or marches. In New York, where he agitated, such behavior was illegal and interfered with state criminal anarchy laws.

When the case was brought to the U.S. Supreme Court, it did not only concern the question of the defendant's guilt, but also the issue of due process of law. According to the Court's long-lasting decision in *Barron v. Baltimore*, the first ten amendments to the U.S. constitution (including guarantees of freedom of speech) referred only to the federal government, not to the states. However, in *Gitlow*, for the first time in its history, the Justices decided to broaden the meaning of the Bill of Rights as binding also to the states, thanks to the 'selective incorporation doctrine' based on an interpretation of the Fourteenth Amendment. Its due process of law clause allowed, in the Court's opinion, expansion of particular rights and freedoms from the first ten amendments to the states. In *Gitlow*, Justices agreed that freedom of speech and of the press should bind both the federal and

state governments. The Court did not, however, decide this for Benjamin Gitlow, as his leaflets violated the important and reasonable law of the country, which had been proved by the government of New York.

The Majority Opinion (Justice Edward Terry Sanford):

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. The case is here on writ of error to the Supreme Court, to which the record was remitted.

. . . The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second, that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: the defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper, and was its business manager. He arranged for the printing of the paper, and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction, and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption, and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation."

. . . At the outset of the trial, the defendant's counsel objected to the introduction of any evidence under the indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on the grounds stated in the first objection to evidence," and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government, and that, if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that, to constitute guilt, the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness, with the object of overthrowing organized government. These were also denied.

. . . Both the Appellate Division and the Court of Appeals held the statute constitutional. . . . The precise question presented, and the only question which we can consider under this writ of error, then is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

. . . For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek,* that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question. It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. *Robertson v. Baldwin; Patterson v. Colorado; Schenck v. United States*; *Frohwerk v. United States; Debs v. United States; Schaefer v. United States; Gilbert v. Minnesota; Warren v. United States*. Reasonably limited, it was said by Justice Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson v. Baldwin; Patterson v. Colorado; Fox v. Washington; Gilbert v. Minnesota; People v. Most; State v. Holm; State v. Hennessy; State v. Boyd; State v. McKee*. Thus, it was held by this Court in the Fox Case that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert* Case, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State v. Holm*. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. *People v. Most*. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People v. Lloyd*. See also: *State v. Tachin*, and *People v. Steelik*. In short, this freedom does not deprive a State of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. *Turner v. Williams*. In *Toledo Newspaper Co. v. United States*, it was said:

"The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute, the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler v. Kansas*. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest."

Great Northern Ry. v. Clara City. That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace, and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In *People v. Lloyd*, it was aptly said:

"Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press, and we must and do sustain its constitutionality.

This being so, it may be applied to every utterance – not too trivial to be beneath the notice of the law – which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox v. Washington; Abrams v. United States; Schaefer v. United States; Pierce v. United States; and Gilbert v. Minnesota*. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases, it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States; Debs v. United States*. And the general statement in the *Schenck* Case that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" – upon which great reliance is placed in the defendant's argument – was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of.the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms, and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen v. Most*.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not, in itself, unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is affirmed.

Whitney v. California – 274 U.S. 357 (1927)

In the 1920s many cases that reached the U.S. Supreme Court concerned issues connected with freedom of speech and its limitations. Most of the decisions in these cases were in favor of the government which was legitimized to establish laws protecting national security. Regardless of the real intent of legislators initiating new laws in the wake of World War I, they meant in practice absolute prohibition on creating and operating socialist and communist movements in the United States. If anybody was involved in organizing left-wing groups or parties, he/she was immediately charged with conspiracy against the government. Such a situation happened to a member of the Communist Labor Party of California, Charlotte Anita Whitney, who was accused of violating California's Criminal Syndicalism Act. The Act forbade any activities which led to overthrowing the democratic government, even by only advocating or teaching. Despite the fact that Whitney claimed to have a peaceful attitude towards the American government, she was found guilty of assisting in the organization of a movement which was dangerous to the safety and welfare of the then-existing state.

The Supreme Court decided the case in 1927 and it held that California's law was constitutional, thus affirming Whitney's conviction. In his majority opinion, Justice Edward Terry Sanford confirmed the 'clear and present danger' doctrine created eight years earlier in the *Schenck* case, broadening its meaning to all activities which tend to disturb public peace, incite crime or create organizations endangering the existence of the government. This controversial approach of the Court has been called the 'bad tendency' doctrine, allowing convictions concerning any kinds of speech which have negative inclinations. Despite the fact that some Justices (Brandeis, Holmes) wrote concurring opinions underlining the necessity of the clear and present danger of speech, the unanimity of the Court proved the political and social tensions present at the analyzed period of U.S. history.

The Majority Opinion (Justice Edward Terry Sanford):

> By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. Her petition to have the case heard by the Supreme Court was denied. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had.
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> On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. Thereafter, a petition for rehearing was granted, and the case was again heard and reargued both as to the jurisdiction and the merits.
>
> . . . The first count of the information, on which the conviction was had charged that, on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully, willfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly be-

came a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

. . . We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course, our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented in and either expressly or necessarily decided by that court; *Dewey v. Des Moines; Keokuk & Hamilton Bridge Co. v. Illinois; Capital City Dairy Co. v. Ohio; Haire v. Rice; Selover, Bates & Co. v. Walsh. Missouri Pacific Railway v. Coal Co*. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey v. Des Moines; Keokuk & Hamilton Bridge Co. v. Illinois*. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here – not presented in or passed upon by the Court of Appeal – whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See: *Oxley Stave Co. v. Butler County; Capital City Dairy Co. v. Ohio; Manhattan Life Ins. Co. v. Cohen; Bass, etc. Ltd. v. Tax Commission*.

. . . we now take up, insofar as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding, she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she "took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot;" "that it was not until after the majority of the convention turned out to be" "contrary-minded, and other less temperate policies prevailed," that the convention could have taken on the character of criminal syndicalism, and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury – sustained by the Court of Appeal over the specific objection that it was not supported by the evidence – is one of fact merely, which is not open to review in this Court, involving, as it does, no constitutional question whatever. And we may add that the argument entirely disregards the facts: that the defendant had previously taken out a membership card in the National Party, that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions, and that, after the constitution of the California Party had been adopted, and this resolution had been voted down and the National Program accepted, she not only remained in the convention, without protest, until its close, but subsequently manifested her acqui-

escence by attending as an alternate member of the State Executive Committee and continuing as member of the Communist Labor Party.

2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in *International Harvester Co. v. Kentucky*, and *United States v. Cohen Grocery,* because not fixing an ascertainable standard of guilt.

. . . The Act, plainly, meets the essential requirement of due process that a penal statute be "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co*. And see: *United States v. Brewer; Chicago, etc., Railway v. Dey; Tozer v. United States*. In Omaechevarria v. Idaho, in which it was held that a criminal statute prohibiting the grazing of sheep on any "range" previously occupied by cattle "in the usual and customary use" thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a "range" or to determine the length of time necessary to constitute a prior occupation a "usual" one, this Court said:

"Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash v. United States; Miller v. Strahl*."

So, as applied here, the Syndicalism Act required of the defendant no "prophetic" understanding of its meaning.

And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. *State v. Hennessy; State v. Laundy; People v. Ruthenberg*. And see: *Fox v. Washington; People v. Steelik; People v. Lloyd*.

3. Neither is the Syndicalism Act repugnant to the equal protection clause on the ground that, as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

It is, settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary, and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basic, but is essentially arbitrary. *Lindsley v. National Cabonic Gas Co*., and case cited. A statute does not violate the equal protection clause merely because it is not all-embracing; *Zucht v. King; James-Dickinson Farm Mortgage Co. v. Harry*. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. *Patsone v. Pennsylvania; Farmers Bank v. Federal Reserve Bank; James-Dickinson Mortgage Co. v. Harry, supra*. The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need, and is not to be overthrown merely because other instances may be suggested to which also it might have been applied, that being a matter for the legislature to determine unless the case is very clear. *Keokee Coke Co. v Taylor*. And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. *Stebbins v. Riley; Graves v. Minnesota; Swiss Oil Corporation v. Shanks*.

The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. See: *State v. Hennessy; State v. Laundy*. And there is no substantial basis for the contention that the legislature has arbitrarily or unreasonably limited its application to those advocating the use of violent and unlawful methods to effect changes in industrial and political conditions, there being nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods. That there is a widespread conviction of the necessity for legislation of this character is indicated by the adoption of similar statutes in several other States.

4. Nor is the Syndicalism Act, as applied in this case, repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom, and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, and cases cited.

By enacting the provisions of the Syndicalism Act, the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern Railway v. Clara City*.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See: *People v. Steelik*. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged. The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal affirmed.

Near v. Minnesota – 283 U.S. 697 (1931)

Censorship is one of the most dangerous limitations to the freedom of speech. However, throughout American history there have been many examples of acts of government (called *Sedition laws*) which have narrowed the ability of people to speak and write freely, if it was inconsistent with the opinions and views of the state authorities. Censorship most often concerned the press, preventing journalists from disseminating truthful information which could harm public officials or their conduct. John Peter Zenger initiated growing awareness of the press in the colonial era, but it was Jay Near who became the symbol of broadening the freedom of the press in the United States. Near prepared an article in a local Minnesota newspaper, the *Saturday Press*, where he presented local public officers in a very negative way by showing their close relations with criminals. The state prevented the article from being published, basing its decision on Minnesota laws allowing censorship (called *prior restraint*) of obscene, malicious or scandalous articles.

In a narrow margin opinion (5–4), the Supreme Court objected to the censorship conducted by the Minnesota government. The Justices, by interpreting the Fourteenth Amendment, broadened the meaning of the First Amendment's freedom of the press and made it applicable to the states. Since 1931 *prior restraint* has been prohibited in most cases, but not all, leaving the possibility of partial censorship of speech that directly endangers national security and safety of the citizens of the United States. For example, forty years later the Court applied the *Near* doctrine to the problems of national security in the famous Pentagon Papers case, *New York Times Co. v. United States* 403 U.S. 713 (1971). On the other hand, it is worth mentioning that the *Near* decision did not allow the publishing of defamatory articles. However, such articles could not be censored before publication, even if later their authors were found guilty of committing a libel.

The Majority Opinion (Chief Justice Charles Evans Hughes):

> Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Section one of the Act is as follows:
>
> "Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away"
>
> "(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or"
>
> "(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,"
>
> is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.
>
> . . . This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local

interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York; Whitney v. California; Fiske v. Kansas; Stromberg v. California*. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases; Northern Pacific Ry. Co. v. North Dakota*. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros. v. Banton; Ribnik v. McBride; Adkins v. Children's Hospital*. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California, supra; Stromberg v. California, supra*. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case, and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions, it is enough to say that, in passing upon constitutional questions, the court has regard to substance, and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson v. Mayor; United States v. Reynolds; St. Louis Southwestern R. Co. v. Arkansas; Mountain Timber Co. v. Washington*. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action, there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice

in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and for justifiable ends. It is apparent that, under the statute, the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words:

"There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked, nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must

satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular, that the matter consists of charges against public officers of official dereliction – and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

. . . The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.

"To prohibit the intent to excite those unfavorable sentiments against those who administer the Government is equivalent to a prohibition of the actual excitement of them, and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect, which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred

of the people, against being exposed to it by free animadversions on their characters and conduct."

There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited."

The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication. Judgment reversed.

Chaplinsky v. State of New Hampshire – 315 U.S. 568 (1942)

Among many various types of speech there are forms of expression which are almost completely protected by the First Amendment to the U.S. Constitution, and there are forms of expression which do not receive such protection, and are thus illegal. To the latter group definitely belong so-called fighting words, i.e. expressions aimed at negative confrontation with other people by inciting violence and hatred. *Chaplinsky v. State of New Hampshire* became the first Supreme Court case in which the Justices were forced to determine the scope of the fighting words doctrine. Although the case seems to touch upon important aspects of the freedom of religion, it has been mainly cited as a milestone decision concerning the limitations of freedom of speech.

The hero of the case, a Jehovah's Witness named Walter Chaplinsky, agitated in a public location in New Hampshire against other kinds of religions, disseminating pamphlets and offensive leaflets. During his arrest by the marshal, Chaplinsky used against the officer such words as 'God-damned racketeer' and 'damned Fascist.' State law made it illegal to offend anybody by intentionally using words in public which could harm or incite hatred of that person. It is worth observing that Chaplinsky was arrested only for his face-to-face encounter with the officer, and not for religious agitation. After being convicted by state courts, he searched for justice in the highest judicial tribunal in the

United States, but the Justices unanimously upheld his convictions and defined the fighting words doctrine as not protected by the First Amendment. The doctrine based on estimation of offensive expressions by reasonable, intelligent and average person who becomes an addressee of such form of speech. The decisions following the *Chaplinsky* precedent maintained its main assumptions and principles, while, however, leading to a narrowing of the scope of the fighting words doctrine.

The Majority Opinion (Justice Frank Murphy):

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant,

"with force and arms, in a certain public place in said city of Rochester, to-wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names."

Upon appeal, there was a trial *de novo* of appellant before a jury in the Superior Court. He was found guilty, and the judgment of conviction was affirmed by the Supreme Court of the State.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled, and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection, the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. Griffin*. Freedom of worship is similarly sheltered. *Cantwell v. Connecticut*.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

"Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions – the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional."

We accept that construction of severability and limit our consideration to the first provision of the statute. On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said:

"The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which, by general consent, are 'fighting words' when said without a disarming smile. . . . [S]uch words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker – including 'classical fighting words,'

words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. See: *Cantwell v. Connecticut*. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. See: *Fox v. Washington*.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, doe not contravene the Fourteenth Amendment.

Affirmed.

Roth v. United States – 354 U.S. 476 (1957)

After defining the scope of the First Amendment's protection of fighting words, the Supreme Court found itself in a similar position with regard to obscene materials. Earlier interpretations of obscenity measures were based on the 19th-century English common-law case which led to the prohibition of publishing famous books by such writers as James Joyce and Balzac. The Court in *Roth* decided to determine a more modern meaning of obscenity and limit its constitutional protection. Samuel Roth was the owner of a book-selling business in the state of New York and he was responsible for mailing different kinds of books and advertisements of books to the inhabitants of the state. Some of his books and advertisements contained nude photographs and erotic stories. Because New York law banned disseminating obscene materials, Roth was charged and convicted by the state courts. He appealed to the U.S. Supreme Court, which heard his case in 1957.

Six Justices led by Justice William Brennan created the so-called 'Roth test' by determining reasonable standards of recognizing particular materials as obscene. The three-element test was applied in the following decades to average persons, common community standards and estimating whether dominant theme of particular material was prurient. At the same time the Court decided that obscenity was not protected by the First

Amendment and therefore anyone who indulged in this kind of speech had to be found guilty of violating the rights of other individuals. The Roth test was modified in 1973 by the Court's decision in *Miller v. California* (413 U.S. 15). Additionally, contemporary American constitutional law often goes back to the case, not only in order to sustain its main principles, but also to cite two dissenting opinions delivered by Justices William Douglas and Hugo Black, who found themselves as defenders of the freedom of speech guarantees. Today their approach is called 'absolutist' and is used to justify prohibition of any form of censorship, especially of the press.

The Majority Opinion (Justice William Brennan):

> The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.
>
> Other constitutional questions are: whether these statutes violate due process, because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*), and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, preempted the regulation of the subject matter (raised in *Alberts*).
>
> Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit. We granted certiorari.
>
> Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. We noted probable jurisdiction.
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> The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. *Ex parte Jackson; United States v. Chase; Robertson v. Baldwin; Public Clearing House v. Coyne; Hoke v. United States; Near v. Minnesota; Chaplinsky v. New Hampshire; Hannegan v. Esquire, Inc.; Winters v. New York; Beauharnais v. Illinois*.
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> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either

blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

. . . We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial Judge instructed the jury:

"The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*."

In *Alberts*, the trial judge applied the test laid down in *People v. Wepplo*, namely, whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois*:

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama*:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."*

The fundamental freedoms of speech and press have contributed greatly to the development and wellbeing of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed, and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*. Some American courts adopted this standard, but later decisions have rejected it and substituted this test: whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person, and, in *Roth*, the trial judge instructed the jury as follows:

"... The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved. . . ."

"The test in each case is the effect of the book, picture or publication considered as a whole not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

"In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and, in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious – men, women and children."

It is argued that the statutes do not provide reasonably ascertainable standards of guilt, and therefore violates the constitutional requirements of due process. *Winters v. New York*. The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." The California statute makes punishable, *inter alia*, the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise, because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States v. Petrillo*. These words, applied according to the proper standard for judg-

ing obscenity, already discussed, give adequate warning of the conduct proscribed, and mark

"... boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

. . . In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "Congress shall make *no law* . . . abridging the freedom of speech, or of the press. . . ." That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7. In *United Public Workers v. Mitchell*, this Court said:

"... The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

Alberts argues that, because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly preempted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions.

"... The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Assn. v. Corsi*.

The judgments are affirmed.

New York Times v. Sullivan – 376 U.S. 254 (1964)

There are hardly any cases decided by the U.S. Supreme Court confronting the issue of tort law, i.e. negligent torts, strict liability torts or intentional torts. This is due to the fact that there is no federal civil law and therefore most civil issues are adjudicated in state courts with state supreme courts as final interpreters of these issues. However, if the case regarding torts also concerns constitutional rights and freedoms of individuals, then the U.S. Supreme Court becomes an obvious institution to shape the scope of these liberties. The case *New York Times v. Sullivan* is such an example – it relates to the freedom of the press, determining at the same time the real meaning and application of an intentional tort called defamation. Defamation is a statement or expression based upon a false claim about somebody who suffers a negative reaction from other people because of the occurrence of that claim. There are two kinds of defamation – slander (oral) and libel (written). The case under consideration concerns the latter type of defamation.

The New York Times contained an article stating that Montgomery police in Alabama had arrested Martin Luther King, Jr. illegally and by partisan and political means. The city commissioner and supervisor of the police department, L.B. Sullivan, filed a libel suit against the newspaper, claiming that the article violated his individual rights. When the case reached the U.S. Supreme Court, Justices had to answer two questions – an individual one, whether the newspaper was liable for damages to the Montgomery city police, and a general one, to what extent the First Amendment protects the press in writing articles against public officials. The majority opinion written by Justice William Brennan held that constitutional protection of freedom of speech limits the ability of public officers to win a libel case against a person who criticizes their official conduct. Thus, the Court paved the way for future criticism of the government by U.S. citizens in written or oral form, provided they do not purposefully make false statements, which is called an 'actual malice' of the speaker. Once again the freedom of the press was confirmed by interpretation of the First and Fourteenth Amendments to the Constitution.

The Majority Opinion (Justice William Brennan):

> We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.
>
> Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs, and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales."
>
> He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that, "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."

. . . We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court – that "The Fourteenth Amendment is directed against State action, and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g.: Alabama Code, Tit. 7, §§ 908–917. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised. See: *Ex parte Virginia; American Federation of Labor v. Swing*.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen*, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action, on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

. . . The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

. . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all." *United States v. Associated Press*.

. . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

. . . The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale.

. . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official con-

duct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

. . . A privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo*, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California* (concurring opinion of Mr. Justice Brandeis), quoted. As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey v. Alabama*, "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff. . . ." *Lawrence v. Fox*. Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg v. California; Williams v. North Carolina*; see: *Yates v. United States; Cramer v. United States*.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*; see also: *One, Inc., v. Olesen; Sunshine Book Co. v. Summerfield*. We must "make an independent examination of the whole record," *Edwards v. South Carolina*, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on

the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom."

The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" – although respondent's own proofs tend to show that it was – that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point – a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract, which is not itself evidence of malice, can retroactively become such by virtue of a retraction subsequently made to another party. But, in any event, that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports, at most, a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. *Charles Parker Co. v. Silver City Crystal Co.; Phoenix Newspapers, Inc., v. Choisser*.

. . . There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements – the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him – did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed

near" the campus, but had not actually "ringed" it, and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not, on their face, make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had, in fact, been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. This reliance on the bare fact of respondent's official position was made explicit by the Supreme Court of Alabama.

. . . This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago v. Tribune Co*. The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion. Reversed and remanded.

Brandenburg v. Ohio – 395 U.S. 444 (1969)

One of the most often cited cases decided in the last forty years by the Supreme Court and concerning the freedom of speech is *Brandenburg v. Ohio*. Surprisingly, the case does not confront the most urgent social and legal issues since it defines the scope of inflammatory speech, which is one of the less analyzed types of speech by the judiciary. The case, however, redefines most of the doctrines created by the Justices in earlier 20th-

century jurisprudence, especially the 'clear and present danger' test from *Schenck v. United States*, and partly the 'bad tendency' test from *Whitney v. California*, replacing them with the 'imminent lawless action' test. This test has been used in subsequent decisions of the Court to define the scope of constitutionally protected speech.

A Ku-Klux-Klan leader from Ohio, Clarence Brandenburg, made a speech in which he discredited other races and used many violent words against the 'colored people.' He was charged with breaching the Ohio Criminal Syndycalism law, which established limitations to so-called violent and offensive speech. While state courts found Brandenburg guilty of the charge, the U.S. Supreme Court did not affirm such a judgment. Justices in a *per curiam* opinion emphasized that according to the Constitution the government could not punish speech that was abstract and that did not lead to use of force or any other violations of law. According to the Court, Clarence Brandenburg's action did not constitute objective and immediate lawless effects, because the teaching of some abstract doctrines did not mean imposing violence. The three-element imminent lawless action test created in the case determined the most important aspects of speech which could be declared unconstitutional, by analyzing the speaker's intent, the speech's imminence and the probability of its negative effects.

The *Per Curiam* Opinion:

> The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal *sua sponte* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. We reverse.
>
> The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.
>
> The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films. One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another

scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are – we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."

"We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California.* The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. See: *Fiske v. Kansas.* But *Whitney* has been thoroughly discredited by later decisions. See: *Dennis v. United States*. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." See also: *Herndon v. Lowry*; *Bond v. Floyd*. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. See: *Yates v. United States; De Jonge v. Oregon; Stromberg v. California*. See also: *United States v. Robel; Keyishian v. Board of Regents; Elfbrandt v. Russell; Aptheker v. Secretary of State* (1964); *Baggett v. Bullitt*.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California,* cannot be supported, and that decision is therefore overruled. Reversed.

Bigelow v. Virginia – 421 U.S. 809 (1975)

Commercial speech may be understood as speech of any form that advertises a product or service for profit or for a business purpose. Although commerce has been an important part of trade both on the federal and state level since the very beginning of U.S. statehood, the scope of commercial speech had never been defined until the mid-20th century. Then, in the famous case *Valentine v. Chrestensen* 316 U.S. 52 (1942), the Court ruled commercial speech out of the protection guaranteed by the First Amendment to the Constitution. More than thirty years later the *Valentine* precedent was overruled by the majority opinion in the case *Bigelow v. Virginia*. Jeffrey Bigelow, the director and editor of the *Virginia Weekly*, was charged and convicted under the state law because his newspaper had printed an advertisement encouraging women to conduct abortion. After his appeal, the case was brought to the Supreme Court, in order to investigate the validity of Virginia's law.

In the name of the Court, Justice Harry Blackmun stated that it was a mistake to assume that advertising, as such, was entitled to no First Amendment protection. The decision confirmed the applicability of the First Amendment to the right of consumers to gain access to truthful information about products being offered on the market. In other words, information expressed in advertisements seemed to have a precious role in society, which acted upon rights and liberties expressed in the supreme law of the land. One should acknowledge that the *Bigelow* decision was made just a few years after the highly controversial opinion of the Court in *Roe v. Wade* (see below) and the effect of the 1973 decision was more than visible in the analyzed case. According to some scholars, there were two more important decisions of the Supreme Court concerning commercial speech in the same period of time, i.e. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights* 413 U.S. 376 (1973) and *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.* 425 U.S. 748 (1976), but it is mainly thanks to the *Bigelow* decision that this type of speech gained constitutional protection. In subsequent precedents dating from the 1980s and 1990s, commercial speech received even broader protection by the First Amendment to the Constitution.

The Majority Opinion (Justice Harry Blackmun):

> An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider v. State*.
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> . . . The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," *Murdock v. Pennsylvania*, or because appellant was paid for printing it, *New York Times Co. v. Sullivan; Smith v. Cal-*

ifornia, or because appellant's motive or the motive of the advertiser may have involved financial gain, *Thomas v. Collins*. The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*.

Although other categories of speech – such as fighting words, *Chaplinsky v. New Hampshire*, or obscenity, *Roth v. United States, Miller v. California*, or libel, *Gertz v. Robert Welch, Inc*., or incitement, *Brandenburg v. Ohio*, – have been held unprotected, no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories.

The appellee, as did the Supreme Court of Virginia, relies on *Valentine v. Chrestensen*, where a unanimous Court, in a brief opinion, sustained an ordinance which had been interpreted to ban the distribution of a handbill advertising the exhibition of a submarine. The handbill solicited customers to tour the ship for a fee. The promoter-advertiser had first attempted to distribute a single-faced handbill consisting only of the advertisement, and was denied permission to do so. He then had printed, on the reverse side of the handbill, a protest against official conduct refusing him the use of wharfage facilities. The Court found that the message of asserted "public interest" was appended solely for the purpose of evading the ordinance, and therefore did not constitute an "exercise of the freedom of communicating information and disseminating opinion." It said: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."

But the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

This Court's cases decided since *Chrestensen* clearly demonstrate as untellable any reading of that case that would give it so broad an effect. In *New York Times Co. v. Sullivan,* a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in the newspaper criticizing police action against members of the civil rights movement and soliciting contributions for the movement. The Court held that this advertisement, although containing factually erroneous defamatory content, was entitled to the same degree of constitutional protection as ordinary speech. It said:

"That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."

Chrestensen was distinguished on the ground that the handbill advertisement there did no more than propose a purely commercial transaction, whereas the one in *New York Times* "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."

The principle that commercial advertising enjoys a degree of First Amendment protection was reaffirmed in *Pittsburgh Press Co. v. Human Rel. Comm'n*. There, the Court, although divided, sustained an ordinance that had been construed to forbid newspapers to carry help-wanted advertisements in sex-designated columns except where based upon a *bona fide* occupational exemption. The Court did describe the advertisements at issue as "classic examples of commercial speech," for each was "no more than a proposal of possible employment." But the Court indicated that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal. The illegality of the advertised activity was particularly stressed:

"Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."

The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in *Chrestensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience – not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. See *Roe v. Wade*, and *Doe v. Bolton*. Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.

. . . We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection, and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. See: *Pittsburgh Press Co. v. Human Rel. Comm'n; Lehman v. City of Shaker Heights*. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*. Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech "commercial" in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.

The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above.

. . . No claim has been made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent, or that it related to a commodity or service that was then illegal in either Virginia or in New York, or that it otherwise furthered a criminal scheme in Virginia. There was no possibility that appellant's activity would invade the privacy of other citizens, *Breard v. Alexandria,* or infringe on other rights. Observers

would not have the advertiser's message thrust upon them as a captive audience. *Lehman v. City of Shaker Heights; Packer Corp. v. Utah*.

The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. See: *Miami Herald Publishing Co. v. Tornillo*. We know from experience that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." The policy of the First Amendment favors dissemination of information and opinion, and

"[t]he guarantees of freedom of speech and press were not designed to prevent," . . . "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ." *Curtis Publishing Co. v. Butts*.

We conclude that Virginia could not apply Va. Code Ann. § 18.1–63 (1960), as it read in 1971, to appellant's publication of the advertisement in question without unconstitutionally infringing upon his First Amendment rights. The judgment of the Supreme Court of Virginia is therefore reversed.

Texas v. Johnson – 491 U.S. 397 (1989)

There have been cases throughout U.S. constitutional history which have confirmed the existence of the most protected values of American society, such as fundamental rights and freedoms, issues concerning national security or development of the general welfare of the people. It is difficult to estimate which of these values prevail, because the U.S. Supreme Court's adjudication in the above-mentioned matters has been dependent on distinct moments in history. Today, there is no doubt that national security measures would often prevail over some rights and liberties of the society. However, in 1989 when the case *Texas v. Johnson* was decided, the question of national values v. personal liberty was posed and answered by the Justices in a surprising manner. A few years earlier Gregory Lee Johnson had participated in a demonstration in Texas against the policies of the Republican administration of Ronald Reagan. Apart from marching, shouting and picketing, Johnson decided to publicly burn the American flag, thus showing his attitude towards the U.S. government. Even among many demonstrators there were people who felt offended by Johnson's act, not to mention the fact that such behavior was illegal under Texas law. Soon the case was brought to state courts and by appeal it reached the highest judicial tribunal in the country in 1989.

While reviewing the case, the Justices pointed out two important questions: first, whether Johnson's conduct was protected by the Constitution, and second, whether the state could protect by law U.S. national symbols. The first problem especially seems interesting for the analyzed topic. By interpreting its own precedents and the history of the First Amendment, the Court found out that Johnson's act was in reality an expression of his political opinions and therefore should be protected. No matter what kind of symbol was desecrated, it was done so because of the ability to exercise freedom of speech which belongs to the most crucial values of American society. However, if Johnson's conduct had caused unrest and riots, then the Court would not have protected this kind of behavior. *Texas v. Johnson* became one of the most criticized decisions of the Supreme Court in recent years in the United States, but it remains untouched as a landmark precedent establishing the symbolic speech doctrine.

The Majority Opinion (Justice William Brennan):

> . . . While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.
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> The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.
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> Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.
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> . . . Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e.g.: *Spence v. Washington*. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e.g.: *United States v. O'Brien; Spence*. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. See: *O'Brien*. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies

Johnson's conviction under a more demanding standard. See: *Spence.* A third possibility is that the State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien*, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence*.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*; of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*; and of picketing about a wide variety of causes, see, e.g.:, *Food Employees v. Logan Valley Plaza, Inc.; United States v. Grace*.

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence*; refusing to salute the flag, *Barnette*; and displaying a red flag, *Stromberg v. California*, we have held, all may find shelter under the First Amendment. See also: *Smith v. Goguen* (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." (REHNQUIST, J., dissenting). Thus, we have observed: "[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette*. Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

. . . We have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*. To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace,", and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*. No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. *Cantwell v. Connecticut; FCC v. Pacifica Foundation* (opinion of Stevens, J.).

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace.

We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See: *Boos v. Barry*.

. . . According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry*.

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "special place" reserved for the flag in our Nation. *Smith v. Goguen* (Rehnquist, J., dissenting).

. . . If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, e.g.: *Hustler Magazine v. Falwell; City Council of Los Angeles v. Taxpayers for Vincent; Bolger v. Youngs Drug Products Corp.; Carey v. Brown; FCC v. Pacifica Foundation; Young v. American Mini Theatres, Inc*. (plurality opinion); *Buckley v. Valeo; Grayned v. Rockford; Police Dept. of Chicago v. Mosley; Bachellar v. Maryland; O'Brien; Brown v. Louisiana; Stromberg v. California*.

. . . In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that, even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role – as where, for example, a person ceremoniously burns a dirty flag – we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol – as a substitute for the written or spoken word or a "short cut from mind to mind" – only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

. . . There is, moreover, no indication – either in the text of the Constitution or in our cases interpreting it – that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio*. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." *Spence*. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement." *Barnette*.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See: *Abrams v. United States* (Holmes, J., dissenting).

. . . Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore affirmed.

Chapter Three

Freedom of Religion

Introduction

Apart from establishing freedom of speech and of the press, the First Amendment to the Constitution also covers the issue of freedom of religion. This guarantee limited to a three-word provision became one of the most interpreted parts of the Bill of Rights. As the Court recognized, there are two major freedoms stemming from the freedom of religion guarantee: the free exercise clause and free establishment clause. The meaning of both clauses has evolved thanks to the changing interpretation conducted by the U.S. Supreme Court, and the analysis of several dozen years of adjudication leads to a definition of the contemporary scope of the freedom of religion in the United States. The free exercise clause concerns the scope of the government's influence over the form and method of the expression of religious beliefs, whereas the free establishment clause determines the proper relation between the state and religious institutions based on the separationist or accommodationist approach of interpretation. The first approach means total separation of state and church, and the latter allows partial connections between the government and religious congregations.

It is worth mentioning that the United States seems to be a country in which religion plays an important role in social and political relations, despite the fact that officially there is no state religion. Furthermore, there are thousands of different churches and denominations in the country enjoying freedom of choice in exercising their faith as well as liberty from encroachment of state legislation upon their fundamental beliefs and values. Every candidate for U.S. president in history has been a representative of one of the churches, even very minor ones, making the phrase *God Bless America* a crucial element of his political strategy. According to many scholars the term 'civil religion' fits America the most, because most of its citizens approve of religion in general without being concerned about the content and essence of particular faiths. Such a theoretical

approach could also be noticed in most of the Supreme Court's adjudications referring to the freedom of religion clauses of the First Amendment.

The free exercise clause became the first of the two clauses closely interpreted by the judicial branch, with regard to the federal government in *Reynolds v. United States* 98 U.S. 145 (1878), a case which is not present in this volume, and with regard to the state government in *Cantwell v. Connecticut* (1940). The latter case became a landmark decision thanks to which the free exercise clause was applied to the states through the Fourteenth Amendment's due process of law clause. The same role with regard to the free establishment clause was played by *Everson v. Board of Education* (1947) in which the Court, for the first time, established the foundations of the later developed separationist approach in religious issues. This approach has been followed by most of the subsequent Courts, which have most often ruled against any kind of governmentally-based influence over religious institutions or individual religious beliefs. Such decisions have concerned mainly the system of education by determining the inadmissibility of school prayer (*Engel v. Vitale*, 1962), financial aid to public and non-public schools (*Lemon v. Kurtzman*, 1971), or the moment of meditation in schools (*Wallace v. Jaffree*, 1985). Recently, however, one can observe a slowly changing attitude in the Court from the separationist approach towards the accomodationist approach, which may be observed in the *Zelman v. Simmons-Harris* precedent (2002) upholding governmental legislation over programs which affect religious institutions but are not aimed at controlling religious issues (so-called private-choice test).

Cantwell v. Connecticut – 310 U.S. 296 (1940)

Despite the fact that religious issues were vital and significant for American society in the 19th century, most of the cases concerned limitations imposed on the federal government with regard to constitutional protection offered by the First Amendment. The most famous decision of these times tends to be *Reynolds v. United States* 98 U.S. 145 (1878) in which the Supreme Court determined the constitutionality of the federal law which banned the polygamy of Mormons, stemming from their religion. However, as a result of the precedential decision of the Court in the *Gitlow v. New York* case (see above) where Justices acknowledged that the freedom of speech clause applied to the states, the process of selective incorporation of other Bill of Rights' clauses on states began. Fifteen years after the *Gitlow* decision the Court had the opportunity to adjudicate in a case which concerned the constitutionality of religious solicitation. Three members of the Cantwell Family (Newton, Jesse and Russell) were visiting private houses, distributing leaflets and books that promoted the superiority of the Jehovah's Witnesses' religion over other religions. Some of their statements, in particular, sounded anti-Roman Catholic, which outraged many people who then complained about the Cantwells' behavior. The

law of Connecticut provided for punishment of people who violated special ordinance requiring the registration of religious solicitors. The family was arrested, charged and convicted for breaching the peace and on appeal the case was brought to the U.S. Supreme Court.

The main role of the Justices was to decide whether the state's legal requirement of having a license to solicit religion was constitutional. The majority opinion prepared by Justice Owen Roberts held that the ordinance of Connecticut violated the freedom of religion of the First Amendment, thus establishing the protection of the free exercise clause against the states. The judiciary decided to protect the individual rights of religious solicitors against the general rights of the public not to be disturbed by their conduct. It is obvious, however, that the *Cantwell* case concerns not only freedom of religion issues but also, if not above all, the freedom of speech guarantees. It is proof that the first decisions of the Court regarding the free exercise clause were in fact decisions based on the protection of freedom of expression.

The Majority Opinion (Justice Owen Roberts):

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County, each of them was convicted on the third count, which charged a violation of § 294 of the General Statutes of Connecticut, and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court, the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell on the fifth count was also affirmed, but the conviction of Newton and Russell on that count was reversed, and a new trial ordered as to them.

. . . The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute, but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that, "in addition to the sale of the books and the distribution of the pamphlets, the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute."

. . . We hold that the statute, a construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties

guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts – freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly, such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may, by general and nondiscriminatory legislation, regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon, and may in other respects safeguard the peace, good order, and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint, but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching, but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

. . . Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt, a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an offense under the state law, and we accept its decision as binding upon us to that extent.

. . . Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is that, under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country, for a people composed of many

races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

The judgment affirming the convictions on the third and fifth counts is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed.

Everson v. Board of Education – 330 U.S. 1 (1947)

If the *Cantwell v. Connecticut* case was used by the Court to apply the free exercise clause of the First Amendment to the states, the same role was played by the *Everson v. Board of Education* decision with regard to the free establishment clause. Interpreting the First Amendment in connection with the due process clause of the Fourteenth Amendment, Justices confirmed that both the federal and state governments were bound by the necessity of separating religious and state issues. This direction of adjudication, often called the separationist doctrine, laid out foundations for the subsequent case-law regarding significant interpretation of the free establishment clause, aiming at prohibition of any kind of state influence over religious issues.

Arch R. Everson filed a lawsuit against the Board of Education of the City of Ewing, New Jersey, which had approved a state program authorizing payments of the cost of transportation of children to all local schools, including religious (Catholic) schools. Everson was convinced that such a payment made by public schools operated by the state violated the separation of church and state doctrine derived from the U.S. Constitution. Although state courts dismissed his arguments and the Supreme Court of the United States affirmed the judgment, sustaining the constitutionality of the New Jersey law, the case is crucial to American constitutional law due to its interpretation through the Fourteenth Amendment. The Justices, led by the famous Hugo Black, incorporated the separationist vision of the free establishment clause and applied it to the states. In the following years the doctrine developed as the Court began to declare state laws invalid which directly or indirectly influenced the establishment of any religion. However, it was not until 1970 when the Court delivered the next crucial decision regarding the doctrinal approach towards the establishment clause of the First Amendment to the Constitution. *Everson v. Board of Education* is also worth analyzing because of its characteristic position concerning religion on 'American soil' since colonial times.

The Majority Opinion (Justice Hugo Black):

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the state constitution. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. The case is here on appeal under 28 U.S.C. § 344(a).

. . . The only contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. *First*. They authorize the State to take by taxation the private property of some and bestow it upon others to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. *Second*. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

The due process argument that the state law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any nonpublic school, whether operated by a church or any other nongovernment individual or group. But the New Jersey legislature has decided that a public purpose will be served by using tax raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

. . . The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania*, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion" probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill

of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of nonbelief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to, and began to thrive in, the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or nonbelievers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or nonbeliever, should be taxed to support a religious institution of any kind;

that the best interest of a society required that the minds of men always be wholly free, and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. The preamble to that Bill stated, among other things, that "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern. . . ."

And the statute itself enacted "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ."

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective, and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds v. United States*. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again, the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in:

"The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. United States*.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power, even though it approaches the verge of that power. See: *Interstate Ry. v. Massachusetts, Holmes*, J. New Jersey cannot, consistently with the "establishment of religion" clause of the First Amendment, contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith*, *or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children, including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

> This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious, rather than a public, school if the school meets the secular educational requirements which the state has power to impose. See: *Pierce v. Society of Sisters*. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.
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> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here. Affirmed.

Engel v. Vitale – 370 U.S. 421 (1962)

Continuing the separationist doctrine earlier established in *Everson v. Board of Education*, the Court was forced to determine the constitutionality of school prayers. Depending on various state and local programs, different boards of education offered shorter or longer prayers in public schools. One such program that had been established in New York schools was taken to court and created a dispute which led to the *Engel v. Vitale* decision. Students of public schools in the state of New York had an opportunity to start the school day with a short prayer to 'Almighty God' which, according to some of them, violated their freedom of religion guarantees. The prayer had been established by the Board of Regents of the State of New York and, what seems quite interesting, was voluntary, not compulsory. Steven Engel, in the name of the parents of children attending New York schools, sued William Vitale from the state's board of education and challenged the legality of the prayer. In 1962 the case was decided on appeal by the U.S. Supreme Court.

Once again Justice Hugo Black delivered the majority opinion in a dispute concerning the freedom of religion, confirming the necessity of a clear division between the role of the state and role of religious denominations and groups. Any kind of prayer established by the federal, state or local government would be held unconstitutional due to interpretation of the First and Fourteenth Amendments guaranteeing separation of church and state. If the government tried to prepare any kind of prayer, even 'nondenominational,' for the children in schools, the judiciary would always oppose such an initiative as a type of sponsorship of religious views violating the establishment clause.

The Majority Opinion (Justice Hugo Black):

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

. . . Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that "Congress shall make no law respecting an establishment of religion" – a command which was "made applicable to the State of New York by the Fourteenth Amendment of the said Constitution." The New York Court of Appeals, over the dissents of Judges Dye and Fuld, sustained an order of the lower state courts which had upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection.

We granted certiorari to review this important decision involving rights protected by the First and Fourteenth Amendments.

We think that, by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this, and the trial court expressly so found:

"The religious nature of prayer was recognized by Jefferson, and has been concurred in by theological writers, the United States Supreme Court, and State courts and administrative officials, including New York's Commissioner of Education. A committee of the New York Legislature has agreed."

"The Board of Regents as amicus curiae, the respondents, and intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage. . . ."

The petitioners contend, among other things, that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention, since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that, in this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

. . . By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church

and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people, rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say – that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "nondenominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may, in certain instances, overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that, only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend

those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind – a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding "unlawful [religious] meetings . . . to the great disturbance and distraction of the good subjects of this kingdom. . . ." And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights, with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that, since the beginning of that history, many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew, rather, that it was written to quiet well justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others – that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that, because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever?"

The judgment of the Court of Appeals of New York is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Lemon v. Kurtzman – 403 U.S. 602 (1971)

In the 1960s and 1970s various states created laws which referred to financial aid to public and non-public schools, among which were also denominational and parochial schools. In Pennsylvania, Alton Lemon sued David Kurtzman, Superintendent of Public Instructions of Pennsylvania, responsible for reimbursement for teacher materials and salaries in nonpublic schools (including Catholic institutions). The reimbursement was in accordance with state law, the Non-public Elementary and Secondary Education Act of 1968, allowing such contributions to religious-based institutions. When the case was brought to the U.S. Supreme Court, it was decided jointly with two other cases, *Earley v. DiCenso* and *Robinson v. DiCenso*, which challenged the constitutionality of similar Rhode Island statutes (providing salary supplements to teachers of secular subjects in private schools).

Chief Justice Warren Burger, speaking for the majority, definitely confirmed the scope of the free establishment clause, negating the possibility of state-based financial aid to any institutions with religious affiliation. The decision is famous for the so-called 'Lemon test' created by the Court, which provided for future adjudication in similar cases concerning the scope of state legislation over religion. To determine a government's legislation unconstitutional one of the three elements of the test has to be violated: the legislation should have a secular purpose, should not advance nor inhibit religion, and should not constitute any closer relations between the government and religion. The Lemon Test has been frequently used in the last four decades to protect citizens' freedom of religion guarantees from a government's encroachments. However, among many Justices, especially conservatives, there is an open discussion about the constitutionality of the *Lemon* precedent.

The Majority Opinion (Chief Justice Warren Burger):

> These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.
>
> Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.
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> . . . *In Everson v. Board of Education*, this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There, Mr. Justice Black, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels acknowledgment,

moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is, at best, opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion, but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*.

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*; finally, the statute must not foster "an excessive government entanglement with religion." *Walz*.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen*, the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were, in fact, instrumental in the teaching of religion. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract, we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission, and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions, and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

In *Walz v. Tax Commission, supra*, the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine, rather than enlarge, the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson*; *Sherbert v. Verner* (HARLAN, J., dissenting). Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was, in fact, being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. MR. Justice Harlan, in a separate opinion in *Walz, supra*, echoed the classic warning as to "programs, whose very nature is apt to entangle the state in details of administration. . . ." Here we find that both statutes foster an impermissible degree of entanglement.

. . . *Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular, as distinguished from the religious, instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for, in both those cases, the Court was careful to point out that state aid was provided to the student and his parents – not to the church-related school. *Board of Education v. Allen; Everson v. Board of Education*. In *Walz v. Tax Commission*, the Court warned of the dangers of direct payments to religious organizations:

"Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ."

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular, the

government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare, and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. *Walz v. Tax Commission* (separate opinion of HARLAN, J.). See also: *Board of Education v. Allen* (Harlan, J., concurring); *Abington School District v. Schempp* (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." *Walz v. Tax Commission*. We could not expect otherwise, for religious values pervade the fabric of our national life. But, in *Walz*, we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

In *Walz*, it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that, in constitutional adjudication, some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. A certain momentum develops in constitutional theory, and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

Wallace v. Jaffree – 472 U.S. 38 (1985)

The U.S. Supreme Court's decision from 1962 in *Engel v. Vitale* clearly set limitations to prayers offered in the programs of public and non-public schools by forbidding such religious statements regardless of their content, wording or purpose. It is interesting, however, to examine the Court's attitude towards the effort to introduce state-based religious activities in schools consisting in silent meditation. Such a situation occurred at the beginning of the 1980s in Mobile, Alabama, where teachers could impose a minute of silence in order to allow the children religious meditation or voluntary prayer in class. Three children of Ishmael Jaffree were subjected to such a program and he brought a suit against the state, asking the courts to review its constitutionality.

When the case entered the Supreme Court of the United States, many observers were convinced that the Justices would allow such a minute of silence in schools, as it was voluntary and not affiliated with any particular religion or denomination. Yet the Court did not hesitate to determine the Alabama law unconstitutional, interpreting it through the First and Fourteenth Amendments and finding that the main purpose of the legislation was religious. The free establishment clause read in connection with the due process clause meant the necessity of the government to stay neutral towards religious issues, especially in public places such as schools. The Court used the Lemon test and found no direct relation with the secular purpose of the legislation established by the state of Alabama, thus confirming the violation of Jaffree's freedom of religion guarantees. The *Wallace* decision did not prohibit all 'moment of silence' legislations, but only those which were established for clear religious purposes.

The Majority Opinion (Justice John Paul Stevens):

> At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a 1-minute period of silence in all public schools "for meditation"; (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and (3) § 16–1–20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."
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> At the preliminary injunction stage of this case, the District Court distinguished § 16–1–20 from the other two statutes. It then held that there was "nothing wrong" with § 16–1–20, but that §§ 16–1–20.1 and 16–1–20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity." After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.
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> The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both § 16–1–20.1 and § 16–1–20.2, and held them both unconstitutional. We have already affirmed the Court of Appeals' holding with respect to § 16–1–20.2. Moreover, appellees have not questioned the holding that § 16–1–20 is valid. Thus, the narrow question for decision is whether § 16–1–20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.
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> . . . Our unanimous affirmance of the Court of Appeals' judgment concerning § 16–1–20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.
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> As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was

amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.

. . . When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman*, we wrote:

"Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*; finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz v. Tax Comm'n*."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, e.g., *Abington School District v. Schempp* (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16–1–20.1 was not motivated by any clearly secular purpose indeed, the statute had no secular purpose.

The sponsor of the bill that became § 16–1–20.1, Senator Donald Holmes, inserted into the legislative record – apparently without dissent – a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no other purpose in mind." The State did not present evidence of any secular purpose.

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16–1–20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16–1–20.1 and its 1978 predecessor, § 16–1–20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

There are only three textual differences between § 16–1–20.1 and § 16–1–20: (1) the earlier statute applies only to grades one through six, whereas § 16–1–20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16–1–20.1 uses the word "may"; (3) the earlier statute refers only to "meditation" whereas § 16–1–20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation, because the minor appellees were in kindergarten or second grade during the 1981–1982 academic year. The second difference would also have no impact on this litigation, because the mandatory language of § 16–1–20 continued to apply to grades one through six. Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16–1–20 before the enactment of § 16–1–20.1. Thus, only two conclusions are consistent with the text of § 16–1–20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

We must, therefore, conclude that the Alabama Legislature intended to change existing law, and that it was motivated by the same purpose that the Governor's answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The legislature enacted § 16–1–20.1, despite the existence of § 16–1–20, for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion." The well-supported concurrent findings of the District Court and the Court of Appeals – that § 16–1–20.1 was intended to convey a message of state approval of prayer activities in the public schools – make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that § 16–1–20.1 violates the First Amendment. The judgment of the Court of Appeals is affirmed.

Zelman v. Simmons-Harris – 536 U.S. 639 (2002)

Since the middle of the 20th century the Court has followed a clear line of adjudication in the establishment clause cases by continuously rejecting the possibility of state legislation over religious issues. At the beginning of the 21st century the Justices again confronted the issue of governmentally-based programs of financial aid referring to schools, some of which were religious institutions. The membership of the highest judicial tribunal in the United States has changed, however, since the times of the imposition of the Lemon test, and one can observe this in the decision in the *Zelman v. Simmons-Harris* dispute. The state of Ohio established a program (Pilot Project Scholarship Program) providing tuition vouchers for the parents of poor children attending public and non-

public schools in Cleveland. Statistics proved that after some time more than 80% of private schools benefiting from the program were religiously affiliated, and so were most of the students. A group of inhabitants of Ohio sued the program, claiming that it violated the necessary division of state and religious issues, i.e. the establishment clause of the First Amendment to the Constitution.

In a very narrow margin opinion (5–4), the Supreme Court, led by its Chief Justice William H. Rehnquist, decided to uphold the program as it did not encroach on the freedom of religion of Ohio citizens. The Justices were convinced that the state of Ohio had proved its interest in maintaining the program, the basic purpose of which was to help the poor and encourage educational opportunities for all children, with no regard to their financial status. According to the majority opinion, it was difficult to find even indirect connections between the program and religious issues. The law had been established for all schools, not only for religious schools, and it was mainly the private choice of parents to send their children to schools with religious affiliation. Thus, the Court used a new approach towards the establishment clause cases, called the 'private choice test.'

The Majority Opinion (Chief Justice William Rehnquist):

> . . . There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See: *Reed v. Rhodes*. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education.". The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.
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> It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program. The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." §3313.975(A). Cleveland is the only Ohio school district to fall within that category.
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> The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. §§3313.975(B) and (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. §3313.975(A).
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> . . . In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural

requirements of the Ohio Constitution. *Simmons-Harris v. Goff*. The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, which we stayed pending review by the Court of Appeals. In December 1999, the District Court granted summary judgment for respondents. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. The Court of Appeals stayed its mandate pending disposition in this Court. We granted certiorari, and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Agostini v. Felton*. There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

. . . Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges. In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. . . . In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid … that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." . . . Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."

. . . *Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

. . . We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious.

Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

. . . Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. *Mueller*; *Witters*; *Zobrest*; *Mitchell*. The argument is particularly misplaced here since "the reasonable observer in the endorsement inquiry must be deemed aware" of the "history and context" underlying a challenged program. *Good News Club v. Milford Central School*. Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

. . . Respondents and Justice Souter claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. See: *Agostini*; see also: *Mitchell*. The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."

This point is aptly illustrated here. The 96% figure upon which respondents and Justice Souter rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999—2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. . . . The 96% figure also represents but a snapshot of one particular school year. In the 1997—1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools that had accepted

15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect. In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications.

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty v. Nyquist*, to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, we found that its "function" was "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions,". Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." The program thus provided direct money grants to religious schools. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. It similarly provided tuition reimbursements designed explicitly to "offe[r] … an incentive to parents to send their children to sectarian schools." Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, then in *Witters*, and again in *Zobrest*. To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

Chapter Four

Right to Privacy

Introduction

There is a long-lasting dispute among U.S. constitutional scholars about the proper method of interpretation which should be established by the Supreme Court: whether it should return to the original intent of the Framers of the Constitution, or perhaps follow the still-changing social, political and economic reality. Without explicitly determining which of these approaches is more adequate for the effective development of American constitutional law, it is more than evident that such a dispute very often concerns the scope of the right to privacy. Although there is no concrete place within the Constitution that would directly refer to such a right, the Justices have conducted a broad interpretation of the Bill of Rights issues which have led to the creation of the right to privacy and its further protection.

Among the first ten amendments to the Constitution, the most often cited source of the right to privacy is the Ninth Amendment, which states that *the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*. The enigmatic meaning of this provision was considered by the Court as a reference to the so-called un-enumerated rights of the people, thus addressing the rights which were not mentioned in the document. There were Justices who related the right to privacy to other constitutional provisions, such as the Third Amendment's prohibition of quartering soldiers in houses without the owners' consent, or the Fourth Amendment's ban on unreasonable searches and seizures. However, it was the Ninth Amendment that became the basis of the most crucial decisions concerning this right.

The first decision which directly confronted the issue of privacy was made by the Court in *Griswold v. Connecticut* (1965), when the Justices had to determine the constitutionality of the use of contraceptives. By applying the doctrine of selective interpretation, the Justices derived the right to privacy from particular provisions of the Bill of Rights, broadening its constitutional protection to the states thanks to the due process of

law clause of the Fourteenth Amendment. Despite wide criticism throughout the next decades, the Court adjudicated in a few more milestone cases, deciding about the admissibility of abortion (*Roe v. Wade*, 1973, and *Planned Parenthood v. Casey*, 1992), the possibility of marriage with a representative of another race (*Loving v. Virginia*, 1967), medical assistance in euthanasia (*Vacco v. Quill*, 1997), and privacy in sexual relations with other people, even of the same gender (*Lawrence and Garner v. Texas*, 2003). The above-mentioned criticism does not only concern the essence and content of particular decisions, but sometimes it focuses on the permissibility of judicial review in the area of privacy. The question occurs of whether the U.S. Supreme Court is the most proper institution to decide on the private issues of American citizens such as abortion or the right to die.

Griswold v. Connecticut – 381 U.S. 479 (1965)

Although *Roe v. Wade* (see below) is considered the most famous (and the most controversial) U.S. Supreme Court case concerning the right to privacy, the decision in *Griswold v. Connecticut* seems more important, as it established the constitutional protection of the right to privacy. The lack of direct reference in the Constitution to such a right did not prevent the Court from deriving it from a few provisions of the Bill of Rights and applying it to the states. A very old law of the state of Connecticut established in 1879 prohibited the use of contraceptives, although it was hardly ever enforced until the beginning of the 1960s. Then, Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, began to give medical advice about birth control to spouses and was convicted on the basis of violation of the state law.

The Supreme Court, in a majority opinion (7–2) written by Justice William Douglas, made invalid the Connecticut law and established constitutional protection of the right to privacy. Despite the fact that there is no place in the Constitution mentioning the right to privacy, the Justices derived its existence from other constitutional principles and guarantees located in the First, Third, Fourth, and Ninth Amendments made applicable to the states through the Fourteenth Amendment. Thus, Estelle Griswold could legally conduct her medical advice because the right to privacy in marital affairs was constitutionally protected. The *Griswold* case led the way to many subsequent decisions in which the Court broadened the right to privacy, exposing itself to criticism, especially from conservatists.

The Majority Opinion (Justice William Douglas):

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven – a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54–196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute, as so applied, violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. We noted probable jurisdiction.

. . . Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish; Olsen v. Nebraska; Lincoln Union v. Northwestern Co.; Williamson v. Lee Optical Co.; Giboney v. Empire Storage Co*. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska,* the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*) and freedom of inquiry, freedom of thought, and freedom to teach (see: *Wiemann v. Updegraff*) – indeed, the freedom of the entire university community. *Sweezy v. New Hampshire; Barenblatt v. United States; Baggett v. Bullitt*. Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama* we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right.

Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense, but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button*. In *Schware v. Board of Bar Examiners*, we held it not permissible to bar a lawyer from practice because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party," and was not action of a kind proving bad moral character.

Those cases involved more than the "right of assembly" – a right that extends to all, irrespective of their race or ideology. *De Jonge v. Oregon*. The right of "association," like the right of belief (*Board of Education v. Barnette*), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See: *Poe v. Ullman*. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully an particularly reserved to the people."

. . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. Reversed.

Loving v. Virginia – 388 U.S. 1 (1967)

The Court's decision in *Griswold v. Connecticut* made it possible to overturn some old precedents regarding the right to privacy which, before 1965, had not been protected. One such case concerned the prohibition of race-based marriage and was decided by the Court two years later. The facts of the case began in 1958 when an African-American named Mildred Jeter married a white-American named Richard Loving in the District of Columbia, but later moved to Virginia where such marriages were banned by the Racial Integrity Act. Both spouses were convicted of violating the state law and sentenced to a year of prison or twenty-five years of exile out of Virginia. After leaving the state and settling in the District of Columbia the Lovings decided to sue their former state for establishing a law which limited their right to marry people of different race and skin color.

The Supreme Court in 1967 unanimously determined the Virginia anti-miscegenation law unconstitutional, thus protecting the Lovings' right to marriage. Basing their decision on the equal protection clause and the due process clause of the Fourteenth Amendment, the Justices acknowledged the constitutional protection of mixed marriages, ending a long-lasting line of precedents prohibiting such relationships. Although there was no direct reference to the *Griswold* case or to the right to privacy, it is obvious that the substance of the decision touches upon private issues of American citizens. Therefore, its analysis is located in the third chapter instead of chapter four of the volume.

The Majority Opinion (Chief Justice Earl Warren):

> This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.
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> In June, 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge, and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:
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> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 258 of the Virginia Code: "*Leaving State to evade law*. – If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 259, which defines the penalty for miscegenation, provides: "*Punishment for marriage*. – If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20–57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, and §§ 20–54 and 1–14 which, respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1965 decision in *Naim v. Naim*, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without

federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska*, and *Skinner v. Oklahoma*. Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York*, or an exemption in Ohio's *ad valorem* tax for merchandise owned by a nonresident in a storage warehouse. *Inc. v. Bowers*. In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem that, although these historical sources "cast some light" they are not sufficient to resolve the problem.

. . . There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."

Hirabayashi v. United States. At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida*.

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma.* See also: *Maynard v. Hill*. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.

These convictions must be reversed.

Roe v. Wade – 410 U.S. 113 (1973)

There have been hardly any more significant and controversial decisions in the U.S. Supreme Court's history than in the case *Roe v. Wade*. After discovering the constitutional protection of the right to privacy, the Court decided to determine the proper laws according abortion, thus finding itself in the center of U.S. political and social problems of the 1970s. *Roe v. Wade* happens to be one of the most often cited examples of far-reaching judicial review conducted by the Court, which led to recognition of constitutional protection of women's right to abortion. Thus, controversies do not only concern the substance of the decisions, which are highly political, but the way that the Justices

acknowledged the right to abortion as a right to privacy stemming from the Bill of Rights provisions.

Jane Roe (in fact Norma McCorvey) filed a suit against District Attorney Henry Wade, representing the state of Texas, protesting against the state ban on abortion, even in situations of rape-effected pregnancy. Roe wanted to have an abortion but under Texas law (and also the law of most of the states) such an act was illegal and punishable for both the doctor and patient. In 1973 the case was brought to the Supreme Court on appeal. The Justices, in a majority opinion presented by Justice Harry Blackmun, admitted that the right to abortion was fundamental and originated directly from the Fourteenth Amendment's due process clause and indirectly from the Ninth Amendment to the Constitution. As a result of the case, the state of pregnancy was divided into three parts, called trimesters, and the Court determined the scope of governmental ability to influence a woman's pregnancy in the second and third trimester. During the first trimester abortion became legal, thus the previous state laws concerning abortion (including Texas provisions) were held invalid.

The Majority Opinion (Justice Harry Blackmun):

> . . . The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.
>
> . . . Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.
>
> Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated.
>
> James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint, he alleged that he had been arrested previously for violations of the Texas abortion statutes, and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.
>
> . . . The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate

her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see: *Griswold v. Connecticut; Eisenstadt v. Baird*; or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*.

. . . The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*; in the Fourth and Fifth Amendments, *Terry v. Ohio, Katz v. United States, Boyd v. United States*, see: *Olmstead v. United States*; in the penumbras of the Bill of Rights, *Griswold v. Connecticut*; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see: *Meyer v. Nebraska*. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*; procreation, *Skinner v. Oklahoma*; contraception *Eisenstadt v. Baird*; family relationships, *Prince v. Massachusetts*; and childrearing and education, *Pierce v. Society of Sisters, Meyer v. Nebraska*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

. . . We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. . . . Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute, and is subject to some limitations; and that, at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District; Shapiro v. Thompson, Sherbert v. Verner*, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut; Aptheker v. Secretary of State; Cantwell v. Connecticut; Eisenstadt v. Baird*.

In the recent abortion cases cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting

health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

. . . The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live' birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physician and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by

new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a sin-

gle reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States v. Vuitch.*

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe v. Bolton*, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intraprofessional, are available.

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota; Dombrowski v. Pfister*. We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*.

> We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.
>
> The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey, et al. – 505 U.S. 833 (1992)

Almost twenty years after the controversial decision in *Roe v. Wade* the issue of abortion once again became the center of political and social tensions, exciting nationwide attention. For conservatives, the *Planned Parenthood* case became a chance to overrule the odious *Roe* ruling, whereas the liberals wanted to sustain the ordered principle. An opportunity arose when Pennsylvania law concerning abortion was changed, thus arousing criticism from abortion clinics and some doctors. In the dispute on the state level, they challenged several provisions of the new law, mainly the necessity of notifying the husband (by a wife) or parent (by a minor) in the case of abortion, a compulsory twenty-four-hour waiting period for a woman before having an abortion, and the report necessity of abortion clinics to the government. A possibility of overruling *Roe v. Wade* occurred as the state of Pennsylvania, by defending its laws, claimed that the 1973 precedent was unconstitutional.

The state government was partly satisfied with the verdict of the U.S. Supreme Court which upheld the constitutionality of the Pennsylvania law concerning abortion, rejecting at the same time the state's claims against *Roe*. The basic ruling from 1973 was confirmed, but the scope of governmental legislation over abortion issues changed. As a result, most conservative politicians were disappointed, especially by the votes of conservative Justices, some of whom decided to join the pro-*Roe* approach. Interestingly, for the first time in history the majority opinion was prepared jointly by three of the Justices.

The Majority Opinion (Justice Sandra Day O'Connor, Justice Anthony Kennedy, Justice David Souter):

> Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989. Relevant portions of the Act are set forth in the appendix. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3 day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. We granted certiorari.

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe v. Wade*. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, the Chief Justice admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

. . . The sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with *Lochner v. New York*, which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes' view, the theory of *laissez faire*. The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of D.C.*, in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, signalled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about

the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co*. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench, "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate but equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy v. Ferguson*, holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*. As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid."

The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see: *Plessy*, we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

. . . The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told,

the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

. . . The Court's duty in the present case is clear. In 1973, it confronted the already divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

. . . The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce. . . . We give this summary:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*.

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion, but refine the undue burden analysis in accordance with the principles articulated above.

. . . Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

The judgment in No. 91–902 is affirmed. The judgment in No. 91–744 is affirmed in part and reversed in part,and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability.

Vacco v. Quill – 521 U.S. 793 (1997)

Despite the continuing process of broadening constitutional protection of various private actions and relations, the issue of the right to die was not thoroughly analyzed by the U.S. Supreme Court before the 1990s. Then, in a few cases, the Justices tried to determine the scope of an individual's right to decide about the termination of his/her life, but it was only in 1997 that the most vital decision was made. The state of New York imposed laws prohibiting physician-assisted suicides of the patients even if their health condition was hopeless. Doctor Timothy E. Quill challenged the constitutionality of the state law, demanding confirmation of his right to administer lethal medication to patients who have decided to end their lives. The dispute was directed against Dennis C. Vacco, New York's Attorney General, and taken to the federal courts.

When the case was brought to the Supreme Court, the Justices had to determine validity of the state law, the basic purpose of which was to prevent euthanasia and sustain medical ethics. The Court agreed with these purposes, thus confirming the constitutionality of the New York provisions. Despite the Justices' respect towards individuals' right to privacy, they did not find rational basis for protection of physician-assisted suicides, which were considered punishable crimes. In an unanimous decision presented by Chief Justice William Rehnquist, the Court interpreted the Fourteenth Amendment's equal pro-

tection clause, determining it as insufficient to establish constitutional protection of the right to die.

The Majority Opinion (Chief Justice William Rehnquist):

In New York, as in most States, it is a crime to aid another to commit or attempt suicide, but patients may refuse even lifesaving medical treatment. The question presented by this case is whether New York's prohibition on assisting suicide therefore violates the Equal Protection Clause of the Fourteenth Amendment. We hold that it does not.

Petitioners are various New York public officials. Respondents Timothy E. Quill, Samuel C. Klagsbrun, and Howard A. Grossman are physicians who practice in New York. They assert that although it would be "consistent with the standards of [their] medical practice[s]" to prescribe lethal medication for "mentally competent, terminally ill patients" who are suffering great pain and desire a doctor's help in taking their own lives, they are deterred from doing so by New York's ban on assisting suicide. App. 25–26. Respondents, and three gravely ill patients who have since died, sued the State's Attorney General in the United States District Court. They urged that because New York permits a competent person to refuse life sustaining medical treatment, and because the refusal of such treatment is "essentially the same thing" as physician assisted suicide, New York's assisted suicide ban violates the Equal Protection Clause. *Quill v. Koppell*.

The District Court disagreed: "[I]t is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death producing device." The court noted New York's "obvious legitimate interests in preserving life, and in protecting vulnerable persons," and concluded that "[u]nder the United States Constitution and the federal system it establishes, the resolution of this issue is left to the normal democratic processes within the State."

The Court of Appeals for the Second Circuit reversed. The court determined that, despite the assisted suicide ban's apparent general applicability, "New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths," because "those in the final stages of terminal illness who are on life support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life sustaining equipment, are not allowed to hasten death by self administering prescribed drugs." In the court's view, "[t]he ending of life by [the withdrawal of life support systems] is *nothing more nor less than assisted suicide*." The Court of Appeals then examined whether this supposed unequal treatment was rationally related to any legitimate state interests, and concluded that "to the extent that [New York's statutes] prohibit a physician from prescribing medications to be self administered by a mentally competent, terminally ill person in the final stages of his terminal illness, they are not rationally related to any legitimate state interest." We granted certiorari, and now reverse.

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision creates no substantive rights. *San Antonio Independent School Dist. v. Rodriguez*,. Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe*. If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end." *Romer v. Evans*.

New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. They neither infringe fundamental rights nor involve

suspect classifications. *Washington v. Glucksberg*; *San Antonio School Dist.* These laws are therefore entitled to a "strong presumption of validity." *Heller v. Doe*.

On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently than anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide. Generally speaking, laws that apply evenhandedly to all "unquestionably comply" with the Equal Protection Clause. *New York City Transit Authority v. Beazer*; see: *Personnel Administrator of Mass. v. Feeney*.

The Court of Appeals, however, concluded that some terminally ill people – those who are on life support systems – are treated differently than those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician assisted suicide. This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life sustaining treatment, a distinction widely recognized and endorsed in the medical profession [n.6] and in our legal traditions, is both important and logical; it is certainly rational. See: *Feeney*.

The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. See: *People v. Kevorkian*; *Matter of Conroy*; *In re Colyer*.

Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the United States. The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or maybe, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. See: *Matter of Conroy*; *Superintendent of Belchertown State School v. Saikewicz*.

The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. See: *United States v. Bailey*; *Morissette v. United States*. Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences. *Feeney*; *Compassion in Dying v. Washington*.

Given these general principles, it is not surprising that many courts, including New York courts, have carefully distinguished refusing life sustaining treatment from suicide. See: *Fosmire v. Nicoleau*. In fact, the first state court decision explicitly to authorize withdrawing lifesaving treatment noted the "real distinction between the self infliction of deadly harm and a self determination against artificial life support." *In re Quinlan*, *Garger v. New Jersey*. And recently, the Michigan Supreme Court also rejected the argument that the distinction "between acts that artificially sustain life and acts that artificially curtail life" is merely a "distinction without constitutional significance – a meaningless exercise in semantic gymnastics," insisting that "the *Cruzan* majority disagreed and so do we." *Kevorkian*.

Similarly, the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter. *Glucksberg*. And

"nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health care situations, or in `living will' statutes." *Kevorkian*. Thus, even as the States move to protect and promote patients' dignity at the end of life, they remain opposed to physician assisted suicide.

. . . This Court has also recognized, at least implicitly, the distinction between letting a patient die and making that patient die. In *Cruzan v. Director, Mo. Dept. of Health*, we concluded that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," and we assumed the existence of such a right for purposes of that case. But our assumption of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract "right to hasten death," but on well established, traditional rights to bodily integrity and freedom from unwanted touching, *Cruzan*. In fact, we observed that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan* therefore provides no support for the notion that refusing life sustaining medical treatment is "nothing more nor less than suicide."

For all these reasons, we disagree with respondents' claim that the distinction between refusing lifesaving medical treatment and assisted suicide is "arbitrary" and "irrational." Granted, in some cases, the line between the two may not be clear, but certainty is not required, even were it possible. Logic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction.

New York's reasons for recognizing and acting on this distinction – including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia – are discussed in greater detail in our opinion in *Glucksberg*. These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.

The judgment of the Court of Appeals is reversed.

Lawrence and Garner v. Texas – 539 U.S. 558 (2003)

In 1986 the U.S. Supreme Court decided the *Bowers v. Hardwick* dispute (478 U.S. 186), in which it had to determine the constitutionality of Georgia law criminalizing sodomy. Despite a wide range of cases broadening the constitutional protection of the right to privacy, the Justices held that sodomy did not enjoy such protection. Seventeen years later a similar case was confronted by the Court, this time concerning the anti-sodomy laws of Texas. Houston police officers had entered the house of John Lawrence and found him in a sexual act with another man, Tyron Garner, which was considered a crime

by state law. On appeal the Supreme Court took up the case to decide whether the Texas law was consistent with the Constitution or otherwise the *Bowers* ruling needed to be overturned.

In 6–3 opinion delivered by Justice Byron White, the Court acknowledged Lawrence's and Garner's right to engage in sexual conduct without interference of the government, because they enjoyed their right to privacy protected by the Constitution. Again, the due process clause served as the main source of the liberty of individuals to decide about their private sexual relationships. As a result, the *Bowers v. Hardwick* precedent was overruled, thus influencing a change of laws in several other states and allowing same-sex relationships in private.

The Majority Opinion (Justice Anthony Kennedy):

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.
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> The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.
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> In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.
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> The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
>
> The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined $200 and assessed court costs of $141.
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> The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick*, to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.
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> . . . We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under

the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*, and *Meyer v. Nebraska*; but the most pertinent beginning point is our decision in *Griswold v. Connecticut*. In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights.

. . . The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*. As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person. . . . This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

. . . At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, e.g., *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K. B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, e.g., 2 J. Bishop, Criminal Law §1028 (1858); 2 J. Chitty, Criminal Law 47—50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes §203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) (" The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty,

supra, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

. . . It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey*.

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis*.

. . . Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

. . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Chapter Five

Equal Protection of Law

Introduction

There is no doubt that the United States of America was not created as a fully democratic country. On one hand it established basic rules and principles of a democratic government such as free elections, sovereignty of the nation, fundamental rights and freedoms of individuals and an independent judiciary. All of these principles were, however, enjoyed by only part of American society:

- free elections were guaranteed for white men only, excluding women and African-Americans;
- sovereignty belonged to the nation, i.e. white women and men, because slaves were not considered citizens;
- fundamental rights and freedoms were guaranteed only from the federal government and were not enjoyed by slaves;
- institutional independence of the judicial branch did not prevent the system from injustice towards African-Americans.

Furthermore, one of the most important values of democratic society, equality before the law, was absent in the original constitutional document of 1787, as well as the provisions of the Bill of Rights. Equal protection of law became part of U.S. constitutional reality only in 1868 when the Fourteenth Amendment was enacted, as a direct result of social and political changes caused by the civil war. After introducing the Thirteenth Amendment in 1865 which abolished slavery, the government took a step forward by equalizing all citizens before the law in 1868 and by providing African-Americans with suffrage rights in 1870. For former slaves this meant a milestone step in their fight to destroy the social and political boundaries which limited their basic rights and freedoms. In 1873 the Supreme Court confirmed that the Fourteenth Amendment was mainly aimed at the equalization of the rights and liberties of slaves (a group of cases called jointly *The Slaughterhouse Cases*).

Before the above-mentioned events, a period of injustice and exploitation occurred, with the U.S. Supreme Court in the middle of social and political tensions. A few years before the civil war, the Justices adjudicated in a dispute concerning the status of a slave who had lived in free territories for a few years. In one of the most controversial decisions in its history, in 1857 in *Dred Scott v. Sandford* the Court determined that slavery could be indirectly derived from the Constitution, thus throwing a rock into the stream of racial tensions between the North and the South of the country. According to many scholars, the *Dred Scott* decision made the outbreak of the war inescapable. Interestingly, this infamous precedent was never overruled by the Court itself, but by the Thirteenth Amendment to the Constitution. It was not, however, the last controversial decision of the highest judicial tribunal referring to social relations and the social position of African-Americans. In 1896 the case *Plessy v. Fergusson* was decided, and despite the existence of the equal protection clause of the Fourteenth Amendment, the Justices affirmed constitutionally-based segregation by creating the so-called 'separate but equal' doctrine. According to this doctrine, African-Americans were equal before the law, but they needed to be segregated from the rest of the society. As a result, for more than fifty years, public places such as schools, offices, libraries and means of transportation were divided into separate areas for white and black citizens.

Following the Court's direction of adjudication, some of the states, especially southern ones, decided to limit rights and freedoms of African-Americans by establishing legislation which aimed at weakening their social status. In effect of these provisions, called the Jim Crow laws, most African-Americans did not vote, did not have access to many common goods, and despite constitutional protection, practical inequality existed. The 'separate but equal' doctrine was abolished by the Supreme Court in the famous decision of 1954, *Brown v. Board of Education*. It is important to acknowledge, however, that the end of segregation resulted from activities undertaken by civil liberties organizations (such as N.A.A.C.P.), and also from the need to improve U.S. international relations at the wake of the Cold War era.

The constitutional status of African-Americans was not the only issue confronted by the U.S. Supreme Court in the process of interpretation of the equal protection clause of the Fourteenth Amendment. The Justices had also a chance to adjudicate in a famous case concerning the creation of internment camps during World War II for Japanese-Americans (*Korematsu v. United States*, 1944), and in a group of cases regarding affirmative action, i.e. governmentally-based programs equalizing the chances of minorities in the public and private sphere (with the crucial decision of *Regents of the University of California v. Bakke*, 1978). Recently, the Court has often decided on the proper scope of governmental legislation towards discriminated minorities, as it did in *Romer v. Evans* (1996) with regard to sexual minorities.

Dred Scott v. Sandford – 60 U.S. 19 (1856)

At the very beginning of American statehood the society was divided into white citizens enjoying their rights and freedoms and black non-citizens having no rights or liberties. Although it had never been directly written into the Constitution, slavery was present in U.S. social and political reality at the end of the 18th century and for more than half of the 19th century. Looking at it from a contemporary point of view, racial inequalities shaped not only everyday relations among the people, but also the principles of constitutional law. The Supreme Court had an opportunity to define the social relations in the United States by adjudicating in a dispute concerning slavery. Dred Scott, the hero of the dispute, was a slave from Missouri who had been living for almost ten years in states and territories where slavery was prohibited. After some time he decided to sue his master in order to gain freedom, claiming that his residing in free territories made him a free man.

The Supreme Court confronted the case in a highly tense moment of U.S. history, when social, economic and political relations between the North and the South were worsening. Having the opportunity to appease the tensions, the decision of 1856 only worsened the relations between the two opposed territories. The majority opinion written by Chief Justice Roger Taney determined the legal situation of Dred Scott, considering him as a slave because of lack of citizenship. Furthermore, the Court negated the possibility of slaves becoming U.S. citizens in future, thus shocking the inhabitants of the North. Basing their opinion on an interpretation of Articles Three and Four, the Justices acknowledged that never in American history had a slave become a citizen, and so the tradition must be upheld. Of course at that time the Constitution did not consist of the Fourteenth Amendment and did not guarantee equal protection of the law, but even taking into consideration the relations of those times the precedent seems very controversial.

The Majority Opinion (Chief Justice Roger Taney):

> This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court, and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case and direct a re-argument on some of the points in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.
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> There are two leading questions presented by the record:
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> 1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
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> 2. If it had jurisdiction, is the judgment it has given erroneous or not?
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> The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this

action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

. . . The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

. . . The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

. . . The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

. . . there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show conclusively that neither the description of persons therein referred to nor their descendants were embraced in any of the other provisions of the Constitution, for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

Undoubtedly a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote, and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union, foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race, and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the gov-

ernment of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, will all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them, for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation, and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

. . . No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And, upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

. . . We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of

Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

. . . in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words – too plain to be misunder-

stood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

. . . Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Slaughterhouse Cases – 83 U.S. 16 (1873)

The establishment of the Thirteenth and Fourteenth Amendments to the Constitution in the 1860s soon led to several disputes which concerned the proper application of the new laws. A few similar cases regarding the slaughterhouse business were decided under the joint name of *Slaughterhouse Cases*: *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughterhouse Company*, and *Esteben, et al. v. Louisiana ex rel. Belden*. The state of Louisiana created a company which centralized the whole slaughterhouse business in New Orleans, thus establishing a monopoly. This situation provoked other slaughterhouse companies to challenge the law as inconsistent with the due process clause, the privileges and immunities clause and the equal protection clause.

In a narrow margin (5–4) opinion delivered by Justice Samuel Miller the U.S. Supreme Court rejected the claims of the petitioners and conducted a narrow interpretation of the Fourteenth Amendment. According to this approach the butchers' privileges and immunities had not been violated because they concerned national citizenship, not state citizenship, as well as the equal protection clause which referred mainly to former slaves. Moreover, the narrow interpretation focused on the due process clause. However, the Justices came down only to identify that the wording of the Fifth and Fourteenth Amendments was identical without determining its future practical meaning.

The Majority Opinion (Justice Samuel Miller):

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Livestock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

. . . The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear, and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled "An act to protect the health of the city of New Orleans, to locate the stock landings and slaughterhouses, and to incorporate the Crescent City Livestock Landing aud Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughterhouses or abattoirs within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stockyards, stock landings, and slaughterhouses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughterhouse of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the livestock landing and slaughterhouse business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock landings and slaughtered at the slaughterhouses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock landings and slaughterhouses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughterhouses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

. . . The plaintiffs in error . . . allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment.

. . . Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked, as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence, the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude."

The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

. . . "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the

true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights the rights of person and of property was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

Plessy v. Ferguson – 163 U.S. 537 (1896)

In the aftermath of the American civil war the U.S. government decided to change the legal status of African-Americans by introducing new constitutional provisions concerning their social and political position. The Thirteenth Amendment banned slavery in 1865, the Fourteenth Amendment established equal protection of law in 1868, and thanks to the Fifteenth Amendment, ratified in 1870, African-Americans gained suffrage rights. It seemed that the legal basis for a major social change had been founded, although in some southern states of the country local governments and the society were reluctant to acknowledge this constitutional protection of African-Americans. In order to prevent the enforcement of the new amendments, especially concerning the suffrage rights and equal protection clause, many governments enacted legislation preventing equalization of the social status of African-Americans. These provisions, called the Jim Crow laws, established segregation in public facilities, such as transportation, schools, and public offices, but also prevented African-Americans from participating in elections by prohibiting illiterates to vote, which in reality concerned mainly former slaves and their families. The U.S. Supreme Court did not have many opportunities to review the Jim Crow laws in accordance with the Constitution. For the first time such a situation occurred at the end of the 19th century in the *Plessy v. Ferguson* case.

Homer Plessy, a person who was only one-eighth black, took the train in Louisiana and violated the law which prohibited him from sitting in the area designed for white people. When he refused to move to the part of the car intended for black people, he was arrested on the basis of the state law which imposed such segregation in the public transportation system. When his case reached the highest judicial authority in the country, most African-Americans were looking with hope towards the Justices. Seven of them, however, decided to interpret the Constitution narrowly, affirming equality among races, but supporting at the same time the Louisiana law. The doctrine established in the case was named 'separate but equal' and meant, in practice, the government's consent for state-based segregation. Every public facility could be segregated unless it provided for equality among races. For the next fifty years most of the Jim Crow laws were affirmed and upheld, dividing society once again and violating the equal protection clause of the Fourteenth Amendment, which was admitted by the Court in 1954.

The Majority Opinion (Justice Henry Brown):

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to."

By the second section, it was enacted "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ

of prohibition averred that petitioner was seven-eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach and take a seat in another assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude – a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughterhouse Cases*, to have been intended primarily to abolish slavery as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights Cases*, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof are made citizens of the United States and of the State wherein they reside, and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughterhouse Cases*, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact

rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

. . . While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's Attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act so far as it requires the railway to provide separate accommodations and the conductor to assign passengers according to their race.

. . . So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by

legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448,

"this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

The judgment of the court below is, therefore affirmed.

Korematsu v. United States – 323 U.S. 214 (1944)

There is hardly any decision in the Supreme Court's history which has not been criticized soon after its imposition and rejected since by almost every person and institution within the country, except for the Court itself. Despite the fact that *Korematsu* was decided in times of war, it raised questions concerning the protection of fundamental constitutional values of U.S. citizens, such as equality before the law and the due process of law guarantee. When the U.S. government was attacked by Japan in Pearl Harbor and thus entered World War II, most people were convinced that the effects of the war would be mostly noticeable on the western or eastern front, but not in the United States. However, in 1942 President Franklin D. Roosevelt issued an Executive Order authorizing the creation of internment camps on U.S. territory for enemy ethnic groups. As a result of this law, such camps were created in the western part of the country for Japanese-Americans, thus forcing over 120,000 people of Japanese descent to spend several months in internment. Some Japanese-Americans, among whom was Fred Korematsu, opposed the law and violated the order, and were arrested and charged of committing a crime.

In 1944 the *Korematsu* case was brought to the Supreme Court, which had to determine the constitutionality of the Executive Order and decide whether the creation of internment camps was consistent with the equal protection of law guarantee of the Fourteenth Amendment. The Court, in a majority decision written by Justice Hugo Black, upheld the law, justifying the existence of the camps as a necessity 'in extraordinary times' of war. The government's need to protect society from the dangers of espionage outweighed the need to protect the individual rights of U.S. citizens. Although only six

out of nine Justices were convinced about the constitutionality of the Executive Order, nothing was done in the subsequent history of the Court's adjudication to overrule the infamous decision. Only Congress decided to compensate Japanese-Americans' damages by paying them reparations in the 1980s. However, the precedent of 1944 has remained unaffected.

The Majority Opinion (Justice Hugo Black):

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case, prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which, like the exclusion order here, was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities, and of the President, as

Commander in Chief of the Army, and, finally, that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case, the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that, by May, 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions, we are compelled to reject them.

Here, as in the *Hirabayashi* case, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that, in a critical hour, such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety which demanded that prompt and adequate measures be taken to guard against it."

. . . We uphold the exclusion order as of the time it was made and when the petitioner violated it. See: *Chastleton Corporation v. Sinclair; Block v. Hirsh*. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. See: *Ex parte Kawato*. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that, on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

. . . We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center, we cannot say, either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This

illustrates that they pose different problems, and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center, there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. See: *Blockburger v. United States*. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose, but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint, whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration camps, with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that, at that time, these actions were unjustified.

Affirmed.

Brown v. Board of Education of Topeka – 347 U.S. 483 (1954)

The Court's 1896 ruling in *Plessy v. Ferguson* (see above) constituted a controversial 'separate but equal' doctrine which allowed the states to divide public facilities into areas for whites and areas for 'colored' people. From the end of the 19th century till the middle of the 20th century, most southern states prohibited African-Americans from equal use of the transportation system, public schools and offices, punishing them for any breach of the so-called Jim Crow laws. The growing awareness of the society about the injustice of the doctrine, the organized movements appealing to the government to change the law, as well as the international situation influenced by the beginning of the Cold War, led to the overturning of the social inequalities in 1954. Especially the activities undertaken by the organization called N.A.A.C.P. (*National Association for the Advancement of the Colored People*) and the government's interest in improving the U. S.'s international position in the wake of the conflict with the undemocratic Soviet Union proved crucial for the Court's decision in *Brown v. Board of Education*.

Linda Brown was an African-American attending a segregated black school a few miles from her house in Topeka, while there was a school for white children located just a few blocks from where she lived. Her parents challenged the Kansas law, as it established segregation which led to inequalities among children of different racial descent. They filed a suit against the Board of Education of Topeka, which approved of the program and had operated it since 1879. The lower courts upheld the law, using as a justification the Supreme Court's decision in *Plessy*. However, the Justices on appeal revised the old precedent, overruling it and thus ending with the 'separate but equal' doctrine. The decision in *Brown* was based on the Court's interpretation of the Fourteenth Amendment's equal protection clause which prohibited racial segregation of any kind, and although American society needed many more years to get used to the formal and substantive effects of the decision, its meaning for U.S. constitutional law is fundamental.

The Majority Opinion (Chief Justice Earl Warren):

> These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.
>
> In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the

Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson, supra*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. *In Cumming v. County Board of Education*, and *Gong Lum v. Rice*, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada; Sipuel v. Oklahoma; Sweatt v. Painter; McLaurin v. Oklahoma State Regents*. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter, supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each

of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any languagevin *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

> Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question – the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

Regents of the University of California v. Bakke – 438 U.S. 265 (1978)

Over 150 years of governmentally-based racial inequality led to the imposition of various laws and policies which were aimed at redressing damages caused by unjust and unconstitutional legislation. Two major legislations were established by Congress in the 1960s, i.e. the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Additionally, some of the governmentally-led policies concerned employment, some education and some health programs, all named under the joint policy of affirmative action. Affirmative action was planned to maximize the benefits of diversity in the public sphere, as well as to stop any kind of institutional discrimination based on race, gender or ethnicity. One such program was operated at the University of California's Medical School at Davis, where sixteen out of one hundred places in every first year of studies were designated for representatives of minorities, who wouldn't have the chance to be admitted to the school by its official qualification procedures. Subject to the effects of such quotas was Allan Bakke, a white man, who tried to be admitted to the university twice without result. If the program had not existed, Bakke would have qualified. Therefore, he sued the Regents of the University responsible for imposition of the affirmative action policy, claiming that his due process of law guarantees and the equal protection clause of the Fourteenth Amendment had been violated.

The U.S. Supreme Court announced its decision in 1978, rejecting the possibility of establishing race-based quotas, although affirming the constitutionality of affirmative action in general. In a very split opinion presented by Justice Lewis Powell, the Court ordered the Medical School to admit Allan Bakke because he had been rejected solely on the basis of race and thus his Fourteenth Amendment guarantees had been violated. At the same time, five of the Justices confirmed the possibility of schools to use race as one of the factors influencing admission programs only if it met the compelling state interest

of creating social diversity at universities. The *Regents of the University of California v. Bakke* precedent was reaffirmed in a modern affirmative action case, *Grutter v. Bollinger* 539 U.S. 306 (2003).

The Majority Opinion (Justice Lewis Powell):

> This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.
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> . . . In this Court, the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see: *Ashwander v. TVA* (concurring opinion), we requested supplementary briefing on the statutory issue.
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> . . . The language of § 601, like that of the Equal Protection Clause, is majestic in its sweep: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
>
> The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for, as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*. We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, quoting *United States v. American Trucking Assns*. Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.
>
> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements . . . generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill: "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964). Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." Other Senators expressed similar views.

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens – Negroes – the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees."

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, e.g.: *Missouri ex rel. Gaines v. Canada; Sipuel v. Board of Regents; Sweatt v. Painter; McLaurin v. Oklahoma State Regents*. For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, e.g.: *Hirabayashi v. United States; Korematsu v. United States; Lee v. Washington* (Black, Harlan, and Stewart, JJ., concurring); *United Jewish Organizations v. Carey*. The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See: *United States v. Carolene Products Co*. Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "lights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer*.

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions

seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley v. Kraemer. Accord, Missouri ex rel. Gaines v. Canada; McCabe v. Atchison*. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

. . . Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause, and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education; Loving v. Virginia*. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

"The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' – that is, bad upon differences between 'white' and Negro." *Hernandez*.

. . . We have held that, in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths; Loving v. Virginia; McLaughlin v. Florida*. The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g.: *Teamsters v. United States; United Jewish Organizations; South Carolina v. Katzenbach*. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

. . . It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undif-

ferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity.

. . . In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Romer v. Evans – 517 U.S. 620 (1996)

The equal protection clause of the Fourteenth Amendment has been interpreted numerous times by the Supreme Court. A vast majority of the cases have regarded racial issues. Fewer cases have concerned gender issues, and the fewest have referred to the rights of sexual minorities. However, in the past two decades the necessity of equality among sexual minorities has been addressed by the Court and discrimination based on sexual orientation has been prohibited. Despite these precedents, there was one case decided in 1996, which confronted the issue of classification used by state governments in order to equalize the status of different social groups. The case concerned an amendment to the Constitution of Colorado (called Amendment 2) which prevented all municipalities or counties in the state from establishing any law aimed at the protection of homosexuals from discrimination based on their sexual orientation. A group of homosexuals led by Richard Evans challenged the law by suing the governor of the state of Colorado, Roy Romer. They claimed that the real effect of Amendment 2 was to discriminate against

homosexuals, and therefore their equal protection of law guarantee had been encroached.

The Supreme Court, in a 6–3 decision declared by Justice Anthony Kennedy, determined the Colorado law unconstitutional as it violated the Fourteenth Amendment by choosing one social group which would be unprotected by law. Such a classification was forbidden, as it led to a lack of any kind of constitutional protection of the named group. The Court tried to find any justifying purpose for Amendment 2, but the state of Colorado failed to prove the interest it had in the creation of such a law. If the decision had been in favor of the state, homosexuals in Colorado would not enjoy any protection, either from the government or from the courts.

The Majority Opinion (Justice Anthony Kennedy):

> The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. . . Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."
>
> Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:
>
> "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing."
>
> Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

. . . The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications.

. . . Sweeping and comprehensive is the change in legal status affected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who `made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc*. The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, *Civil Rights Cases*. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes.

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind."

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited anti discrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. See: *J. E. B. v. Alabama ex rel. T. B.*; *Lalli v. Lalli*; *McLaughlin v. Florida*; *Oyama v. California*. Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates – and, in recent times, sexual orientation.

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado Executive Order D0035 (1990), which forbids employment discrimination against "all state employees, classified and exempt' on the basis of sexual orientation." Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." The repeal of these measures and the prohibition against their future reenactment demonstrates that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary legislation.

. . . The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass. v. Feeney*; *F. S. Royster Guano Co. v. Virginia.* We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

. . . It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt v. Painter*. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of `equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Oklahoma ex rel. Williamson*.

. . . The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ." *Civil Rights Cases*.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

Chapter Six

Criminal Procedure/Rights of the Accused

Introduction

The U.S. Constitution basically covers the general issues concerning the powers of the government and the rights of the people. Constitutions rarely refer to specific institutions connected with particular branches of law, such as civil law, criminal law, or civil and criminal procedure. The American document, however, devotes its large part to imposing fundamental liberties of an individual being subject to judicial litigation. Criminal law and criminal procedure are especially represented in a few amendments of the Bill of Rights, constituting a large catalogue of rights of the accused enjoyed before, during, and after a criminal trial. The Fourth, Fifth, Sixth, and Eighth Amendments establish important guarantees regarding the procedural due process of law of the Fifth and Fourteenth Amendments. In other words, the due process clause of the Fifth Amendment makes it obligatory to the federal government to respect certain rights of the suspect and accused, and a similar clause of the Fourteenth Amendment broadens the protection of these procedural liberties to the states. It has been the Supreme Court's role, however, to incorporate particular provisions of the Bill of Rights into the states by imposing the selective interpretation doctrine. As a result most, but not all, provisions of the above-mentioned amendments are today applied to the state governments.

In the 1960s the Court adjudicated in numerous cases concerning the scope of governmental protection over the rights of individuals in criminal procedure. One of the first cases of this kind was *Mapp v. Ohio* (1961) in which the Justices interpreted the Fourth Amendment's search and seizure clause by confirming the necessity of obtaining of a search warrant by the police. The *Mapp* case created the so-called exclusionary rule, prohibiting the use of illegally obtained evidence by law enforcement institutions during search procedures. A similar issue was at stake in 1968 when the *Terry v. Ohio* case was decided. By establishing the 'probable cause' test, the Court allowed the police to con-

duct a search of an individual without a search warrant, if he/she behaved suspiciously in the policeman's opinion. Both cases shaped the contemporary scope of the Fourth Amendment by producing leading decisions in the area of the powers of law enforcement institutions.

Two other disputes decided in the same period concerned fundamental rights of the accused in the area of legal representation and the presence of the jury during trial. In *Gideon v. Wainwright* (1963) the Supreme Court confronted an issue which was present in many state jurisdictions, that is the admissibility of legal counsel only if a person has been charged with committing a serious offense. By interpreting the Sixth Amendment, the Justices clearly confirmed the fundamental right of the accused to enjoy the legal aid of a professional lawyer, thus such legal assistance should be provided in any criminal case. Similarly, in 1968, the Court decided on the absolute right to a jury trial the main purpose of which was to decide the defendant's guilt (*Duncan v. Louisiana*). It was the first of several cases concerning the character and powers of the jury in the American system of criminal justice, with *Batson v. Kentucky* (1986) as the last important one of this kind. As a result, all of the states were forced to unify their legislation referring to the indispensable right to trial by jury that would be chosen in a democratic and fair manner.

Probably two of the most controversial decisions of the Supreme Court regarding the criminal procedure were: *Miranda v. Arizona* (1966) and *Gregg v. Georgia* (1976). In the first case, the Court established the famous Miranda warning which ought to be presented to the arrested person in order to reveal the fundamental rights enjoyed by him/her. The second dispute referred to the status of the death penalty in the U.S. legal system and confirmed the constitutionality of capital punishment, leaving the decision concerning its imposition to the states. Both of these cases became a source of major criticism among law enforcement institutions (*Miranda*) and international society (*Gregg*).

Mapp v. Ohio – 367 U.S. 643 (1961)

The Fourth Amendment to the Constitution protects individuals from unreasonable searches and seizures conducted by the police or other officers responsible for law enforcement. Despite covering issues concerning mainly criminal procedure, the Fourth Amendment also touches the delicate sphere of individuals' privacy, as law enforcement officers very often conduct searches and seizures of their property. Since the beginning of U.S. statehood, the Constitution has protected individuals from searches conducted by the federal government, as the Bill of Rights did not apply to the states. In 1961, however, in the case *Mapp v. Ohio*, the Court decided to broaden this guarantee to the states through interpretation of the Fourteenth Amendment. Dollree Mapp, an inhabitant of Cleveland's suburbs, was approached at her home by police officers who were searching for a fugitive suspect. She hesitated to open the door, as the policemen did not have

a search warrant, but after some time when the warrant was allegedly obtained by the police, she let them in. During the search the policemen found pornographic and obscene materials in Mapp's basement which were prohibited by the state law. After being arrested, Dollree Mapp requested to see the warrant upon which her house had been searched, but the police could not find it. They used their evidence against Mapp in court, where she was finally found guilty.

On her appeal to the U.S. Supreme Court, Mapp challenged the constitutionality of the search conducted by the state officers, claiming that her due process rights had been violated. Until 1961 states were not bound by the necessity of obtaining a warrant before a search was conducted; such a rule was obligatory for the federal government. When deciding the *Mapp* case, the Court, in a majority opinion delivered by Justice Tom Clark, criticized the state police's conduct and determined that it had lacked a formal warrant. Such a warrant is binding when planning a search and seizure of property belonging to an individual, and any evidence collected without warrant may be excluded from the court procedure, as 'fruit of the poisonous tree.' By broadening the so-called exclusionary rule to the states, the case set partial limitations on state law enforcement institutions.

The Majority Opinion (Justice Tom Clark):

> . . . On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.
>
> The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. . . . The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed. The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. Colorado*, in which this Court did indeed hold "that, in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

. . . Seventy-five years ago, in *Boyd v. United States*, considering the Fourth and Fifth Amendments as running "almost into each other" on the facts before it, this Court held that the doctrines of those Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

. . . Less than 30 years after *Boyd*, this Court, *in Weeks v. United States*, stated that "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . , and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that, "in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." *Wolf v. Colorado*. This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required – even if judicially implied – deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." *Silverthorne Lumber Co. v. United States*. It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ," *Weeks v. United States* and that such evidence "shall not be used at all." *Silverthorne Lumber Co. v. United States*.

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks* – and its later paraphrase in *Wolf* – to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

The Court, in *Olmstead v. United States*, in unmistakable language restated the *Weeks* rule: "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting

the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." In *McNabb v. United States*, we note this statement: "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd v. United States* . . . *Weeks v. United States*. . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified' . . . or 'who have been unlawfully held incommunicado without advice of friends or counsel.' . . ."

. . . In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. Colorado,* again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said: "[W]e have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

. . . Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then, just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches – state or federal – it was logically and constitutionally necessary that the exclusion doctrine – an essential part of the right to privacy – be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but, in reality, to withhold its privilege and enjoyment. Only last year, the Court itself recognized that the purpose of the exclusionary rule "is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*.

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado*. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers v. Richmond*. And nothing could be more certain than that, when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitu-

tional seizure of goods, papers, effects, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram v. United States*. They express "supplementing phases of the same constitutional purpose to maintain inviolate large areas of personal privacy." *Feldman v. United States*. The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence – the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. See: *Rochin v. California*.

. . . The judgment of the Supreme Court of Ohio is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Gideon v. Wainwright – 372 U.S. 335 (1963)

The right to an attorney belongs today to one of the most indispensable and fundamental rights of the accused in criminal trials. This has not always existed in the American legal system, although the Sixth Amendment, enacted in 1791, imposed the responsibility on the federal government to provide for legal counsel in criminal cases. Until the 1930s most of the states did not guarantee the right to counsel in petty crimes, allowing such assistance only when serious offenses had been committed. Then, in *Powell v. Alabama* 287 U.S. 45 (1932), the Supreme Court bound states to the provision of the Sixth Amendment, but ten years later, in *Betts v. Brady* 316 U.S. 455 (1942), abolished the necessity of the states to provide for assistance of an attorney in petty crimes. Finally, in 1963 the Justices had the opportunity to definitely declare the scope of the Sixth Amendment guarantee.

Clarence Earl Gideon, a poor, homeless man, was accused of breaking into a poolroom in Florida and stealing a small amount of money. He was put on trial without legal representation, despite his request for the state to appoint him a counsel. Therefore, he was forced to represent himself, conducting various activities characteristic for legal counsel, i.e. direct examination and cross-examination of witnesses, or opening statement and closing argument. He was found guilty and sentenced to a five-year imprisonment, trying to no avail to appeal to courts of higher resort. After a few months, Gideon wrote an appeal to the Supreme Court and surprisingly got a chance to be heard by the highest judicial authority in the country. The Justices referred to the *Powell* precedent, overruling *Betts v. Brady* and confirming the guarantees of the Sixth Amendment as applicable to the states through the Fourteenth Amendment. Since that ruling, every court in the United States has been responsible for providing legal assistance to those accused who cannot afford such counsel.

The Majority Opinion (Justice Hugo Black):

Petitioner was charged in a Florida state court with having broken and entered a pool-room with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when *Betts v. Brady*, was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari.

. . . The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and, on review, this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which, for reasons given, the Court deemed to be the only applicable federal constitutional provision. The Court said: "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding, if left standing, would require us to

reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration, we conclude that *Betts v. Brady* should be overruled.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered "[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date." On the basis of this historical data, the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon, the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell v. Alabama*, a case upholding the right of counsel.

. . . We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that "the right to the aid of counsel is of this fundamental character." *Powell v. Alabama*. While the Court, at the close of its *Powell* opinion, did, by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language: "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Grosjean v. American Press Co*. And again, in 1938, this Court said: "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Johnson v. Zerbst*. To the same effect, see: *Avery v. Alabama*, and *Smith v. O'Grady*.

In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable

to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument. . . ."

. . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down," and that it should now be overruled. We agree.

The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion. Reversed.

Miranda v. Arizona – 384 U.S. 436 (1966)

Among various cases limiting the powers of law enforcement agencies, *Miranda v. Arizona* seems the most important and the most controversial one. It determined the essential behavior on the side of police while conducting detention or arrest procedures, as well as the value of interrogation of a defendant in police custody. The case was decided simultaneously with three other disputes: *Westover v. United States*, *Vignera v. New York*, and *California v. Stewart*. The issues in these three disputes concerned the right to counsel during questioning by the police, which the defendants had been deprived of, while their statements were used against them in the court during their trial. In the case *Miranda v. Arizona*, Ernesto Miranda was arrested for allegedly kidnapping and raping a woman, to which he confessed during interrogation by the police. Later, his confession was used in his trial as evidence of his guilt. In 1966 all four cases were heard by the Supreme Court, producing a joint decision which established the famous warnings which had to be presented by the police as part of the arrest procedures.

Chief Justice Earl Warren delivered the majority decision in which the Justices overturned the convictions of the defendants, whose interrogations were found to have been

unconstitutional. Basing their opinion on the guarantees of the Fifth Amendment (self-incrimination clause), and the Sixth Amendment (right to an attorney clause) the Court prohibited using as evidence any confessions made by defendants who had not been informed about their fundamental rights. The practical result of the case was the introduction of the so-called Miranda warning, consisting of a statement made by the police concerning the right of a criminal defendant to remain silent and the right to the presence of an attorney during questioning by the police. The warnings are considered as fundamental due process rights of defendants protected by the Fifth and Sixth Amendments to the Constitution and made applicable to the states by the Fourteenth Amendment. The police are bound to read the warnings to any arrested person, but if the suspect decides not to use his rights, then anything said or done by him may be used as evidence during the criminal trial.

The Majority Opinion (Chief Justice Earl Warren):

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.
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> We dealt with certain phases of this problem recently in *Escobedo v. Illinois*. There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.
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> This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. A wealth of scholarly material has been written tracing its ramifications and underpinnings. Police and prosecutor have speculated on its range and desirability. We granted certiorari in these cases, in order further to explore some facets of the problems thus exposed of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.
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> . . . The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well

which were admitted at their trials. They all thus share salient features – incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

. . . In *Miranda v. Arizona*, the police arrested the defendant and took him to a special interrogation room, where they secured a confession. In *Vignera v. New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In *Westover v. United States*, the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly in *California v. Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

. . . Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and

in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

. . . The Fifth Amendment privilege is so fundamental to our system of constitutional rule, and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent, without more, "will benefit only the recidivist and the professional." Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. See: *Escobedo v. Illinois.* Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

. . . Our decision is not intended to hamper the traditional function of police officers in investigating crime. See: *Escobedo v. Illinois*. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

. . . The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed: "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fail to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law,

the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead v. United States*. In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath – to protect to the extent of his ability the rights of his client. In fulfilling this responsibility, the attorney plays a vital role in the administration of criminal justice under our Constitution.

Miranda v. Arizona:

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession, and affirmed the conviction. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings, the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights.

Duncan v. Louisiana – 391 U.S. 145 (1968)

The jury belongs to one of the two major elements characterizing civil and criminal procedure under the common law system, with the adversary form of a trial constituting the

second element. Especially in criminal trials the presence of a jury seems crucial in order to assure the fundamental rights of the accused, who would prefer to be judged by a group of twelve laymen than by one professional. In this respect a jury seems to embody a social sense of justice by providing a defendant with a verdict of guilt or innocence decided by his peers. The existence of the jury since the beginning of American statehood does not mean, however, that this institution has been afforded to every defendant in every criminal trial. Until the late 1960s the status of the jury was limited to constitutional protection of the jury trial in federal courts and a few state courts which were not bound by any of the Supreme Court's direct precedents in this matter. Then, in 1968, the case *Duncan v. Louisiana* was decided, unifying laws concerning the presence of a jury in all criminal trials at both federal and state level.

An African-American, Gary Duncan, was charged in Louisiana for committing a misdemeanor, and according to the state law, he could not exercise his right to a jury trial as the offense was a petty one. After his conviction, Duncan appealed to higher courts in order to challenge the Louisiana law as unconstitutional because of not providing him with the possibility to be judged by jurors. When the case was brought to the U.S. Supreme Court, the Justices used it to determine the right to jury trials in criminal cases as fundamental to the American legal system. By joint interpretation of the Sixth and Fourteenth Amendments to the Constitution, the Court made the right to trial by jury applicable to the states and thus obligatory in any criminal cases. *Duncan v. Louisiana* became the first out of three landmark cases referring to the jury, decided in a short period of time: two years later in *Williams v. Florida* 399 U.S. 78 (1970), the Justices expressed their opinion about the twelve-man jury requirement, and two years after that in *Apodaca v. Oregon* 406 U.S. 404 (1972) about the issue of the unanimity of jury decisions in criminal trials.

The Majority Opinion (Justice Byron White):

> Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law, simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but, because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $10. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "[n]o error of law in the ruling complained of," denied appellant a writ of certiorari. Pursuant to 28 U.S.C. § 1257(2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. We noted probable jurisdiction.
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> . . . The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due

Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

. . . The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that, by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century, Blackstone could write: "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion."

Jury trial came to America with English' colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 – resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" – was the declaration: "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded: "The Trial of all Crimes. except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

. . . The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course, jury trial has "its weaknesses and the potential for misuse," *Singer v. United States*. We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger. In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them, and that, when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that, in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that, in most places, more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

. . . The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Terry v. Ohio – 392 U.S. 1 (1968)

Following the Supreme Court's decision in *Mapp v. Ohio* (see above), the judiciary began to shape the scope of the powers given to law enforcement institutions with regard to their usage of search and seizure procedures. After determining in *Mapp* the necessity of possessing of a special formal document called a warrant, the Court faced the issue of a policeman stopping a suspect on the street without such a warrant. The problem occurred in the case *Terry v. Ohio* and led to a decision which narrowed the meaning of the Fourth Amendment's search and seizure clause and the exclusionary rule. John Terry, along with two other men, was behaving suspiciously in one of the districts of Cleveland, Ohio, and a police officer approached them in order to confirm their identity. After having difficulties with obtaining basic information about the suspects, the officer conducted a search of their outer clothing and found a gun in Terry's pocket. The gun was confiscated, Terry was arrested and after a trial sentenced to imprisonment on the basis of possession of a non-registered weapon.

The Supreme Court decided the case on appeal in 1968 determining the admissibility of policemen stopping and frisking suspects without a search warrant. According to the Court, such a procedure would always be constitutional when the policeman could prove a 'probable cause' of dangerous, illegal behavior from a suspect. The Justices noticed that the Fourth Amendment protected individuals from unreasonable searches and seizures, but Terry's search had been reasonable as the policeman had properly judged his suspicious behavior.

The Majority Opinion (Chief Justice Earl Warren):

> . . . Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that, while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35, and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years, and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case, when I looked over, they didn't look right to me at the time."
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> His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked

back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece – in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time, Officer McFadden had become thoroughly suspicious. He testified that, after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point, his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

. . . After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. The Supreme Court of Ohio dismissed their appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*.

. . . The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*. We have recently held that "the Fourth Amendment protects people, not places,"

Katz v. United States, and wherever an individual may harbor a reasonable "expectation of privacy," he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*. Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck v. Ohio; Rios v. United States; Henry v. United States; United States v. Di Re; Carroll v. United States*. The question is whether, in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

. . . The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts, the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

. . . We cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is, in fact, carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers, in properly discharging their investigative function, may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v. United States,* is also justified on other grounds, *ibid*., and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden v. Hayden*. Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here – the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that, because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara v. Municipal Court.*

. . . We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. Affirmed.

Gregg v. Georgia – 428 U.S. 153 (1976)

The death penalty in the U.S. criminal justice system still holds the attention of the world's societies and politicians, who make efforts to affect major changes in this respect in the United States. American jurisprudence hesitates to change the law concerning the death penalty, especially because of its constitutional protection. The history of capital punishment in the United States is as long as the country itself. It was established as the highest penalty for severe crimes in all of the states and on the federal level. However, in the 1840s some of the states began to resign from imposing it in their jurisdictions. After the civil war, provisions concerning the death penalty became binding in the whole country, and this situation remained unchanged until the 1950s, when the number of death sentences started to drop. Then, in 1972, for the first time in its history, the U.S. Supreme Court decided to confront the issue of the constitutionality of the death penalty by interpreting the Eighth Amendment's protection against cruel and unusual punishment. In the decision in *Furman v. Georgia* 408 U.S. 238 (1972), the Justices prohibited the future imposition of capital punishment as it was unconstitutional under the above-mentioned provision. However, four years later, in *Gregg v. Georgia*, the Court overruled its earlier precedent by creating a new principle concerning the death penalty in the American criminal justice system. The case was decided along with four other disputes, together called the *Death Penalty Cases*.

Troy Gregg was found guilty of murder and robbery by a Georgia court, which imposed on him the death penalty. He appealed to higher courts, claiming that he had been deprived of his rights protected by the Eighth and Fourteenth Amendments to the Constitution due to his conviction being cruel and unusual. The U.S. Supreme Court, in a majority opinion presented by Justice Potter Stewart, acknowledged that not every death sentence constitutes a cruel and unusual punishment, and therefore the obligatory ban on capital punishment set out in the *Furman* case was improper. By upholding Gregg's conviction, the Justices confirmed the possibility of imposition of the death penalty by the states in extreme criminal cases, but abstained from forcing the states to include this kind of penalty in their respective jurisdictions. In effect, today thirty-seven states and the federal government have capital punishment in their criminal justice systems.

The Majority Opinion (Justice Potter Stewart):

> . . . The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that, on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p.m. A short time

later, the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

. . . The trial judge submitted the murder charges to the jury on both felony murder and nonfelony murder theories. He also instructed on the issue of self-defense, but declined to instruct on manslaughter. He submitted the robbery case to the jury on both an armed robbery theory and on the lesser included offense of robbery by intimidation. The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

. . . The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases. The death sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense, and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders.

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments.

. . . The Court, on a number of occasions, has both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until *Furman v. Georgia*, the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

. . . The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common law rule imposed a mandatory death sentence on all convicted murderers. *McGautha v. California*. And the penalty continued to be used into the 20th century by most American States, although the breadth of the common law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. See: *Woodson v. North Carolina*.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . ." And the Fourteenth

Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law.

For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid per se. In *Wilkerson v. Utah*, 99 U.S., where the Court found no constitutional violation in inflicting death by public shooting, it said: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category within the meaning of the eighth amendment."

. . . And in *Trop v. Dulles*, Mr. Chief Justice Warren, for himself and three other Justices, wrote: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment . . . , the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime, regardless of its depravity and impact on society. This view was accepted by two Justices. Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty, rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

. . . The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help, to vindicate their wrongs.

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law." *Furman v. Georgia*. "Retribution is no longer the dominant objective of the criminal law,"

Williams v. New York, but neither is it a forbidden objective, nor one inconsistent with our respect for the dignity of men.

. . . We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

. . . The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury's discretion is channeled. No longer can a jury want only and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.

Batson v. Kentucky – 476 U.S. 79 (1986)

The procedure of jury selection, often called *voir dire* (from French: to tell the truth), has always raised important constitutional questions. To provide for the proper exercise of a defendant's right to a jury trial, the procedure should result in creating a group of laymen that is a cross-section of a local community. The history of U.S. criminal procedure proves, however, that creation of a fair jury has often been problematic, especially in the 1930s and 1940s in southern states, where a white jury sentencing a black defendant became a common thing. Controversies have always concerned some aspects of *voir dire*, mainly the procedure of using so-called peremptory challenges to strike out prospective jurors without a cause. As many examples prove, peremptory challenges have often been used by the lawyers representing the parties in a criminal trial to strike out candidates of different skin color or ethnicity. However, in 1986 the Supreme Court finally determined the proper scope of peremptory challenges, thus ending the unfair and partisan procedure of choosing candidates for one of the most important institutions in U.S. legal reality.

James Batson, an African-American convict, challenged the decision of the court, as the jury that had found him guilty had consisted only of white men. According to Batson, the *voir dire* had been conducted in an unjust manner, thus violating his due process and equal protection of law. When the case reached the U.S. Supreme Court, the Justices held that Batson had been deprived of his Sixth and Fourteenth Amendments' guarantees and overturned his conviction. In a 7–2 decision, the Court underlined the necessity of equal treatment of all prospective jurors with no regard to their race or skin color. As a result, the *voir dire* procedure was modified so that the parties of the dispute could not strike out a candidate to the jury by using peremptory challenges, if the real reason of the removal was race discrimination.

The Majority Opinion (Justice Lewis Powell):

> . . . Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges. The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire, and not to selection of the petit jury itself.
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> The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. . . . The Supreme Court of Kentucky affirmed. . . . We granted certiorari, and now reverse.
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> In *Swain v. Alabama*, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." This principle has been "consistently and repeatedly" reaffirmed, in numerous decisions of this Court both preceding and following *Swain*. We reaffirm the principle today.
>
> More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia*. That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.
>
> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal

protection. *Akins v. Texas.* But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas; Ex parte Virginia*. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder* or on the false assumption that members of his race as a group are not qualified to serve as jurors, see: *Norris v. Alabama; Neal v. Delaware*.

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder.*

. . . Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See: *Thiel v. Southern Pacific Co*. A person's race simply "is unrelated to his fitness as a juror." As long ago as *Strauder*, therefore, the Court recognized that, by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. See: *Carter v. Jury Comm'n of Greene County; Neal v. Delaware*.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See: *Ballard v. United States; McCray v. New York*.

. . . The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E.g.: *Whitus v. Georgia; Hernandez v. Texas; Patton v. Mississippi*.

Further Readings

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